

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

**Civil
Case No. 18/2427 SC/CIVL**

BETWEEN: Mocha Limited
First Claimant

**AND: South Pacific Electric (Vanuatu)
Limited**
Second Claimant

AND: Hawkings Infrastructure Limited
Defendant

Coram: Justice G.A. Andrée Wiltens

Counsel: Mr. M. Fleming for the Claimants
Mr. J. Malcolm for the Defendant

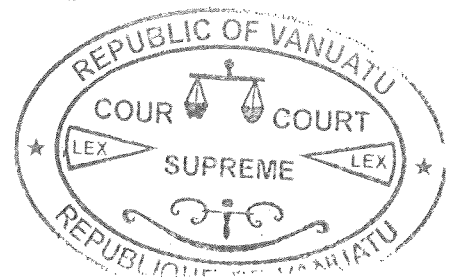
JUDGMENT

A. Introduction

1. This is a claim by two sub-contractors for money owned pursuant to contracts for the provision of construction and electrical services as part of the Vanuatu Tourism Infrastructure Project in Port Vila.

B. Background

2. Less than a month after the claim was filed there was an application for summary judgment. This was based on Hawkins Infrastructure Limited (“Hawkins”), despite having filed a response and defence denying liability, having latterly agreed to pay Mocha Limited

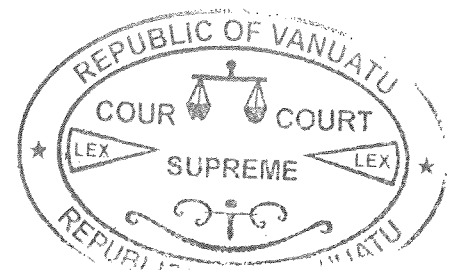


(“Mocha”) what was claimed, namely VT6,725,000; and agreed to pay South Pacific Electrics (Vanuatu) Limited (“SPE”) an agreed slightly reduced amount from what was claimed, namely VT11, 187, 810.

3. In the interim, between the claim and the summary judgment application, Mocha and SPE had sought and obtained an interim restraining order to prevent Hawkins moving some VT 80,000,000 off-shore pending resolution of their claims.
4. Additionally, it was realised that VAT had not been taken into account, resulting in the claims being amended upwards.

C. Issues

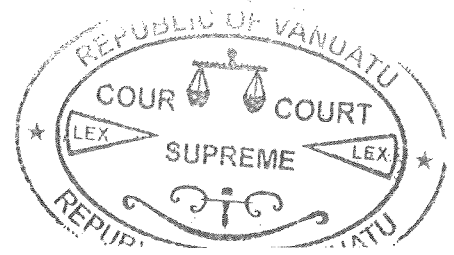
5. Mr. Malcolm, for Hawkins, submitted that summary judgment need not be granted as he held a cheque for the outstanding agreed amounts (just over VT 17,000,000), and he did not challenged the additional sums owing to cover VAT.
6. Mr. Malcom’s cheque is no longer sufficient to cover the outstanding agreed amounts. As well Mr. Fleming did not accept the settlement offered - he sought summary judgment plus interest and costs.
7. Mr. Fleming sought interest at commercial rates on the “Hungerford” basis, and on the basis of the sworn statement by Mr. Masuino as to the effect on SPE of Hawkins non-payments as and when due.
8. Mr. Fleming also sought costs on an indemnity basis relying on the statements of principle set out in *Shamin v QBE Insurance (Vanuatu) Ltd* Civil Case 15/183 and *Kramer Ausenco (Vanuatu) Ltd v. Supercool Vila Ltd* [2018] VUCA 29.



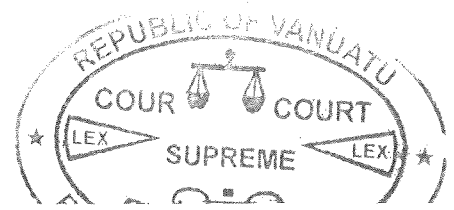
9. Mr. Malcolm opposed interest, submitting that Hawkins did not actually owe Mocha or SPE until Hawkins was itself paid by the Government of Vanuatu relying on the wording of the contracts. He further maintained that the claim was premature as the Government still retained contract funds, and that to order costs was unfair in the circumstances.

