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

Civil Case No.61 of 2009

BETWEEN: TRANS-PACIFIC LIMITED
Claimant

AND: DINH TRADING LIMITED
First Defendant

AND: ALEX PALAVI
Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. B. Bani for the Claimant*
Mr. F. Laumae for the Defendants

Date of Judgment: *22 March 2012*

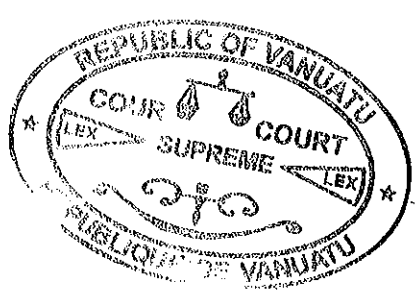
JUDGMENT

1. This is a claim for the refund of a deposit paid pursuant to a contract that the claimant cancelled for non-performance. The claim also seeks interest at 10% per annum and costs.

2. The factual background to the claim may be briefly summarized. In **February 2008** following the acceptance of a quotation submitted by the defendant in **October 2007**, an agreement was entered into between the claimant and the defendant company for bulldozing, land clearing, and other earth works to be carried out by the defendant company on the claimant's proposed subdivision at **Mangaliliu** in **North Efate**.

3. Pursuant to the agreement a 50% deposit of **VT3,750,000** was duly paid in February 2008 with the balance contract price to be paid after satisfactory completion of the contracted works.

4. From the outset the defendants encountered problems with the transportation of its bulldozer to the claimant's work site, and, after 3 months of trying with little success to get the bulldozer onto the site at **Mangaliliu**, the claimant cancelled the contract in **May 2008** and sought the return of its deposit. The contract was thereafter awarded to a new contractor in **September 2008**.



5. Despite a regular exchange of correspondence between the parties the deposit was not returned and, after a year of waiting, the claimant filed its Supreme Court claim on **29 May 2009**.

6. In its joint defence the defendants deny any liability to refund the claimant's deposit and although the defendants admit as part of the contract, "*that the defendants would arrange and ensure delivery of the first defendant's bulldozer to the (claimant's) site at Mangaliliu village ...*", they, nevertheless, deny that they failed to deliver the bulldozer to the claimant's property because of various landing restrictions imposed by various unrelated third parties. The defendants frankly admit however that "*the first defendant cannot carry out land clearance on the claimant's property because of the restrictions imposed.*"

7. The defendants later added a set-off and counterclaim to its defence based on verbal assurances it claims was given by the claimant's agents and officers, that the defendants would be awarded another contract to undertake similar works at another of the claimant's proposed subdivisions at **Creek Ai** also in **North Efate**. The defendants also claim that they were permitted to retain the deposit for the new contract that was to be awarded to the defendants but which never eventuated.

8. In its response the claimant denies entering into three (3) separate agreements with the defendants or agreeing to any variation to its first agreement with the defendants. As for the **Creek Ai** contract the claimant accepts that the contract was put to competitive tender and the defendants were unsuccessful in their bid and, therefore, had no basis to retain the deposit.

9. In support of the claim, sworn statements were produced from:

   - **Andrew Ross Munro** a partner in **Moores Rowland** who was the principal officer of the claimant company dealing with the contract and with the defendants. He produced 3 sworn statements dated 6 November 2009; 18 February 2011 and 16 March 2010 respectively;

   - **Roy McDonald** an employee of **Moores Rowland** who handed over the VT3,750,000 deposit cheque; and

   - **Joel Duvu** who acted as Project Manager at the claimant's work site near **Mangaliliu village, North Efate**.

10. The defendants called the second defendant **Alex Palavi** in its defence and he produced his 3 sworn statements dated 25 November 2009; 8 November 2010; and 19 June 2009 respectively.

11. At the end of the trial counsels agreed the following issues were raised for determination:

(a) How many contracts were entered into by the parties 1, 2 or 3?

(b) What were the terms of the contract(s)?

