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

Civil
Case No. 18/3314 CIVIL

BETWEEN: **Matarau Tefeke (Ifira)**
Claimant

AND: **Vanuatu Project Management Unit**
First Defendant

Republic of Vanuatu
Second Defendant

Date of Hearing:	23 December 2020
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mr J. Malcolm for the Claimant
	Mr S. Aron for the Defendants
Date of Decision:	5 January 2021

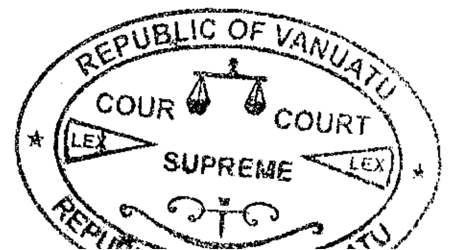
Judgment

A. Introduction

1. In October 2016, the Claimants agreed with the Government of the Republic of Vanuatu to provide certain materials to enable the construction of the South Paray Domestic Wharf. Pursuant to this agreement, the Claimant submits the Government has taken the materials required for the project, but to date has neglected to pay for them.

2. By consent, on 19 August 2020, judgment as to liability was conceded by the Second Defendant, leaving only the issue of quantum to be determined.

3. This judgment deals with quantum.



B. Background

(i) Documents

4. On 12 February 2016 the Ministry of Infrastructure and Public Utilities, representing the Government of the Republic of Vanuatu entered into an agreement relating to the South Paray Wharf site with the landholders, Family Kalpram Tuekot and descendants, Matarau Tefeke, and the community and people of Ifira Tenuku.

5. It set out the terms and conditions for the application of resources to construct the Domestic Wharf on land facilitated by Ifira Ports and Development Services, a subsidiary of Ifira Trustees Limited and approved by the Customary Land Owners. It also set out the process and plans for long term access to the wharf facility by the public, and for the management of South Paray Wharf through the creation of an appropriate entity.

6. On 21 October 2016 there was a further agreement entered into between the Government of the Republic of Vanuatu, the Commissioner of Mines and Family Kalpram Tuekot and Descendants and Matarau Tefeke of Ifira Tenuku as the custom land owners ("the Agreement").

7. The purpose of the Agreement was to:

    - acknowledge the consent of the declared custom land owners to dredging and use of aggregate material from land owned by them,

    - record the responsibilities of the Vanuatu Project Management Unit ("VPMU") towards the project,

    - ensure that the work was carried out according to an issued Quarry Permit,

    - record the allocation of building materials to the project by the custom land owners, and

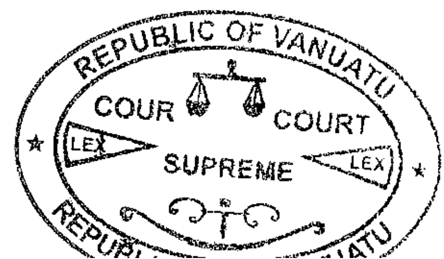
    - set out the arrangement for the agreed compensatory payments to the custom land owners by the Government.

8. Payments were to be made, as set out in an appended Schedule, in respect of:

    (i) Royalties, pursuant to the Quarry Permit Act No. 9 of 2013 and as calculated by the Commissioner of Mines; and

    (ii) Aggregates used in the project. It was provided that:

    > "...upon completion of the quarry works, and once a full and concise report by VPMU is done showing the actual total amount of building materials extracted, that a calculation for the total estimated value of extracted materials from the quarry activities and royalties due to the Landowners will be made by VPMU, approved by both the Commissioner of Mines and the Custom Owners".



9. The Schedule to the Agreement set out that payments for aggregates would be done in the following manner:

   "(a) Total amount of aggregates extracted and used by the Government in the construction of the South Paray Wharf Facility to be calculated and confirmed by the Commissioner of Mines;

   (b) Custom Land Owners to verify and check the total amount of aggregates used as provided by the Commissioner of Mines, and to agree;

   (c) Commissioner of Mines to then calculate total value of aggregates in vatu at the current rate used under the Quarry Act and to provide the calculation to the VPMU and Custom Land Owners;

   (d) Payment arrangements for aggregates to Custom Land Owners to be formalised, along with agreed calculations by all parties, to be agreed and completed in a series of formal meetings, the first meeting to be held within 30 days of the signing of this agreement".

