IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 21/362 CAC/CIVA

BETWEEN: MATARAU TEFEKE
Appellant

AND: VANUATU PROJECT MANAGEMENT UNIT
First Respondent

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU
Second Respondent

Coram:	*Hon. Chief Justice Vincent Lunabek* *Hon.Justice Raynor Asher* *Hon.Justice Oliver Saksak* *Hon Justice Dudley Aru* *Hon.Justice Viran M Trief* *Hon.Justice Richard White*
Counsel:	*Mr John Malcolm for the appellant* *Mr Sammy Aron for the respondents*
Date of Hearing:	*5th May 2021*
Date of Judgment:	*14th May 2021*

JUDGMENT

Introduction

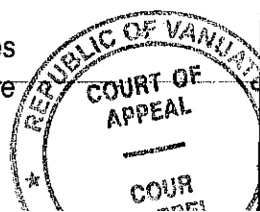
1. This appeal is against an award made in the Supreme Court on 5th February 2021 whereby the Government was found to be liable for:

   (a) Payment of VT2,141,820 as royalties calculated at the rate of 40% of the 35,697 cubic metres of dredged material, and

   (b) Payment of VT5,354,550 for the same volume of dredged material at the rate of VT150 per cubic metre (as aggregate payment).

Relevant Facts

2. On 12th February the Second Respondent through its Ministry of Infrastructure and Public Utilities entered into an agreement with the custom landowners of the South Paray Wharf site who are



family Kalpram, Tvekot and descendants,Matarau Tefeke and the community and people of Ifira Tenuku.

3. The agreement set out the terms and conditions for the application of resources to construct the Domestic Wharf facilities by Ifira Ports and Development Services. It also set out the process and plans for long term access to the wharf by the public and for the management of the South Paray wharf through creation of an appropriate entity.

4. On 21st October 2016 a further agreement was executed between the Second Respondent, the Commissioner of Mines and the custom-landowners.

5. That agreement was for the purposes of:

- Acknowledging the consent of the declared land owners to dredging and use of aggregate material from land owned by them;

- Recording the responsibilities of the Vanuatu Project Management (VPMU), (First Respondent);

- Ensuring the work carried out was in accordance with the Quarry Permit, issued;

- Recording the allocation of building materials to the project by the custom owners; and

- Setting out the arrangements for the agreed compensatory payments to the custom landowners by the Second Respondent;

- Schedule 1 of the agreement set out the payments to be made to the custom landowners in the following manner:

"1. *Payment for aggregates to custom landowners shall be in the following manners:*

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 Commissioner of Mines;*

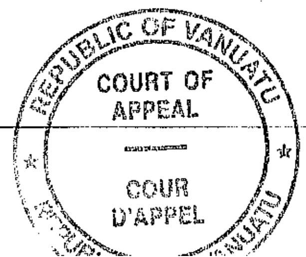
b) *Custom Land Owners to verify and check the total amount of aggregates used as provided by Commission of mines and to agree;*

c) *Commissioner of mines to the calculate total value of aggregates in vatu and current rate under the Quarry Act and to provide the calculation to the VPMU and Custom Land Owners;*

d) *Payment arrangements for aggregates to Custom Landowners to be formulated, along with agreed calculations by all parties, to be agree and completed in a series of formal meetings, the first meeting to be held within 30 days of the signing of this Agreement*

2. *Payment for Royalties shall 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."

6. By 27th July 2017 the VPMU Manager had recorded that 35,697 cubic metres of aggregates had been dredged and used for the Wharf Project.

7. The Second Respondent has not made payments under the agreements.

8. The appellant filed proceeding against the First and Second Respondents claiming the sum of VT178,784,850 for royalty payments at September 2017 VT50,000,000 for March, June and September 2018 and VT28,485,000 for December 2018, damages for breach of contract, or in the alternative, for theft/ conversion and quantum meruit.

The Decision

9. The primary Judge in the Supreme Court held that the appellants were entitled to VT2,141,820 as royalties and VT 5,354,550 for the aggregates.

10. First the Judge awarded VT2,141,820 in royalties to the custom land owners based on the evidence of the then Acting Commissioner of Mines, Mr Rakau who calculated the rate at time which was VT 150 per cubic metre, and in accordance with the terms of the agreement.

