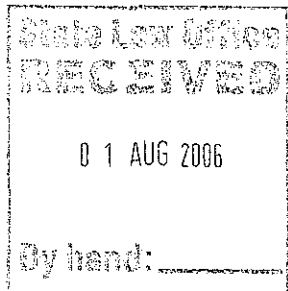


**IN THE SUPREME COURT**  
**OF THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

Civil Case No.118 of 2005



**BETWEEN: VITAL LOWENBU**

Claimant

**AND: ARTHUR C. EDMANLEY, THE  
COMMISSIONER OF POLICE**

First Defendant

**AND: THE DIRECTOR, DEPARTMENT  
OF PUBLIC UTILITIES &  
INFRASTRUCTURES**

Second Defendant

**AND: THE GOVERNMENT OF THE  
REPUBLIC OF VANUATU**

Third Defendant

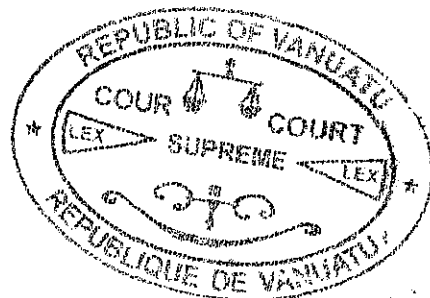
**Coram:** Justice P. I. Treston

Mr. Kilu for Claimant

Ms. Williams for Defendants

**Dates of Hearing:** 13 & 14 June 2006

**Date of Decision:** 01 August 2006



# JUDGMENT

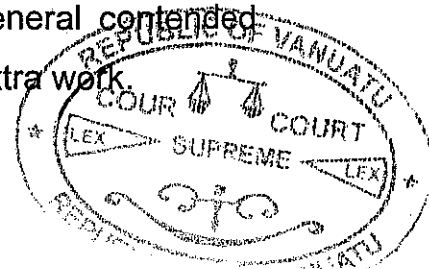
## CLAIM

In an amended Supreme Court claim, the Claimant claimed against the First, Second and Third Defendants for breach of a contract price in relation to the renovation of the Police Commissioner's official residence at Independent Park area, Port Vila in the sum of VT3,437,376. In addition, the Claimant claimed the sum of VT19,835,356 being 1% of the contract price for breach of a contract together with VT1,842,590 for extra work done by him and for VT2,509,311 for security services provided and finally for the sum of VT263,850 for care and clean up of the yard of the property.

The Claimant sought specific performance of the contract claim on the basis of non-payment, and damages for breach of the contract claim, and for extra work, security and care and clean-up costs.

In his closing address, counsel for the claimant abandoned the action for specific performance of the contract claim.

In their defence the Defendants contended that the First Defendant was the incorrect party as the contract was entered into on behalf of the Government by his predecessor. The Second Defendant also denied that it was the correct party since the contract was entered into on behalf of the Government and the Third Defendant claimed that payment had been made in full of the contract amount and that the extra work was never agreed to by the Third Defendant and amounted to a private arrangement between the Claimant and the former Commissioner of Police, Mr. Robert Diniro, about which the Third Defendant had no knowledge. The Defendants in general contended that they were not aware of and never approved any extra work.



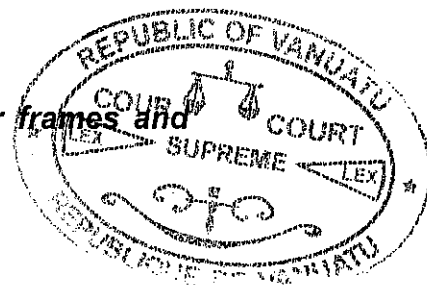
## FACTS

In 2004 quotations by tender were sought for renovation works to the residence of the Police Commissioner, Port Vila. The tender documents were under the letterhead of the Republic of Vanuatu, Public Works Department and a full contract for materials and labour was sought and it was noted in the tender documents that "This contract is been financed by the Vanuatu Government and administered by the project management unit, Public Works Department". Tenders were to be submitted by registered post in a plain sealed envelope to the Police Commissioner and as a result, the Claimant, trading as Atingting Construction, was the successful tenderer and signed a form of agreement on namely 11 June 2004 between himself and his company and the Government of the Republic of Vanuatu. The Government "the employer" had accepted the Claimant's tender for VT4,996,330 and the twelve week period for the contract was to be between the date of agreement namely 11 June 2004 and 3 September 2004. The agreement specified that the General Conditions of Contract would be the standard Vanuatu conditions available for inspection at Public Works Department Headquarters at Port Vila.