(c) Did the defendant breach its contract(s) with the claimant?

(d) Did the claimant breach its contract(s) with the defendant?

12. **As to issue (a)** after careful consideration of the evidence in the case I am satisfied and I so find that the claimant company entered into only **one** (1) contract evidenced by its signed acceptance of the defendant company's **Quotation No. 70/2007** dated **11th October 2007** coupled with the payment of a deposit of **VT3,750,000**.

13. In so finding I have considered the defendant's evidence about its belated attempt to unilaterally vary or correct its **Quotation No. 70/2007**, and I conclude that the variation was never agreed to or accepted by the claimant company. In this regard the principal difference between the **Quotation No. 70/2007** and the later unilaterally corrected version, is the **150%** increase in the figure for "*Mobilization and demobilization*" from **VT400,000** to **VT1,000,000**. Likewise, I prefer and accept the claimant's evidence that it had neither promised to give the defendants another contract nor had it agreed for the deposit of **VT3,750,000** that was paid under **Quotation 70/2007** to be retained by the defendants after it had cancelled the contract.

14. I am also mindful that the defendants claim an expectation at least, of getting a contract from the claimant to undertake similar works at its **Creek Ai** site in **North Efate** as evidenced by its **Quotation No. 43/2008**, but, having considered all of the evidence, including the defendants' prevailing business/contractual practice of obtaining written confirmation of acceptance of its written quotation as well as a "*50% deposit of the amount cited*", and the second defendant's acceptance, in cross-examination, that its **Correction Quotation No. 70/2007** and **Creek Ai Quotation No. 43/2008** were never signed as accepted by the claimant nor, had it received a "*50% deposit*" of the quoted amount which would have been higher than the **VT3,750,000** deposit paid by the claimant after its acceptance of **Quotation No. 70/2007**, I am satisfied that neither the **Correction Quotation No. 70/2007** nor the **Creek Ai Quotation No. 43/2008** were concluded binding contracts.

15. **As to issue (b)** the terms of the only concluded contract between the claimant and the defendants is contained in the defendant company's **Quotation No. 70/2007** dated **11 October 2007** written on its letterhead signed by the second defendant, and addressed to **Mr. Andrew Munro**. In its material parts it reads as follows:

"***QUOTATION No. 70/2007***

Re : Clearing vegetations and rocks ... 43000 m2 at Magaliliu subdivision area.
Road access and driveway 387,00 ml x 6.00 ml ... 2322 m2

1. Mobilization and demobilization .....400,000 VT

2. Clearing, grubbing and storing excess on site with a Bulldozer D8
20,000 VT/H X 8 H X 18 Dys ..... 2,880,000 VT

3. Clearing loose rocks on the beach and storing on site with a cat excavator 30 tons
20,000 VT/H X 8 H X 7 Dys .....1,120,000 VT

4. Reprofiling with grader the pavement and compacting
100 VT/M2 X 2322 M2 .....232,200 VT

5. Hauling in sub base selected materials
2,200 VT/M3 X 650 M3 .....1,430,000 VT

6. Reprofiling, compacting and watering
260VT/M2 x 2322M2 .....603,720 VT

Total..... 6 ,665,920 VT

Vat 12.5% ..... 833,240 VT

Total Ttc ..... 7,499,160 VT

Alex PALAVI
Manager for Road Section
.....

Our recent policy to deal with this type of work, is you deposit 50% of the amount cited above before works start off and 50% after completion.

In case of agreement, we would like you to return us the second copy signed and written accepted."

16. It is immediately apparent from a reading of the above quotation that the defendant company was responsible for: "***Mobilization and demobilization***". That phrase means transporting or placing the defendant's equipment and machinery onto the claimant's work site at **Mangaliliu**, and, after completion of the contracted works, the removal and return of the defendant's equipment and machinery to the defendant's workshop.