11. Second, the Judge refused to award the rate of VT5,000 for aggregates proposed by Mr Sope in his sworn statement. This amount was proposed as a result of a comparison between the rates of VT6,000 – VT7,000 payable to the Fletcher Construction Limited for aggregates quarried from quarries at Eratap and Mele.

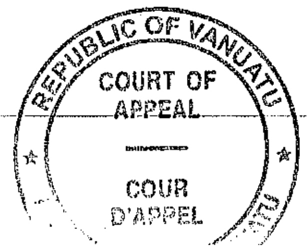
12. The Judge did not consider awarding a lower sum of VT4,000 per cubic metre of aggregates which the appellant argued was accepted by the Attorney General.

The Appeal

13. The appellant appealed those findings and decision on one ground namely that the Judge had erred in setting a minimum level retroactively.

Submissions

14. The appellant submitted that the Judge was wrong in applying the VT150 rate for royalties to assess the amount payable to the custom land owners for aggregates.



15. The appellant submitted the correct rate the Judge should have adopted and awarded should have been the VT5,000 per cubic metre as proposed by Mr Sope or the VT4,000 as said to have been admitted by the Respondent's Solicitors.

Discussion

16. The appellant accepted the Judge's decision that VT150 per metre was the royalty rate at the time based on 40% of the 35,697 cubic metres of the dredged materials.

17. The appellant challenged the VT150 per cubic metre set for aggregates.

18. In deciding the minimum rate of aggregate the Judge said at [35]:

> *"there is no novation or variation of the original Agreement as to the manner in which the rate of payment aggregates used was to be calculated. To set the rate at anything other than VT150 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 vote 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 at the time. The claimant is not entitled to any more than VT 150 per cubic metre of aggregates."*

19. Clause 8 (c) of the Agreement states:

> *"The total value and amount of extracted materials must be clearly calculated and shown to the Custom Land Owners by the Commissioner of Mines and the arrangement to pay such total amount as outlined in the Schedule of this Agreement. This is to be called "payment for aggregates."*

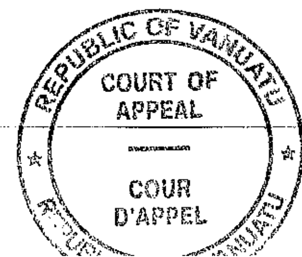
20. Schedule 1 (c) of the Agreement states:

> *"(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."*

21. The Judge had in evidence before him the letter dated 28 May 2018 written by the Commissioner of Mines to the VPMU (First Respondent). That letter sets out the rates of both royalties and aggregates at VT150 per cubic metre and confirms this was the "practiced" minimum rate at the time.

22. The Judge recorded at [22] of the Judgment that:

> *"on 28th May 2008, VPMU received from the Commissioner of Mines the valuation of extracted material at the rate of VT 150 per cubic metre."*



23. The letter of 28 May 2018 was made in accordance with Clause 8 (c) of the Agreement read together with Clause 1(c) of Schedule 1 of the Agreement.

24. Those steps and actions were taken in accordance with the provisions of the Quarry Act.

25. We are not persuaded the Judge was wrong in applying the minimum rate for aggregate payment at VT 150 per cubic metre. We agree with the trial judge's interpretation of the plain words of the Agreement.

26. Moreover, the agreement must be construed against the background that the payment was for raw aggregate in a rough state by the lagoon, which would require considerable expenditure to remove to a place where it could be sold in a reasonable condition, and then the retailer would want a margin. Plainly it would make no sense if the retail rate was intended to be paid to the Appellants, with all those costs still ahead. They would thereby get a massive unearned and plainly unintended bonus.

27. The Judge had correctly construed the relevant provisions of the Agreements and was satisfied on the evidence the provisions of the Quarry Act had been complied with. We find no error in the Judge's decision.

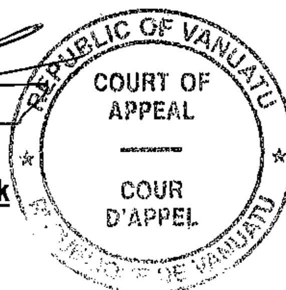
The Result

28. This appeal is therefore dismissed.

29. The appellant will pay the respondent's costs fixed at VT 40,000.

DATED at Port Vila this 14th day of May, 2021

BY THE COURT



Chief Justice V. Lunabek