Work commenced on 11 June 2004 and although the drawings for the contract were never produced to this Court in evidence, the undisputed evidence of the Claimant at clause 12 of his sworn statement of 27 February 2006 was as follows: -

**"12. The works that I have to do under the contract include: -**

- **replace full roofing sheets;**
- **replace full ceilings;**
- **replace all doors and door frames;**
- **replace all window frames and louver frames and louvers;**



- - *replace all electric cables and all lights;*
- *replace the sanitary system;*
- *replace the plumbing system;*
- *put tiles on full floor of the house;*
- *replace kitchen sink and cupboard;*
- *repair all wardrobes;*
- *demolish certain walls; painting"*

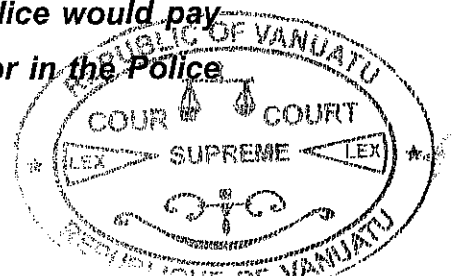
As far as the extra work claim is concerned the Claimant deposed at clauses 13 and 14 of the sworn statement as follows: -

**"Extra Work Claim**

**13. In relation to the extra work claim, I was personally asked by the Police Commissioner, Robert Diniro, to also perform certain extra works which: -**

- *extending the verandah by 5 metres. This involved building of new floor, ceiling and roofs;*
- *extending the lounge room;*
- *demolish a wall in the lounge room;*
- *separate the lounge room and dining room with a concrete wall;*
- *build a concrete bench in the kitchen and close one existing window;*
- *reduce the size of all bedroom windows;*
- *cut down some trees in the yard.*

**14. When the Police Commissioner asked me to do these extra works, I was worried they were not included in the contract specifications. I queried about payments in relation to these extra works, but the Police Commissioner assured me that the Police would pay for it as the jobs had been budgeted for in the Police Budget."**

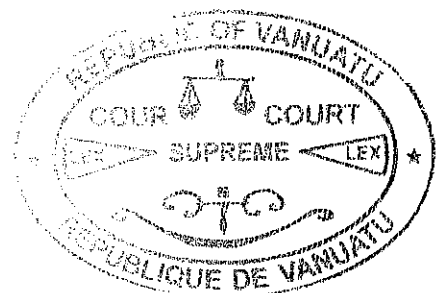


The Defendants denied that the extra work was authorized and in particular the present acting Police Commissioner of Police, Mr. Arthur Caulton Edmanley, the First Defendant, said that there was no record of any correspondence or other such related documents to show there was any intention of the former Commissioner to vary the terms of the contract and there were no records of any instruction to the architects on any variation to the contract.

Mr. Dick Abel, one of the Government architects, who coincidentally witnessed the signatures of the former Police Commissioner and the Claimant on the original agreement, said that neither he nor any of the architects at the Department of Utilities received any instructions from the former Commissioner of Police to value the house for any additional work and no variation orders to the original agreement were ever made. In fact he said that when he went to inspect the property most of the original renovation work under the contract and the alleged extra work was already completed and there was no way that he could have valued the extra work or approved it at that stage.

The acting Commissioner of Police said that renovation works were still in progress when the former Commissioner ceased employment and that payments were being made by his office to the Claimant until it was realised that additional works done by the Claimant were being paid for and payments were thereupon terminated.

The acting Commissioner also detailed in clauses 6 and 7 of his sworn statement of 8 March 2006 that payments totaling VT4,996,330 were made. (The Court notes that in fact the claim for specific performance for payment of that amount was abandoned during the hearing as above).



## HEARING

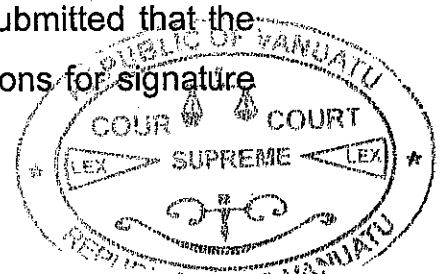
The Claimant filed a sworn statement and the sworn statements of three witnesses and the defence filed the two sworn statements that I have referred to namely from Mr. Edmanley and Mr. Abel. All witnesses were in Court and were cross-examined or were available to be cross-examined.