10. Payments for royalties was to be done in the following manner:

    (a) "Total royalties payable by the Quarry Permit Holder to the Custom Land Owners, upon confirmation by the Commissioner of Mines, in arrears to the Custom Land Owners at agreed regular intervals, at the rate prescribed by the Commissioner of Mines and in compliance with the Quarry Permit issued and stipulated in the Quarry Permit Act".

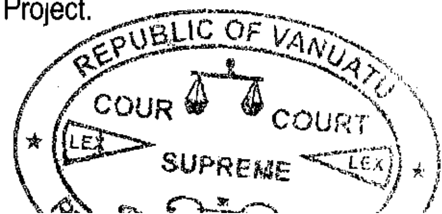
11. There was a Second Schedule to the Agreement, which was signed on 21 July 2017. It catered for excess dredged aggregate material which was held by VPMU and stockpiled at South Paray Wharf.

12. It set out that an excess of 6,000 cubic metres of aggregate had been dredged from the custom land owners' land, which was not used for the South Pray Wharf project. The ownership of the stockpile was returned to the custom land owners, and the Schedule indicated that they intended to remove that material from the Wharf site, at their expense. By accepting back the stockpile, the custom land owners agreed to waive the royalty payments for that material.

(iii) Correspondence

13. While VPMU was waiting for the Commissioner of Mines to determine the value of the extracted mineral in vatu (as required by the agreement entered into), Mr Barak Sope as spokesperson for Matarau Tefeke wrote a letter dated 6 April 2017 (in his evidence Mr Roqara had the letter dated 30 August 2017, but that is clearly an error). Mr Sope recorded the discussion of a meeting held on 6 April 2017 and proposed, after consulting the Chief of Matarau Tefeke that the price of the aggregates should be VT 5,000 per cubic metre. He recorded further that such price had been communicated prior to the Second Agreement dated 21 October 2016. He also demanded that no further aggregates be removed until full payment had been made.

14. By letter dated 27 July 2017, the VPMU Project Manager Mr Roqara recorded 35,697 cubic metres of aggregates had been dredged and used for the Wharf Project.



15. By letter dated 24 August 2017, the Acting Commissioner of Mines, Mr Brooks Rakau, confirmed the same volume of aggregates was taken and used on the project.

16. On 30 August 2017, Mr Sope wrote to Mr Roqara. He confirmed meetings dealing with the payments of royalties in September 2017 with the Commissioner for Mines and Mr Roqara. Mr Sope sought payment for royalties for 46,661 cubic metres dredged and sought payment for 35,696 cubic metres of aggregates used on the Wharf project. He stated payment was overdue. He stipulated that the custom land owners' price for the aggregates was VT 5,000 per cubic metre.

17. By letter dated 8 September 2017, Mr Roqara calculated that the volume confirmed, at the "...[Matarau Tefeke] proposed rate of VT 5,000 per cubic metre" would equate to VT 178,485,000. The letter goes on to record that the Agreement required the rate to be confirmed by the Commissioner of Mines, which had yet to occur, but if it was confirmed then a proposed payments schedule was set out.

18. That is taken by the Claimant as acknowledgement of the agreed rate for the aggregates taken by the Claimant in the course of the Wharf project; but it is not accepted as such by the Defendants.

19. By letter dated 16 April 2018, Mr Sope forwarded invoices addressed to VMPU for the royalties and the aggregates taken. They were said to be overdue. The letter indicated that the stockpile still remained on site, although some was used to construct the entrance road. The invoices are for royalties on 35,697 cubic metres utilised in the construction, and for the same volume of aggregates taken.

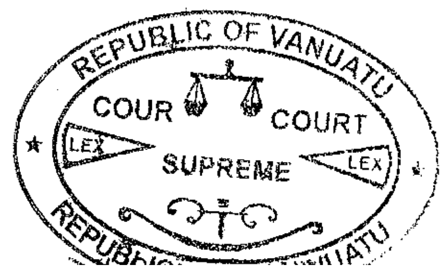
20. The first royalty invoice records "...at the agreed rate of Fifty (50) Vatu per cubic metre". That calculation came to VT 1,784,850, which was asked to be paid 50/50 to (i) Family Kalpram Tuekot and Descendants, and (ii) to Matarau Tefeke (Ifira). That VT 50 figure accords with a document headed "Information to Custom Land Owners for Dredge Materials Valuation & Royalties", which related to the Wharf Project. This document also records that 40% of the Royalty payments are payable to the custom land owners.

