

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

Civil Case No.212 of 2012

**BETWEEN:** RONALD VUDUY  
Claimant

**AND:** AND PROPERTY LIMITED  
Defendant

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

**Counsels:** Mr. D. Yawha for the Claimant  
Mr. D. Thornburgh for the Defendant

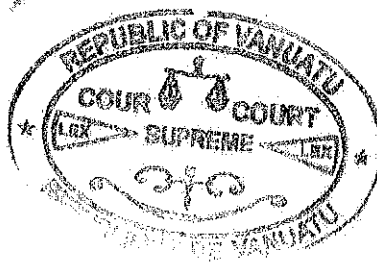
**Date of Ruling:** 17 February 2017

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**ASSESSMENT OF DAMAGES**

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1. On 11 August 2014 summary judgment was entered in favour of the claimant for damages to be assessed. The claim pleaded that in November 2011 the claimant entered into a verbal contract to build concrete walls around the defendant company's development at Pango. It is common ground that the defendant company's land at Pango is comprised of 2 blocks of land of different sizes separated by a public road – a smaller block of land (hereafter described as being on the "landward side") and a larger block on the "seaward side".
2. The claimant's quoted price was "VT50,000 per linear metre for a 2.2 metre high concrete block wall with extra footing". The person who the claimant dealt with exclusively was Jeremy Dick a resident director of the defendant company. The wall was built but payment was not made despite several attempts to obtain payment.
3. In July 2012 after receiving a payment of VT1 million and further unsuccessful attempts to obtain payment of the balance the claimant issued an Invoice to the defendant company setting out the several works with costing undertaken for the defendant company as follows:



"RONALD VUDUY CONSTRUCTION  
PO BOX 331  
PORT VILA  
VANUATU  
CT: 163699  
Mob: 7752000

INVOICE

To: AND Property Ltd

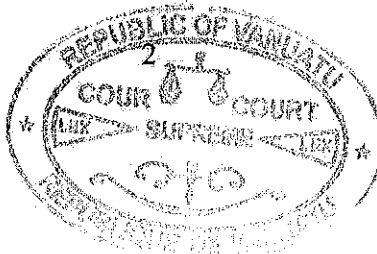
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- 1) Construction of 125LM of concrete wall (X 2.m High)  
Materials and labour supplied  
 $125 \times 50.00\text{vt/m} = 6,250,000\text{vatu}$
  
  - 2) Construction of dividing walls between pools 10.8LM (3x3.6m) (x1.6m High)  
Materials and labour supplied  
 $10.8 \times 40.000\text{vt/m} = 432,000\text{vatu}$
  
  - 3) Labour supplied for:
    - a) 5LM of concrete wall (1.6m High) dividing pools
    - b) Fixing septic tank
    - c) Chasing electrical conduits for lights
    - d) Removal of 40ft container
    - e) Paint touch ups
    - f) Timber fencing between bungalows
    - g) Installing all entrance doors, door frames and skirtings around

Labour costs = 900,000vatu

TOTAL =	<u>7,582,000 vatu</u>
12.5% VAT	<u>947,750 vatu</u>
GAND TOTAL =	<u>8,529,750 vatu</u>
Paid to Date	<u>1,000,000 vatu</u>
<b><u>Amount Outstanding</u></b>	<b><u>7,529,750 vatu</u></b>

**NOTED: This account is overdue payment in full is required today"**

4. It is clear on the face of the Invoice that the claimant was involved in building several concrete walls of different lengths and heights as well as erecting timber fencing all with different costings, in and around the defendant company's development at Pango.
  
5. In its defence the defendant company admits that Jeremy Dick was a director of the defendant company in November 2011 and remained so until he was finally removed on 21 June 2012. It accepts that Jeremy Dick "... apparently accepted the claimant's verbal quotation for the building of a 2.2

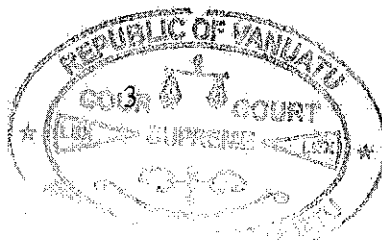


metre high fence with footing at the price of VT50,000 per lineal metre without adherence to the established and agreed practice ...".