## SUBMISSIONS

The Claimant submitted that under Clause 31 of the General Conditions of Contract he should have been paid monthly on the certificate of the architect and, as he had not been so paid, there was a breach of Clause 31 of the General Conditions of Contract for which the Claimant could recover. It was submitted that, despite not being paid, the Claimant continued the work including extra works in good faith having allegedly been requested by the former Police Commissioner and that it was a matter of inference that the former Police Commissioner had authorized the extra work.

During the course of submissions, counsel for the Claimant acknowledged there had been no evidence adduced to prove the amount of the claims and that no specific calculation as to penalty for late payment was available to be given to the Court.

The Claimant submitted that it was the duty of the Police Administration to approve the extras to the contract and it was inappropriate for the Defendant to rely on the variation clause in the General Conditions of Contract. The Claimant submitted that although the Police were refusing to pay for the extra works, they had in a way accepted the extra works by purchasing the materials for those works. It was submitted that the Defendants should have provided a copy of the variations for signature



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by the Claimant and that in summary, as the Claimant had completed all the work, payment was due to him.

The defence submitted that there had never been any breach of the agreement of 11 June 2004 and it was only that agreement which should bind the Third Defendant.

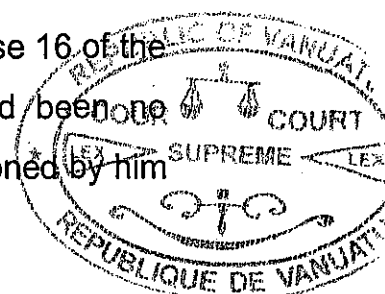
The Defendant highlighted three relevant issues as follows: -

1. Whether the Government still owes the Claimant any money from the principal sum of VT4,996,330;
2. Whether the Government is liable for breach of contract; and
3. Whether the Government is responsible for the extra work done by Atinting Construction.

It was submitted that, in relation to issue one, the evidence clearly showed that all payments under the agreement of 11 June 2004 had been made by the defence either directly to the Claimant or directly to Port Vila Hardware for materials. It was submitted that even in cross-examination, the Claimant admitted that all the money due under the original agreement had been paid but that VT500,000 had been paid to Port Vila Hardware instead of to him.

In relation to issue two, the defence submitted that there was no breach of the contract by the defence. The contract did not specify when the last payment should be made and there should not be any claim for damages for delay in making payment in those circumstances.

In relation to the third issue, the defence submitted that Clause 16 of the General Condition of Contract applied and that there had been no variations authorized by the architect or subsequently sanctioned by him



in writing and authority was given for the proposition that the Court would be reluctant to accept oral evidence to add to the terms of what was a complete contract whether or not one of the parties had read the document (see Lestrangey v Graucob (1934) 2 KB 394).

The defence submitted that Mr. Abel's evidence was clear that there never had been any variation given by any architect to the existing contract nor any approval given and Mr. Edmanley made it clear that there were no record of any variations to the original agreement.

Reference were made to Richard Stone, *The Principles Of Contract* (1997) 3<sup>rd</sup> Edition at page 57 where any variation to a fixed contract must be mutual in the sense of both sides offering something additional. It was submitted that there was no actual agreement for any additional work to the residence, for security services, or for care and cleaning up around the building and that the Defendants could only be bound by the contract of 11 June 2004.

## LAW

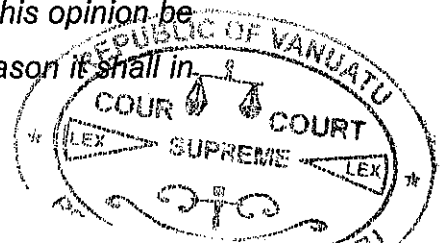
This is a civil claim where the Claimant must prove his allegations on the balance of probabilities that is that the allegations are more likely than not.

## THE RELEVANT GENERAL CONDITIONS OF CONTRACT

The relevant conditions are set out below as follows: -

### **"16. Variations**

*The Architect shall make any variations of the form quality or quantity of the Works or any part thereof that may in his opinion be necessary and for that purpose or if for any other reason it shall in*





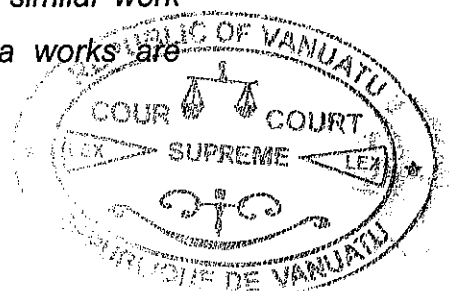
his opinion be desirable shall have power to order the Contractor to do and the Contractor shall do any of the following:

- i) Increase or decrease the quantity of any work included in the Contract; and
- ii) Omit any such works; and
- iii) Change the character or quality or kind of any such work; and
- iv) Change the levels, lines, position, dimensions of any party of the work; and
- v) Execute additional work of any kind necessary or the completion of the Works.

