IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 164 of 2012**

BETWEEN: MIKE NVATIMPUAP & JOBO NOVWAI NISE
First Claimants

AND: JEAN PAUL TITUS SIMON representing the Ipota Land Owners Council
Second Claimant

AND: AMYVATU LIMITED
Defendant

Hearing: ***19 February 2014***
Judgment: ***24 February 2014***
Before: ***Justice Stephen Harrop***
Appearances: ***Mary Grace Nari for the Claimants***

RESERVED JUDGMENT

Introduction

1. On 19 February 2014, a formal proof hearing took place at which Mrs Nari on behalf of the claimants made submissions as to the appropriate amount for which judgment should be entered. The hearing proceeded on the basis of the extensive sworn evidence on file.

2. Earlier in the proceeding, in his oral ruling of 3 July 2013 , Justice Spear recorded that he was satisfied that the documents required to be served on the defendant in accordance with directions given earlier by him could be accepted as having being duly complied with. Because no steps had been taken by the defendant since the skeletal defence which was initially filed and because no address for service had been provided, his Lordship directed that the case would proceed without further notification to the defendant unless it decided to take formal steps in the case. It has done nothing since.

Background

3. In early 2011, an agreement was reached between the claimants and the defendant under which custom land on Erromango ,commonly known as Nopun Tomboi, was provided by the claimants. In return , the defendant was to provide employment to the local people, assist the custom land owners and the community with social services and incomeï generation projects and it was envisaged that the parties would enter into a timber rights agreement prepared by the Forestry Department.

4. On 13 February 2011 the defendant, a company incorporated in Vanuatu but whose directors are French nationals and residents of Noumea, New Caledonia, sought exemption from the Customs Department in respect of Vt 200 million worth of machinery imported from New Caledonia. The Department granted an exemption for 1 year on the basis that this was a large Government project. As the claimants have pleaded, it would appear that that exemption was improperly given because the defendant was operating a private business project rather than a Government project.

5. On 9 April 2011, the defendant arrived at Ipota village in East Erromango with all of its machinery. The defendant did not have any formal harvesting plan for the proposed timber operation and the Forestry Department warned it not to commence operations. It appears this warning was ignored. On 17 April 2011, the defendant commenced timber operations on a large scale with heavy machinery and employed 12 local men to assist with those operations. That was done without a timber rights agreement having been signed and without a Forestry Department licence.

6. On 11 July 2011 a timber rights agreement *was* signed by the parties and it was recorded that royalty rates ranging from Vt 1,500 to Vt 2,500 per m3 would be paid together with compensation for damage to roads.

7. On 27 November 2011, the defendant ceased operations on Erromango and left Vanuatu. They left behind their machinery and outstanding debts.

8. On 6 December 2012, Justice Spear made Orders authorizing the claimants to seize and hold safe and secure against all others an extensive range of machinery and equipment belonging

to the defendant. The defendant has made no attempt to apply to have those Orders reviewed, as it was entitled to.

9. In their amended claim dated 9 April 2013, the claimants seek Orders for damages and request that this be enforced against the defendantôs machinery. Any question of enforcement is to be considered only after the appropriate amount for which judgment is to be entered is finalized. That is the purpose of this judgment.

10. The claimants seek an order for damages in the sum of Vt 200 million. In paragraph 12 of the amended claim they set out 4 heads of claim but these are not particularized as to the amount claimed for damages under each head.

11. Justice Spear pointed out there were deficiencies in the evidence as to quantum which resulted in Mrs Nari filing a considerable amount of evidence to supplement that which had earlier been filed.

12. Rather than review all of the evidence which has been filed, I propose to discuss the evidence which is relevant when considering each of the claims, this now having been clarified in Mrs Nariôs submissions dated 11 February 2014, at least in relation to the first 3 heads of damage. It is convenient to deal with the 4 categories of damages in a different order from that which they are pleaded.

Royalty Payments for Timber from April – November 2011

13. The evidence before the Court, notably through the Forestry Report of Mr Samuel Lokre prepared on 4 July 2013 is that the timber felled and removed from Ipota by the defendant which later formed 7 shipments of timber, had an estimated market value of Vt 193,770,000. Because there is no record of exact species of the timber that was removed and shipped and indeed as to the precise amount of timber shipped, a degree of pragmatism is required. It is in part because the defendant failed to keep proper records that the claimants have had difficulty in this area but a reasonable estimate has been provided and the defendant should not benefit from its own default in failing to keep proper records.

14. I am prepared to award the claimants royalties at the top end of the range which had been agreed between the parties namely Vt 2,500 per m3. On this basis Mrs Nari calculates that the appropriate award of damages for unpaid royalty payments is **Vt 297,500**. I accept the evidence relating to that and her submission and award that sum under this head.

