

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

(Civil Jurisdiction)

Civil Case No. 57 of 2010

BETWEEN: ENTERPRISE DINH VAN TU LTD
Claimant

AND: IVUKI KALTAK
First Defendant

**AND: TIMOTHY KALTAK
ANDREW KALTAK
RUSSEL KALTAK TIMOTHY**
Second Defendants

**AND: THE ESTATE OF KALTAPU KALTAK by its Administrator,
ANDREW KALTAK**
Third Defendant

AND: KNIGHTSBRIDGE INVESTMENT LIMITED
Fourth Defendant

AND: KONTI – KING LIMITED
Fifth Defendant

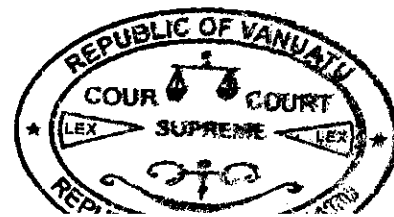
Hearing: 3 October 2011
Before: Justice Robert Spear

Appearances:

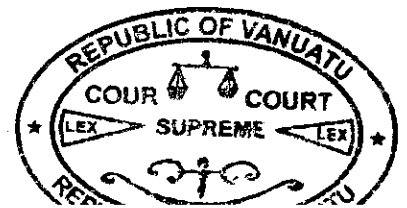
Claimant: Daniel Yawha
1st – 3rd Defendants: Tom Joe Botleng
4th & 5th Defendants: Mark Hurley

JUDGEMENT

- 1) This is the conclusion of the application by the fourth and fifth defendants, joined to the proceeding on 29 September 2011, for the discharge of the restraining orders made on 12 September 2011.
- 2) That application first came on for hearing on 29 September 2011. It was supported by a sworn statement by Mr John Tonner which is extensive in its treatment of the recent history of the quarry in question. Mr Yawha sought time to consult his client given that he had only been served with the application to discharge the restraining orders and Mr Tonner's sworn statement the previous evening. The application was accordingly adjourned through to today for hearing.

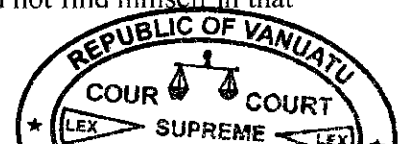


- 3) At the hearing this morning, Mr Yawha indicated that his instructions were not to oppose the application for the discharge of the restraining order recognizing that this would see the restraining order discharged. Accordingly, the restraining orders made on 12 September 2011 are duly discharged.
- 4) Mr Yawha now wishes to reconsider what remedies his client might have against any of the parties to this proceeding and, in particular, whether there are available claims for damages. Unless the proceeding is discontinued, as matters have progressed, it will be necessary for the Claimant to amend its Claim. To that end, any amended claim is to be filed and served by 21 October 2011.
- 5) Any Defence to the Amended Claim to be filed and served by 11 November 2011.
- 6) The case will then return to a conference before me at 8 am on 30 November 2011. By that time, it will be understood which party, if any, the Claimant seeks to pursue.
- 7) The question of costs arises in respect of the discharge of the restraining orders. Mr Hurley argues that his clients, the fourth and fifth defendants, are entitled to indemnity costs essentially on the basis that, if the Court had been given the full history to this case in the first place, it would not have made the restraining orders. That is certainly the case. Mr Tonner's sworn statement is convincing of such a confused contractual position that the Court would not have been attracted to a restraining order. It would have left it for the parties to deal with this by way of a claim for damages. I mentioned this to counsel at the hearing on 29 September 2011 as I was particularly critical of the failure on the part of the first, second and third defendants to take any proper steps in opposition to the application for the restraining order.
- 8) The various hearing notes and conference notes will identify that there was a complete lack of response, if not interest, shown on the part of the first, second and third defendants to the application for the restraining order. There was a limit, of course, to what the claimant could put before the Court as to the current contractual position as that was between the defendants and not the complainant. That notwithstanding, the claimant was aware that *MCI* was mining the quarry with the support of the defendants and, of course, it indeed sought restraining orders against *MCI* on 12 September 2011. As has



now been explained, there is no such entity as MCI Ltd, it is a trading name, and the names of the defendants are as correctly described above.

- 9) The first consideration here is whether the fourth and fifth defendants are entitled to indemnity costs. Certainly, they were not involved at all as between the claimant and the first, second and third defendants. Their contract is with the successors to the title to the land of the deceased Mr Kaltapu Kaltak or as the current custom owners whichever the case may be if they are different. It has been necessary, however, for the fourth and fifth defendants to engage counsel and also to seek to have their present contractual position protected notwithstanding that that should have been attended to, at least initially, by the first, second and third defendants.
- 10) There is still some slight uncertainty as to the events of 12 September 2011 and whether there was some misunderstanding or miscommunication in relation to the advice given to Mr Kalmet of the hearing who was endeavoring to represent the interest of the fourth and fifth defendants. The simple position is that the application was set down for hearing on 12 September 2011 at the nominal time of 3 pm but on the basis that it would follow the conclusion of the criminal trial that I was involved in that day. Counsel attending the hearing on 8 September 2011 (which included Mr Kalmet) were informed that they would need to check with the Court staff to find out exactly what time I was likely to come free as I proposed to hear the urgent application for the restraining order once the criminal case had concluded for the day.
- 11) Mr Kalmet has written to the Chief Registrar advising that he was informed by members of the Court registry that the application for the restraining order would not be heard on 12 September as the criminal case was continuing. Accepting Mr Kalmet may have received that advice, it was wrong advice as it was always intended to hear the application for the restraining order at the conclusion of the criminal case; no matter what the time was. Be that as it may, it is of some significance that Mr Yawha applied that same day 12 September 2011 for an order joining MCI Ltd and seeking restraining orders against them. As the decision of 12 September 2011 records, I was not prepared to make restraining orders against that company which indeed is more correctly a trading name.
- 12) It is difficult to blame the claimant for any misinformation or wrong advice given to Mr Kalmet by a member of the Court staff. Certainly Mr Yawha did not find himself in that



position as he was back here at the Court office when I was able to commence the hearing at approximately 5 pm that Monday 12 September 2011.

- 13) The fourth and fifth defendants have been completely successful in respect of their joint motion to discharge the restraining orders. The restraining orders should not have been made on the first place. That notwithstanding, I do not consider that the full extent of the fourth and fifth defendant's legal costs should be visited upon the claimant. To a substantial degree, the responsibility for the restraining orders being made can be laid fairly and squarely at the doorstep of the first, second and third defendants. They not only took no effective steps in opposition, they virtually ignored the proceedings.
- 14) This is an appropriate case for indemnity costs to be awarded to the fourth and fifth defendants and that is so ordered. That will be payable as to 25% by the claimant and 75% jointly and severally amongst the first, second and third defendants. Those indemnity costs will be as agreed or alternatively to be taxed.

BY THE COURT