21. The second aggregates invoice records "...at the agreed rate of Five Thousand (5,000) Vatu per cubic metre'. That calculation came to VT 178,485,000, which was also requested to be paid 50/50 to the same entities.

22. On 28 May 2018, VPMU received from the Commissioner of Mines the valuation of the extracted material at a rate of VT 150 per cubic metre.

C. <u>Issues</u>

23. It was accepted before me that the Government of the Republic of Vanuatu is liable for (i) royalties and (ii) aggregates in respect of the material extracted and used for the project. However, to whom the Government is liable is in contention. [Issue One].



24. The rate for payment of the extracted aggregates is the main issue in dispute. The correct rate must be determined. Whether the stockpile should impact this determination is a further consideration. [Issue Two].

D. Evidence

(i) Issue One

25. The Claimant is but one party to the Agreement. Clearly the Government cannot be liable to only the Claimant under the Agreement. Further, Mr Lapsai Robson has provided uncontested evidence that the Efate Island Court decision in Land Case No. 3 of 1995, which awarded custom ownership of (i) Etu Maau land to Family Kalpram Tuekot and descendants and (ii) Matarau Tefeke of Ifira, has been appealed. The appeal remains undetermined.

26. Accordingly, the Government is content to acknowledge liability, but wishes to pay the funds to the Custom Owners Trust Account for distribution once finality is achieved as to the rightful recipients of the funds.

27. Mr Malcolm submitted that the concession by the Government at a prehearing conference on 19 August 2020 as to liability but recorded as a judgment of the Court should be binding. The Court cannot accept that submission. What was recorded was obviously a misunderstanding of counsel's true position, which is not that judgment to only Matarau Tefeke was appropriate. Justice to all parties is what is required.

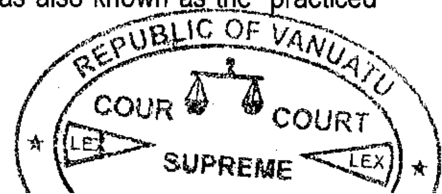
(ii) Issue Two

28. Apart from Mr Sope's unchanging proposal, Mr Johnson Wabaiat, the former Director of VPMU, attests that during his time as Director "...we had never rejected..." the proposal. The eight reasons for that are set out in his statement. They included the fact that aggregates transported by Fletcher Construction Limited from Eratap and Mele to commence the Lapetasi Wharf project were valued at VT 6,000 per cubic metre, and in some cases VT 7,000 per cubic metre. While that point is reasonable, the following is not. He considered that a lesser amount than VT 5,000 "...would affect the future business" of the South Paray Wharf. There is no substance to that opinion and no support for it. In summary, Mr Wabaiat considered the custom owners should be paid for the aggregates at the rate of VT 5,000 per cubic metre.

29. Mr Gregory Calo is the owner and General Manager of a roading business. In June 2016, his company was contracted to transport materials from Mele to the South Paray Wharf. He stated the value of that material was VT 6,000 per cubic metre. He considered the material was of a higher quality than usual, and he considered the custom land owners should be paid at the rate of VT 6,000 per cubic metre, or more.

30. Mr Roqara stated that the Agreement provided for the value of the aggregates to be set by the Minister of Mines. Accordingly, as the Acting Minister had advised the rate was to be VT 150 per cubic metre, that is what he considers should be paid.

31. The Acting Minister of Mines, Mr Rakau, stated that at the relevant time there was an "applicable rate", which was VT 150 per cubic metre. This was also known as the "practiced



rate". He did not accept Mr Sope's proposed rate of VT 5,000 per cubic metre at any time. He also appended 2 examples of determinations at around the same time, In one, in relation to Leviamp Beach Quarry, the rate was set at VT 125 per cubic metre; and in the other, relating to Iunasis Quarry, the rate was set at VT 150 per cubic metre.

32. As further evidence to support his position, Mr Rakau pointed to the fact that the Quarry Act Amendment of 2016 enabled to setting of a minimum rate. When he attended to that in November 2018, he set the minimum rate at VT 150 per cubic metre.

E. <u>Discussion</u>

33. There is no clear evidence as to an agreed value for the aggregates. It is correct that Mr Sope has been consistent and persistent in proposing a rate of VT 5,000 per cubic metre. However, under the Agreement, he is not the arbiter. Further, there is a lack of evidence that Mr Sope's proposed value was accepted or adopted by any other entity. Accordingly, the principles of estoppel have no application.