The abandoned "160 plus " felled trees

15. It is clear from the evidence that the defendant caused a good deal of environmental damage and left in the forest at Ipota a substantial number of felled trees which it did not remove and which have begun to rot and become overgrown. There is some uncertainty about the number of felled trees involved: Mrs Nari refers to ñ160 plusò but I note Mr Lokre refers to 579 felled trees still laying in the forest at Ipota. Whatever the number may be, he has provided evidence that the market value of those remaining trees is Vt 316,365,000. This of course is not the loss suffered by the claimants because they had agreed to these trees being removed in return ,not for payment of their market value, but rather for payment of royalties. An award of contractual damages is designed to put the claimant in a position they ought to have been in if the contract had been fully performed. If those trees had been removed then all that the claimants would have been entitled to is a payment of the royalties relating to those trees. However much they may wish it, the claimants are not entitled to compensation for the difference in value between the state of their forest before the defendant arrived and the state in which the defendant left it.

16. Using the approach to calculation of royalties applied above, the appropriate award under this head is **Vt 485,723.** I am satisfied on the evidence I have read and Mrs Narió submissions that that is the appropriate award under this head.

Outstanding Salaries for 12 Employees for 7 months

17. Extensive evidence has been filed by the various workers employed by the defendant primarily in chain sawing and saw milling work. Leaving aside the foreman Mr Worok, each of the 11 workers claims Vt 188,533. Mr Worok was the foreman and he claims Vt 263,946.

18. Having read the affidavit evidence I am satisfied that these claims are fully justified and that damages must be awarded accordingly. Mrs Nari in her submissions claimed that a total of Vt 2,338,029 was the appropriate award. By my calculation a slightly lower figure is appropriate. The 11 workers who claim Vt 188,533 amount to a total claim of Vt 2,073,863. When Mr Worokôs claim for Vt263,946 is added to this, the total is Vt 2,337,809. I discussed this minor discrepancy with Mrs Nari at the hearing and she accepted that the figure I have reached was the appropriate award. I therefore award damages to the workers in accordance with each of their claims as set out in their sworn statements to a collective total of **Vt 2,337,809**.

Forest Damage as per report dated 27 June 2012

19. There is no question that the defendant has caused substantial environmental damage to the claimantôs land. It commenced operations without approval of the environmental impact assessment report which had been prepared by Bani, Environmental Consultancy.

20. Mr Russell Nari , in his sworn statement of 17 October 2013, helpfully summarized the difficulties of proof of loss which the claimant faced. He said in paragraph 3: ñWithout the monitoring plans, baseline data and the time the operation stopped and up to now, it will be very difficult to establish credible and quantified monitory environmental, ecological and socio-economic damages in this case. The only damages that can be assessed and quantified at this stage will be the counted logs and trees reported through the Department of Forest on 27 June 2012. Therefore the damages should be limited to the logs and trees as reported in the report but exclude other environmental, ecological and socio-economic damages as claimed in this case given the absence of baseline data ñ.

21. Mrs Nari accepts that there is no monetary claim that can be properly awarded under this head in light of the awards of damages already made in relation to royalties for timber removed and for timber which was felled but not removed. Because the claim for forest damage is limited to the loss of money for the milled logs and those still laying the forest, I have already made the appropriate awards above. While the Court has considerable sympathy with the claimants and indeed other occupants of the land at Ipota which has been badly affected by the defendantôs operations, the Court can only make an award of damages

based on clear evidence of loss. Here with regret it is accepted by Mrs Nari that the Court can make no further award beyond those already made above.

22. In summary the total award of damages is **Vt 3,121,032**, this being the sum total of the 3 awards referred to above.

23. Although the prayer for relief in the amended claim did not expressly claim for interest, there was a reference to interest being claimed at 5% immediately under the heading of the document and I am prepared to treat that as a claim for interest at 5%. I am satisfied that the damages I have awarded ought to attract interest at that rate from 1 December 2011 because the royalty payments for both the removed and unremoved logs and the payments to the workers should all have been made by then, at the latest.

24. During the hearing I made calculations as to the appropriate award of interest and discussed this with Mrs Nari. The upshot is that there will be an award of interest in the sum of **Vt 346,306.**

25. Finally as to costs, Mrs Nari said that the costs she had incurred and would be billing to her clients for her time (including all disbursements) stood at Vt 500,000. While normally I would expect to see details of these costs and to tax them, I am prepared in the circumstances of this case to take a liberal and generous attitude to this question and not to require any further attendances on the part of Mrs Nari which would add to the costs to the claimants. Having regard to the complexity of this case and the amount of work which Mrs Nari has very clearly had to do, I am satisfied that an award of costs in the sum of **Vt 500,000** (including disbursements) is fair and reasonable and the claimants are awarded costs in that sum accordingly.

26. In total then judgment will be entered for the claimants jointly and severely against the defendant in the sum of **Vt 3,967,338.**

27. An enforcement conference will be held at 9 am on Wednesday 9 April 2014 at which time the Court will consider directing sale of 1 or more items and machinery so as to meet the judgment debt. Given that the directors of the defendants reside in New Caledonia and

having regard to its failure to take steps for many months in relation to this case, I direct that Mrs Nari arrange for the sealing of a judgment and that she then serve the defendant in the same way as it was served with the claim and related documents with the following:-

a) This reserved judgment;

b) The sealed judgment.

28. Mrs Nari is to provide proof of service at the enforcement conference.

29. The defendant must understand that if it does not arrange an appearance by counsel or one of its directors at the enforcement conference then the Court will make an order for the sale of 1 or more of the items of machinery so as to satisfy the judgment debt.

BY THE COURT