17. In this latter regard it is a fact agreed by the defendants: "*... that the defendant would arrange and ensure delivery of the first defendant's bulldozer to the claimant's site at Mangaliliu village, North Efate*", and further, "*that the* (defendant's) *barge was unable to beach and unload the bulldozer at Mangaliliu landing site due to restrictions imposed by the locals and Peace Corps volunteers*".

18. In the result it is undisputed that the defendant company was unable to undertake any of the works it had contracted to perform at the claimant's site at **Mangaliliu** in terms of its **Quotation No. 70/2007** and furthermore, this situation persisted for a period of almost 3 months despite several reminders and the voluntary efforts of the clamant company to facilitate the "*mobilization*" of the defendant company's bulldozer onto the claimant's site at **Mangaliliu**.

19. In light of the foregoing and despite the absence of a completion date or an agreed time frame within which the contracted works in **Quotation No. 70/2007** was to be performed or completed, I am satisfied that the defendants had been given sufficient time to complete the "*Mobilization*" of its equipment to the claimant's work site in **Mangaliliu**, and, in failing to do so, the defendant company was in breach of **Quotation No. 70/2007** thereby entitling the claimant company to cancel the agreement.

20. Furthermore, given that the defendant company intended to transport its bulldozer by barge to the claimant's work site at **Mangaliliu**, it was incumbent on the defendants to satisfy themselves that there was a safe landing area available at the claimant's work site, and, if none was available, that they had the necessary permission and approval of the relevant landowner, to safely land the barge with its bulldozer at an alternative site as close as possible to the claimant's work site.

21. In this latter regard it would have greatly clarified matters if the defendants had made it clear on the face of its quotation (as it did with the requirement of a deposit and a signed copy of the quotation), that any negotiations and approvals required to be undertaken with or obtained from custom landowners under the agreement would be the responsibility of the claimant.

22. The absence of such an indication in the defendants' **Quotation No. 70/2007** means "*contra preferentum*" that the defendant company has sole contractual responsibility for obtaining **all** necessary permission and approvals for the landing of the barge carrying its bulldozer and thereafter safely landing the barge and delivering its bulldozer onto the claimant's work site. This it never managed to achieve.

23. Needless to say I reject the defence evidence that suggests that the claimant company had any contractual obligations to assist in either the transportation of the defendants' bulldozer to the claimant's work site at **Mangaliliu** or in obtaining the approval or permission of the owner of the land and foreshore that the defendant intended to land the barge carrying its bulldozer at or near the claimant's work site.

24. In light of the above my firm conclusion on **issue (c)** is that the first defendant company breached **Quotation No. 70/2007** through its complete failure to fully perform any part of the contracted works.

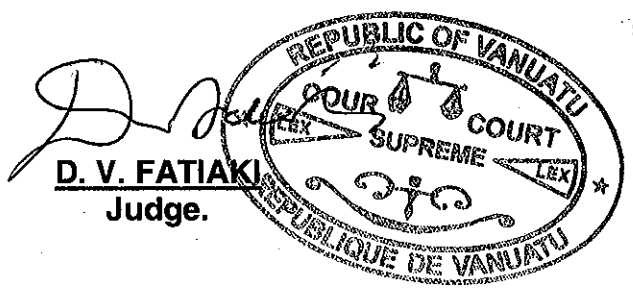
25. Accordingly the claimant is entitled to the return of the deposit it paid to the defendant company pursuant **Quotation No. 70/2007** together with interest.

26. Needless to say my answer to **issue (d)** is: **No**, the claimant did not breach **Quotation No. 70/2007** in cancelling it on **28 May 2008**.

27. In conclusion I dismiss the defendant's set off and counterclaim in its entirety and enter judgment in favour of the claimant in the sum of **VT3,750,000** together with interest at **10% per annum** calculated from **28 May 2008** until fully paid up. The claimant is also awarded costs of this action to be agreed or taxed in the absence of agreement.

DATED at Port Vila, this 22nd day of March, 2012.

BY THE COURT



D. V. FATIAKI
Judge.