No such variation shall in any way vitiate or invalidate the Contract but the value (if any) of all variations shall be taken into account in ascertaining the amount of the final account.

All variations authorised by the Architect or subsequently sanctioned by him in writing shall be measured and valued jointly by the Architect and the Contractor. The valuation of variations unless otherwise agreed shall be made in accordance with the following rules:

- a) The rates on the original Bill of Quantities or Schedule of Rates, as the case may be, shall determine the valuation of extra work of similar character executed under similar conditions as work priced therein.
- b) The said rates, where extra works are of a similar character or executed under similar conditions as aforesaid shall be the basis of prices for the same so far as may be reasonable, failing which a fair valuation thereof shall be made based upon prices for similar work in the locality current at the time the extra works are executed.

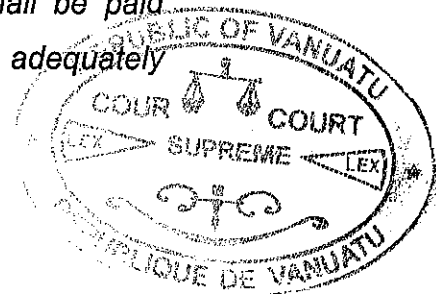


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- c) When a Bill of Quantities or Schedule of Rate do not form part of the Contract documents, valuations of extra work or deductions shall be agreed based upon prices for similar work in the locality current at the time the variations are executed.
- d) Where extra work cannot properly or fairly be evaluated by measuring the pricing same the Contractor shall be allowed day-work prices therefore as stated in the Bill of Quantities or Schedule of Rates, as the case may be, or, if not so stated, then calculated upon the cost of materials used at the then current market value plus the workmen's time at the current rate paid.

**31. Certificate and payments**

- 1) Unless agreed otherwise the Contractor shall submit to the Architect, after the end of each month, a statement showing the estimated contract value of the permanent work/works executed up to the end for the month, the Contractor shall be paid monthly on the Certificate of the Architect the amount due to him/her on account of the estimated contract value of permanent works executed up to the end of the previous month, together with such amount (if any) as the Architect entirely in his/her discretion may consider proper on account of materials for permanent work/works delivered by the Contractor on the site at the said time, subject to retention of the percentage named in the appendix to these General Conditions of Contract until the amount retained shall reach the "limit to retention" named in the aforesaid appendix and hereinafter called the "retention money". No payment on account of materials delivered to the site shall be paid unless the said materials are properly and adequately placed or stacked and stored.



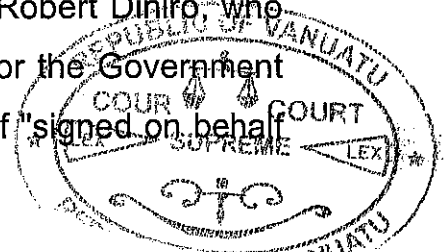
- 2) • *On half of the retention money shall be paid to the contractor when the Architect certifies in writing that the works have been practically completed and the other half at the expiration of the defects liability period or upon completion of the making good defects under clause 27 whichever is later.*

### **32. CLAIMS FOR EXTRAS**

*The Contractor shall submit to the Architect claims for any works or circumstances or account of which he may consider that he/she is entitled to extra payments within fourteen days from the time of the commencement of such work or occurrence of such circumstance. All such claims should be accompanied by such particulars of the claims and must state under which provisions of the Contract (if any) it is claimed that payments should be made. No claims will be allowed which has not been submitted within fourteen days of the arising of the cause of such claims."*

### **FINDINGS**

Despite the change to the parties concerned by virtue of the amended claim, which was in fact ordered by the Court at an early stage, and despite discussions as to the issues in various conferences undertaken by this Court, the Defendant in his amended Supreme Court claim persisted in joining Arthur C. Edmanley, the Commissioner of Police and the Director of the Department of Public Utilities and Infrastructures to this action as First and Second Defendants. The Court pointed out to the Claimant at various conferences that this was misconceived and clearly the Government should have been the only Defendant because the contract and the form of the agreement was clearly between the Claimant as contractor and the Government of the Republic of Vanuatu as employer. The former Police Commissioner, Mr. Robert Diniro, who signed that agreement was clearly acting as agent for the Government and clearly signed on that basis under the heading of "signed on behalf



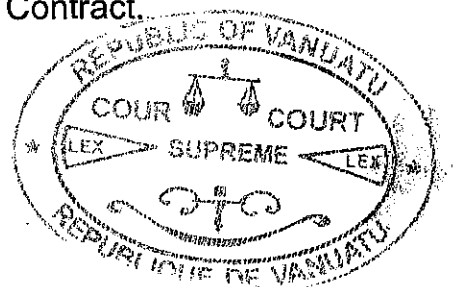
of the employer, Police Commissioner". Mr. Abel the Architect who gave evidence was clearly only a witness to the signatories to that contract and was never part of the contract. Accordingly the First and Second Defendants should never have been parties to the action.