34. Mr Malcolm sought to distinguish Mr Roqara's and Mr Rakau's evidence. He submitted that much of what they had stated related to royalty payments only, and the evidence as to minimum payments was simply unhelpful.

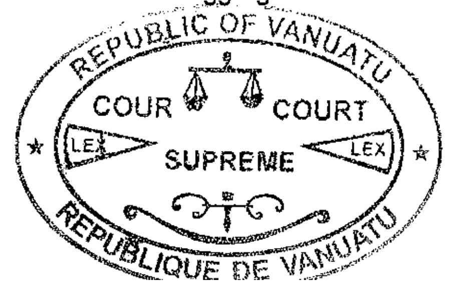
35. There is no novation or variation of the original Agreement as to the manner in which the rate of payment for aggregates used was to be calculated. To set the rate at anything other than VT 150 per cubic metre would be to violate the terms of the Agreement reached by the parties. The Claimant is bound by what was agreed, namely that the rate is to be fixed by the Minister of Mines, which he has done. Further, the rate which the Minister set is not out of proportion with other rates set at the time. The Claimant is not entitled to any more than VT 150 per cubic metre of aggregates.

36. There is no dispute between the parties that 46,661 cubic metres of aggregates were dredged. However, the amount of that material used on the South Paray Wharf project is what is covered by the Agreement, and that is the lesser amount of 35,697 cubic metres. The difference was, and remains, stockpiled on the site. The Government is not liable, under the Agreement, to pay for that material.

(iii) <u>Royalty Payment</u>

37. The rate at which royalties are to be paid was originally accepted to be VT 50 per cubic metre, but before me the appropriate rate was agreed by counsel to be VT 150 per cubic metre. There was also agreement that the custom land owners entitled to 40% of the royalty calculation.

38. The Second Schedule to the Agreement specifically deals with the stockpiled material not attracting royalties for the custom owners. As there was no challenge to this, the custom owners are entitled to royalties on the lesser amount of 35,697 cubic metres of aggregates only.



F. Result

39. In terms of royalties owed, I set the appropriate rate as that agreed at the hearing, irrespective that a lower figure was contemplated at an earlier time. Accordingly, the Government is liable to pay royalties at the rate of 40% of 35,697 cubic metres of dredged material, the value of which is set at VT 150 per cubic metre. By my calculation that amounts to VT 2,141, 820.

40. For the reasons provided above, the Government is liable to pay the custom owners for 35,697 cubic metres of aggregates at the rate of VT 150 per cubic metre. By my calculation, that amounts to VT 5,354,550.

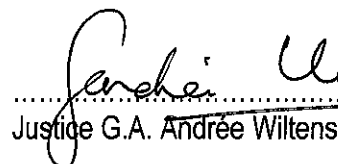
41. I am prepared to enter judgement against the Government in those amounts, but not in favour of the sole Claimant, or indeed both parties referred to in the Agreement. The judgment amounts are to be paid into the Custom Owners Trust Account and distributed once a final determination has been made as to the lawful custom owners.

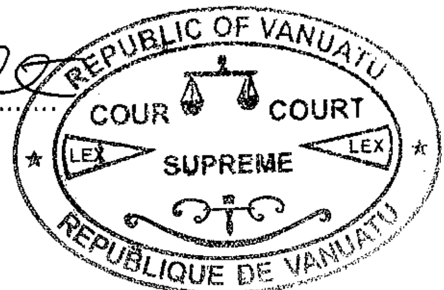
42. On one view, the Claimant has succeeded in that there is a judgment against the Government. However, that judgment is not in favour of the Claimant, and is in a significantly reduced amount from that which was originally claimed. Accordingly, the Government is entitled to the costs of this action. I set that at VT 100,000. The costs are to be paid within 21 days and are due on a joint and several basis.

43. A further conference is scheduled for 8am on 20 January 2021 for the Government to advise the Court: (i) that it has paid the judgment sum and costs awarded, or (ii) to explain how it intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for immediate enforcement action to be pursued.

44. In order for this to occur, a copy of this judgment must be served on the Government, with a proof of service provided.

Dated at Port Vila this 5th day of January 2021
BY THE COURT





Justice G.A. Andrée Wiltens