6. The defence also admits that the claimant completed "... remaining walls including the divide concrete walls to each swimming pools" and asserts that the claimant's invoice for the sum of VT8,529,000 is "grossly excessive". The defence also avers that a sum of VT2,2 million was part payment for completion of part of the walls. This is denied by the claimant.
7. At the assessment trial the claimant produced four (4) sworn statements and was cross-examined at length. The defence produced the sworn statements of Toswell Tari; Daniel Simeon; and John Ernest Salter who were also cross-examined. Claimant's counsel also marked as exhibit D(4) a sworn statement of Daniel Manu which had been provided by the defence and used during cross-examination. Significant by its absence however, is a sworn statement from Jeremy Dick who, at an earlier stage in the proceedings, was added as a Third Party by the defendant company.
8. Much criticism was made by defence counsel about the absence of Jeremy Dick and the failure of the claimant to call him as a witness in support of his claim. In my view the criticism was unfounded. Jeremy Dick was a director of the defendant company at the relevant time and entered into the oral contract with the claimant in that capacity. He could just as equally have been called by the defendant to establish its defence but it, too, chose not to call him as a witness. Neither party has provided a sworn statement from Jeremy Dick.
9. I make that observation advisedly because not only has liability been accepted and summary judgment entered against the defendant company but also because Section 193 of the Companies Act expressly provides: "*The acts of a director or manager shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification*".
10. More relevantly in AGC (Pacific) Ltd. v. Woo International Pty Ltd. [1992] PNGLR 100 Sakora J. summarises the law relating to "*in-house management rules*" and "*ostensible authority*" as it relates to the acts of a company when he writes:

*"... where a person dealing with a company acts in good faith and with no notice of reasonable grounds for suspicion of irregularity or impropriety, he is not affected by any actual irregularity or impropriety in a matter of internal regulation: ... This proposition is sometimes referred to as the rule in Turquand's case: Royal British Bank v Turquand (1856) 6E and B 327; [1856] EngR 470; (1856) 119 ER886. The substance of this rule is that a third-party dealing with the company is not bound to ensure that the internal regulations derived from, inter alia, the articles of association) have in fact been complied with as regards the exercise and delegation of authority in the company."*

And later:



*"It is the directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such: HL Bolton (Engineering) Co Ltd. V T. J. Graham and Sons Limited [1956] 3 All ER 624.*

*And in relation to contractual obligations arising out of the acts or actions of the employees or officers of the company, the liability arises out of the operations of the doctrine of ostensible (or apparent) authority. ..."*

11. Be that as it may defence counsel in his closing address identified the following matters in dispute:

- Length of the wall;
- Lineal metre rate;
- Terms of the contract;
- Scope of works; and
- What the payment of VT2,2 million was for?

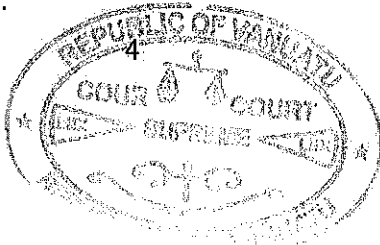
Counsel also accepted that it was never denied that Jeremy Dick could bind the defendant company.

12. Before dealing with the matters in dispute it is convenient to make some general observations about the nature of the competing evidence received in this assessment. As earlier stated, the claimant himself provided 4 sworn statements in support of his claim with several annexures and was extensively cross-examined by defence counsel. He spoke from personal firsthand knowledge about facts and events with which he had a professional, commercial interest and involvement.

13. The defendant company on the other hand, called witnesses who had no close personal knowledge or involvement with the claimant or the building contract that was undertaken by him at the defendant company's property at Pango. All defence witnesses spoke from hindsight and offered measurements, quotations, and opinions years after the events of 2012. No registered land surveyor or qualified quantity surveyor was called by the defence.

14. I have no hesitation in saying that I accept and prefer the claimant's evidence which was unshaken and given in a forthright manner. He did not strike me as exaggerating his claim or of lacking knowledge of intimate details of the works agreed and performed by him. He also provided an unchallenged boundary survey of the defendant company's property which recorded precise measurements which cumulatively exceeds the 125 metres that the claimant claims in his Invoice.

15. Equally I found the defence evidence lacking in important details, unreliable and hypothetical. For instance the defendant company and John Salter rely heavily on an email dated 19 December 2011 (not copied to the claimant) that passed between Jeremy Dick and John Salter which contains the following cryptic passage:

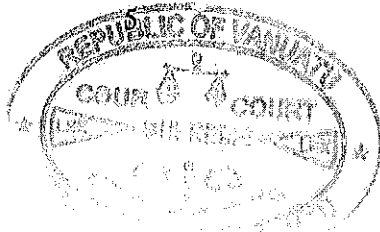


"I am expecting to make a payment for the fencing, 4,500,000 is the total price for the fencing. This will not be fully charged as we are not done most of it is materials of blocks/cement, so I would estimate 3,000,000 would be required".