It is clear that during the course of the evidence the Defendant admitted that the total amount under the contract, namely VT4,996,330, had been paid by the Third Defendant. That is clear from the evidence of Mr. Edmanley that I have already referred to in his sworn statement which evidence I accept. Whether or not VT500,000 due to the Claimant and not to Port Vila Hardware was ever paid mistakenly by the Third Defendant was never the subject of proof by the Claimant and that was recognized in closing submissions when counsel for the Claimant abandoned the claim for specific performance of the written contract.

As to the alleged late payment of amounts due to the Claimant under Clause 31 of the General Condition of Contract (above) there was never any proof by the Claimant that he submitted monthly statements to the Architects in accordance with that clause and as a result there can be no damages for breach of the contract. Incidentally the payment for one percent of the contract price per day as a penalty for damages for breach of contract seems to have been contained in the appendix to the general condition of contract which was never produced to the Court.

I am also not satisfied from the evidence that the Claimant proved that the Defendants ever paid for the materials for any extra work.

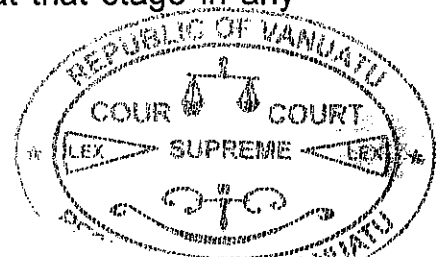
In addition with regard to the extra work claimed, there is no proof by the Claimant that he submitted any claim for any extra work within fourteen days from the time of the commencement of such work pursuant to Clause 32 of the General Conditions of Contract.



In addition I find that any variation to the original agreement was never authorized or sanctioned by the Architect in accordance with Clause 16.

Furthermore, the Claimant's proof that the extra works were requested by the former Police Commissioner, Mr. Diniro, is based on hearsay evidence which, in the circumstances, is insufficient to satisfy the Claimant's onus on the balance of probabilities. I would have thought that the Claimant could have called Mr. Diniro as a witness but even though the Court earlier suggested that to counsel for the Claimant during the course of trial preparation conferences and also suggested that the Claimant perhaps ought to join Mr. Diniro as party to protect the Claimant's interests that was never done. It may well be that Mr. Diniro has some personal liability for payment of the extra works unauthorized by the Defendants but the Claimant has totally failed to prove on the balance of probabilities that Mr. Diniro had any actual or ostensible authority of the Third Defendant to require the Claimant to undertake any extra works. The extra works as outlined by the Claimant, in any event, fall far beyond the scope of the original tender which was for renovation of the residence of the Police Commissioner.

Finally, and in my mind conclusively, as counsel for the Claimant accepted during his submissions, the Claimant has totally failed to prove in evidence the allegations made in his claim. By way of example I refer to the fact that there was no proof as to what sanctions there ought to be for the late payment of monthly accounts and no proof that monthly accounts were ever submitted to the architect. There was no proof as to the basis of charging for the extra work such as hours spent on it, materials expended for it, the rate of charge out for such hours and the cost of the materials. Mr. Abel said in his evidence, which I accept, that when he inspected the property most of the extra work had already been completed and it was impossible to value it at that stage in any event.



Furthermore there was no proof in evidence as to the amount charged out for the security allegedly undertaken and there was no evidence at all about how care and general clean up of the residential area was ever charged for and upon what basis. The Court pointed out to counsel for the Claimant in the course of submissions that where allegations are made in a claim they must be substantiated by way of evidence and the Claimant has failed to do that in this case even without the other difficulties that I have outlined above. The Claimant has failed to prove any of his claims on the balance of probabilities.

### **CONCLUSION**

Accordingly I enter judgment for the remaining Defendant, the Government of the Republic of Vanuatu, and I direct that the Claimant must pay costs on a standard basis to the Defendants as agreed or as determined by the Court.

**Dated AT PORT VILA on 01 August 2006**

**BY THE COURT**