D. Decision

10. Mocha is owed VT7, 735, 750 for work done. There is no dispute as to liability or quantum. The invoice was issued on 10 July 2018. The amount owing is part of retention moneys withheld by the Principle, namely the Vanuatu Government. The retention funds were to be released at or around the end of October 2018. I accept Mr. Malcolm's argument that until Hawkins received the funds from the Vanuatu Government there was no contractual obligation for Hawkins to pay the invoice.
11. As well, while Mr Masuino has given evidence in support for interest in respect of SPE, there is no similar evidence in relation to Mocha. In the circumstances, Mocha is entitled to the sum owing only without interest.
12. SPE is owed a total of VT12, 374, 522 for work done. There is no dispute as to liability or quantum. There were 4 invoices issued. The first was issued on 31 July 2017 in the amount of VT 2, 769, 280. The second was issued on 27 October 2017 in the amount of VT 507, 120. The third invoice was issued on 15 March 2018 in the sum of VT 5, 346, 292. Lastly, there was the final invoice for VT 3, 971, 050, issued on 1 September 2018, which was to be paid out of retention funds.



13. For the same reasoning as earlier explained re Mocha's invoice relating to payment out of retention moneys, there cannot be an award of interest in respect of the fourth SPE invoice.
14. The contract provided that Hawkins shall pay interim invoices submitted to it by the 28th of the month following invoice issuance. Accordingly, Hawkins must pay interest on invoice 1 from 28 August 2017, on invoice 2 from 28 November 2017, and on invoice 3 from 28 April 2018.
15. Mr. Masuino's evidence that the non-payment of invoices by Hawkins affected SPE financially in that SPE had to complete the contract works by using borrowed funds. The interest payable varied between 10 - 12 percent. He further stated that considerable man power and costs were involved, not to ignore the elements of frustration and stress in attempting to achieve payment. He considered that if 15% interest were awarded that would still be insufficient to make good the effects of Hawkins defaults on the operations of SPE.
16. I set the "Hungerford" interest payable on the outstanding funds at 12% p.a. That allows a small margin for the additional costs in attempted recuperation over the lower 10% interest rate, and compensates SPE fully for the funds borrowed at 12% interest. The other matters Mr. Masuino has referred to I regard as the normal or usual costs of doing business.
17. There is considerable evidence of attempts by counsel for Mocha and SPE and Mr Masuino (on behalf of both claimants) to resolve the outstanding debts, including several offers to accept lesser sum and to forgo costs. Instead of approaching the matter in a co-operative and conciliatory manner, Hawkins adopted an aggressive defence to stall

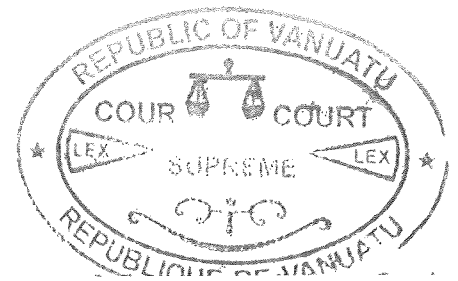


what it later accepted to be entirely legitimate claims. Mocha and SPE were rightly concerned regarding the possibility of the VT 80,000,000 retention moneys leaving Vanuatu and, if that had occurred, leaving them with little or no recourse against Hawkins. The application for the interim restraining order was necessary due to Hawkins's approach.

18. I accept Mr Fleming submissions that exemplary damages are properly due. I see no unfairness in that, despite Mr Malcolm's strenuous urgings otherwise.

E. Conclusion


19. Accordingly, I order summary judgment in favour of Mocha in the sum of VT 7, 733, 750.
20. I order summary judgment in favour of SPE in the sum of VT 12,374, 522 together with interest at 12% p.a. to the date of judgment: on the amount of VT 2,769,280 from 28 August 2017, on the amount of VT 507,120 from 28 November 2017, and on the amount of VT 5,346,292 from 28 April 2018.
21. Hawkins are to pay indemnity costs to Mocha and SPE. Mr. Fleming relied on the invoice attached to Mr Masuino's sworn statement (annexure MM11) and sought a further 6 hours allowance for work done after 2 October 2018 - a total of VT 1,437,106. I accept that figure as being the appropriate amount of costs.
22. On 26 October 2018, with the consent of counsel, I reduced the amount of retention moneys the subject of the restraining order to VT 23,000,000.



23. Subject to counsel accepting this decision (namely not wishing to exercise their appeal rights), the amounts payable as a result of this judgment to Mocha, to SPE, and by way of costs, are to be paid out of the retention funds. Thereafter, whatever balance is left over may be released to Hawkins.

DATED at Port Vila this 13th day of November, 2018

BY THE COURT


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Justice G. A. Andrée Wiltens

