

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

Civil Case
No. 22/3401 SC/CIVL

BETWEEN: Cyrille Mainguy trading as Mainguy
Consulting Engineer and Project
Management
Claimant

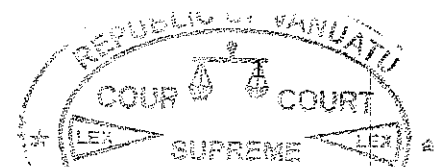
AND: Republic of Vanuatu
Defendant

Date: 27 November 2023
Before: Justice V.M. Trief
Counsel: Claimant – Mr D.K. Yawha
Defendants – Mrs F.W. Samuel

JUDGMENT

A. Introduction

1. The Claimant Cyrille Mainguy trading as Mainguy Consulting Engineer and Project Management filed Claim for debt recovery.
2. The Defendant the State did not file a defence resulting in Default Judgment (Fixed Amount) dated 29 May 2023.
3. By Decision as to Defendant's Application to Set aside Default Judgment dated 2 August 2023, the default judgment was set aside and the State granted leave to file and serve Defence in the terms proposed by 4pm on 11 August 2023. I noted that liability was not disputed therefore also made orders for the filing and service of sworn statements as to quantum of damages and submissions.
4. Despite the Orders made, the State has not filed a Defence. In the circumstances, default **judgment** is again entered for Mr Mainguy for an amount to be determined.
5. The Orders of 2 August 2023 also required Mr Mainguy to file and serve any further sworn statements as to quantum by 4pm on 25 August 2023 and for the State to file its further sworn statements as to quantum by 4pm on 8 September 2023. I also



directed the parties file submissions as to quantum in October 2023 and the Court would determine quantum on the papers after that.

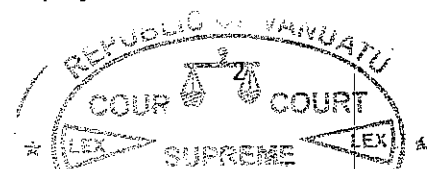
6. Only Mr Mainguy has filed a document following the 2 August 2023 Orders. On 6 November 2023, he filed Further Sworn statement of Cyrille Mainguy in support of the Claim. The State has not filed sworn statements in response.
7. I now assess the quantum payable to Mr Mainguy.

B. Background

8. In or about April 2022, Enterprise Dinh Van Tu Ltd ('Enterprise DVTL') constructed 3 new buildings known as the Vila Central Hospital New Containment & Transitions Facility Building at the VCH premises in Port Vila (the 'VCH project').
9. There was urgency to have these buildings constructed as the Government wanted to have it ready for its opening of the country's borders which had been shut due to the Covid-19 pandemic, by 1 July 2022.
10. Enterprise DVTL was contracted and undertook the construction works. The civil engineer was Mr Mainguy's firm, Mainguy Consulting. The Claimant provided services in relation to this project including providing building designs and plans, and the supervision of the construction works.
11. Enterprise DVTL and Mainguy Consulting both presented invoices for payment but only the former was paid some of the amount invoiced. Enterprise DVTL sued the State for the balance of the amount owed in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; Civil Case No. 2940 of 2022 ('CC 22/2940') (previously numbered 22/2290).
12. Mr Mainguy presented two invoices for payment totalling VT45,390,529. Both remain unpaid.
13. On 7 December 2022, Mr Mainguy filed the Claim in this matter seeking payment on the two invoices.

C. The Evidence

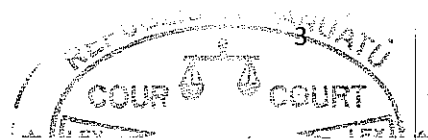
14. In Sworn statement of Cyrille Mainguy filed on 21 July 2023, Mr Mainguy deposed that the value of the contract between Enterprise DVTL and the State in respect of the VCH project was VT605,207,050 [**Annexure CM1**]. Summary judgment was entered for Enterprise DVTL of VT225,094,188 on its outstanding invoices in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; CC 22/2940.
15. He deposed that he entered into a separate contract with the State in March 2022 for the design, drafting of all plans and supervision for the construction of the VCH project buildings for VT60,520,705 fees, which was 10% of the entire project value of VT605,207,050 [unsigned copy attached as **Annexure CM2**].



16. By 4 April 2022, he delivered to the State the designs and plans for all 3 buildings of the VCH project. On 6 July 2022, he presented his first invoice totalling VT30,260,353 fees (50% of the maximum contract amount) and on 9 September 2022, his second invoice totalling VT15,130,176 (the balance of his fees) [**Attachments CM3 and CM4**]. Both invoices remain unpaid therefore he filed the present proceedings. He also deposed that he undertook all required site inspections (67 in total) and sent his reports to the Director General of the Ministry of Infrastructure and Public Utilities ('DG MIPU')
17. Johnson Binaru, the DG MIPU, by his Sworn statement filed on 28 June 2023 attached Mr Mainguy's site inspection reports from June 2023 [**Attachments "JB3" and "JB4"**]. Following the default judgment entered in the present matter, the State obtained a report dated 8 June 2023 from Qualao Consultancy from their site visit to the VCH project buildings [**Attachment "JB1"**].
18. **Attachment "JB1"** included a copy of Mr Mainguy's Certificate of Provisional Practical Completion dated 6 July 2022 in which he certified that the whole works for the VCH project had reached Practical Completion therefore the 12-month defects liability period commenced from 6 July 2022.
19. By Further Sworn statement filed on 6 November 2023, Mr Mainguy attached a copy of the Orders dated 29 August 2023 in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; CC 22/2940 in which the State conceded a further VT115,978,977 to be paid to Enterprise DVTL for wasted costs and loss of profits and VT1,516,000 costs. He deposed that the State had admitted the entire amount of its contract with Enterprise DVTL, therefore it is logical that he should be paid his contract fee which was 10% of the value of the contract between Enterprise DVTL and the State.