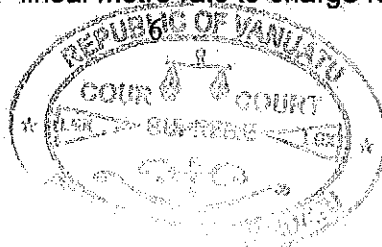
16. I say "cryptic" because it is clear that the payment that was being sought is a part-payment for materials comprising blocks and cement which is more relevant to a Labour only contract where the owner supplies the materials.
17. I do not accept that the sum of VT4,500,000 referred to in the passage is a figure that had been either quoted or mentioned by the claimant nor does it correctly reflect "... the total price for the fencing" where the contract is not a fixed lump sum contract but one based on an agreed lineal metre rate. Needless to say in such a contract "the total price" is dependent on the length of the fence and as at the date of the email the claimant had not even commenced building the now disputed fence and no mention is made in the email as to the agreed length of the fence or the lineal metre rate quoted by the claimant and agreed to by the author of the email.
18. Even adopting the defendant's lowest figure of 111.6m as the total length of the walls built by the claimant, the contract price would be:  $(111.6m \times 50,000vt/lm) = VT5,580,000$  based on the agreed lineal metre rate. This price is still VT1.08 million more than the so-called "total price" mentioned in the email.
19. I am also satisfied and it is not seriously disputed that the claimant had previously done work for the defendant company in relocating a chainlink and steel pole fence and then constructing a new 2.2m high concrete wall on the landward side of the defendant company's property at Pango where an old house was standing.
20. Turning now to the matters in dispute identified earlier:

(1) The Length of the walls and linear metre-rate

The defendant relied on the evidence of two witnesses Tari Toswell the owner of Tariwabo Construction who produced a Labour only quotation dated 1 December 2014 and Daniel Simeon a builder and employee of the defendant company who provided two slightly more detailed quotations in January 2015 for Labour and Materials and a Labour only quotation. It is interesting to note the significant difference in the Labour only quotes provided by the witnesses to build the walls that were measured. Toswell Tari quoted VT360,000 (VAT Inc) for a maximum construction period of 3 weeks whereas Daniel Simeon quoted a sum of VT648,000 for 9 weeks work to build the same walls which is almost twice the costs and three times longer. Such pronounced unexplained variations in the Labour only quotes merely reinforces the court's earlier stated view about the reliability and quality of the defence evidence and witnesses. Neither witness provided a lineal metre rate quote as was done by the claimant.



21. Both witnesses used figures of 112.0m (Toswell) and 111.6m (Simeon) respectively as being their measurements of the already built walls at the defendant company's Pango property. Neither has broken down his measurement between the seaward side walls and the landward side wall nor described in any detail how the measurement was arrived at and what measuring equipment (if any) was used in the process. Neither is a registered land surveyor or qualified quantity surveyor.
22. Neither witness referred to the claimant's Invoice which refers to several concrete walls that were constructed by the claimant nor did the witnesses provide diagrams in their evidence. I have contrasted their figures with the more detailed measurements of Daniel Manu whose sworn statement included a clear diagram. He deposed to actually measuring the walls constructed by the claimant, and the total length of the measured walls as drawn are:  $(76.8 + 17.7 + 11.5) = 106\text{m}$  for the three seaward side walls. That measurement does not include the undisputed internal pool dividing walls of 10.8m built by the claimant and which when added to the seaward side walls gives a total of  $(106 + 10.8) = 116.8\text{m}$ . This figure is significantly longer than the figures adopted by the defence witnesses in preparing their quotations. It also excludes the length of the landward side wall which was also built by the claimant (at an earlier time) and which measures 34.8 metres.
23. I reject the incomplete and contradictory defence evidence of the length of the walls built by the claimant at the defendant company's Pango development.
24. The only defence evidence of an alternative lineal metre rate is to be found in an email of Doug Bailey to John Salter dated 11 September 2012 (again not copied to the claimant) where he opines that "... a more reasonable price for the (claimant's) wall ... is about 36,000VT/lm". However no sworn statement was provided by Doug Bailey nor was he called as a defence witness.
25. The email confirms that the author did not quote for the walls at the defendant company's Pango development because the costs involved "*were much larger than what seemed acceptable*". The author then refers to a quote of VT30,000/lm for a 1.8m high steel/concrete block wall he was building at Beverly Hills and accepts that the claimant's walls are 22% higher but that would "... *theoretically justify no more than a 20% higher price ...*".
26. This email graphically illustrates the difficulty and unreliability of the defence evidence given in hindsight. This was a contractor who by his own admission "*did not quote*" to build the defendant company's walls at the relevant time but who is willing nevertheless, to give an opinion on another contractor's work many months later after the walls were built, of what would be a "*reasonable*" lineal metre rate to charge for the walls.



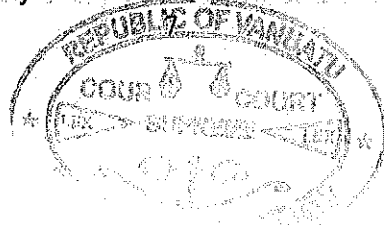
27. Needless to say if the contractor had quoted his so-called "reasonable price" at the relevant time there is every likelihood that he would have secured the contract to build the defendant company's walls but instead, at the relevant time his unexplained calculations produced "... numbers (that) were much larger than what seemed acceptable" (whatever that may mean).
28. I reject the hearsay, inadmissible, untested opinion of Doug Bailey which I find self-serving, gratuitous and unreliable.

#### Terms of Contract/Scope of works

29. In this regard the defendant has produced almost no evidence disputing the claimant's evidence or denying the content of the claimant's Invoice especially the small jobs enumerated under item (3).
30. In these matters too, I accept the claimant's direct evidence of the works that he performed for the defendant company at the request of and with the agreement of Jeremy Dick the defendant company's on-site representative at the relevant time including the building of 2 separate 2.2m high concrete walls – initially, a shorter wall on the landward side of the defendant company's development at Pango and later, a longer perimeter wall and internal dividing walls on the larger block of land on the seaward side.
31. I accept the contents of the claimant's Invoice as an accurate summary of the scope and type of works done by the claimant at the defendant company's premises which is largely undisputed except for the VT50,000/m rate figure.

#### The VT2,2 million payment

32. Finally I turn to consider the above payment which was made by way of a cheque addressed to the claimant and dated 22 December 2011. The cheque is unaccompanied by an Invoice from the claimant and was paid when Jeremy Dick was still a director of the defendant company. Time wise, it is more closely related to Jeremy Dick's email of 19 December 2011 when the claimant had not yet commenced building the longer seaward side walls but after the various works undertaken by the claimant on the defendant company's landward side land had been completed.
33. The claimant is adamant that the VT2,2 million payment was for separate fencing works that he had completed by December 2011 involving the dismantling and erection of a pre-existing chainlink and steel pole fence as well as constructing a new 2.2m high concrete wall in front of the old house on the landward side of the defendant company's Pango property.
34. The defendant company without any confirmatory email or sworn statement from Jeremy Dick baldly asserts that it had made 2 payments in respect of




unspecified walls built by the claimant which included the VT2,2 million. The relevant cheque however was issued 6 months before the claimant's Invoice which makes no separate mention of the 34.8m landward side concrete wall which, on the evidence, had already been built by December 2011.

35. In my view the figure of VT2,025,000 represents the total cost of the works undertaken and completed by the claimant prior to the issuance of the disputed cheque and comprised of relocating a chainlink and steel pipe fence and then erecting a 34.8m x 2.2m high concrete wall on the road frontage of the smaller block of land on the landward side of the defendant's property. It has no relation to the claimant's Invoice which refers exclusively to the works carried out by the claimant on the larger block of land on the seaward side of the defendant's property.
36. I reject the defendant company's unsupported assertion that the payment of VT2,2 million was a part-payment for the claimant's Invoice which was produced 6 months after the payment had been made and which Invoice acknowledges the payment of VT1 million made by the defendant in July 2012.
37. Needless to say, if the defendant company was sure that its VT2,2 million payment was for the claimant's invoiced works then one would have expected that it would at the very least, have insisted that the claimant amend his Invoice to reflect that certainty. That is not reflected in John Salter's email to the claimant two days after receiving his Invoice in July 2012 nor is it supported by any evidence produced by the defendant company.
38. The court having determined all matters in issue against the defendant company, judgment is entered in the claimant's favour as follows:
  - (1) Judgment in the sum of VT7,529,750;
  - (2) Interest of 10% per annum on the judgment sum calculated from 2 July 2012 until fully paid; and
  - (3) Standard costs to be taxed if not agreed.

DATED at Port Vila, this 17<sup>th</sup> day of February, 2017.

BY THE COURT



D. V. FATIAKI  
Judge.