D. Discussion

20. As set out in the Judgment dated 14 April 2023 in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; CC 22/2940, which was recalled and corrected as to the interest calculations dated 5 June 2023 (both unreported), the contract price set out in the contract between Enterprise DVTL and the State for the VCH project construction works was VT605,207,050.
21. The State commenced the VCH project on an urgent basis but without complying with the provisions of the *Government Contracts and Tenders Act* [CAP. 245]. The Attorney General advised the Government that nevertheless, the contractor had incurred substantial costs and so the Government must pay the cost of the construction works. The Government paid VT186,000,000 towards the invoices and the balance sought was the subject of the summary judgment for VT225,094,188 and the Orders dated 29 August 2023 in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; CC 22/2940.
22. Justice Geoghegan held as follows in the Judgment dated 5 June 2023 in *Enterprise Dinh Van Tu Limited v Republic of Vanuatu*; CC 22/2940 (unreported) at paras 4, 12 and 13:



4. Mr Dinh was told that there was urgency to have the work done as the Government wanted to open the borders shut due to Covid-19, by 1st July 2022 and that the work has been approved to commence. The civil engineer was a firm known as Mainguy Consulting who would certify the works and the Claimant should deal with them for pricing of the contract.

....

12. Works stated on 1st April 2022. On 6th April 2022, the Prime Minister, and other dignitaries in the presence of the media conducted a ground breaking ceremony. Thereafter the evidence of Mr Dinh is that the Claimant put all its efforts and resources into undertaking work on the project. A weekly certification report was done by the engineers. On 6th July 2022, an invoice was issued for VT327,508,051. It was duly certified by Mainguy Consulting. No issue was taken with it however payment was not made.

13. ... On 31st August 2022, Mr Malcolm Tarileo, the Director of the Public Works Department, forwarded a letter to the Director of the Department of Finance certifying that all construction works had been completed in accordance with all applicable technical standards plus specification and the construction plans approved and supervised by Mainguy Consulting.

(my underlining)

23. He held as follows at paras 28 and 29:

28. ... Despite the alleged breach of the Government Contracts and Tenders Act such a breach cannot relieve the defendant of liability to pay a contract entered into at the behest of the defendant, under urgency and against a background of previous similar dealings between the parties. The alleged breach which has occurred, has occurred not as a result of any conduct by the claimant but because of the conduct of the defendant. It would be unconscionable to permit the Government to rely on its own conduct to avoid liability in circumstances such as this.

29. There is a contract between the parties which is partly written and partly oral. The terms of the contract are clear. The contract was provided by the defendant which acknowledges liability by virtue of the fact that it has already paid a significant sum to the defendant. The contract has been substantially performed.

(my underlining)

24. I consider that the State is bound by the findings made in that Judgment as to the existence of and the value of the VCH project construction works, and that Mainguy Consulting was the civil engineer contracted for the project.

25. Mr Mainguy has proved that he was contracted as the civil engineer to provide building design and plans, and supervision, for the VCH project construction works. Although there is no signed copy of the contract in evidence, I find that there was a contract between him the State which was partly written (as set out in **Annexure CM2**) and partly oral. Mr Mainguy's contract price was VT60,520,705 fees, which was 10% of Enterprise DVTL and the State's contract price of VT605,207,050. This contract price based on the budget estimate provided.

26. Mr Mainguy has also proved that he provided all designs and plans for the VCH project, supervised and certified the construction works, conducted all required site inspection reports, sent these to the DG MIPU (who by his own sworn statement confirmed this) and certified the Practical Completion of the entire works associated

with the VCH project as he was required to under the contract. He then provided two invoices for his fees totalling VT45,390,529 for which he seeks payment.

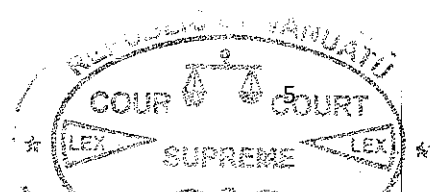
27. The VCH project works were undertaken and completed. Mr Binaru's evidence included Mr Mainguy's Certificate of Provisional Practical Completion dated 6 July 2023. The Judgment dated 5 June 2023 in CC 22/2940 (unreported) referred to the Director of the Public Works Department's letter dated 31 August 2022 certifying that all construction works had been completed in accordance with all applicable technical standards plus specifications, and with the construction plans approved and supervised by Mainguy Consulting.
28. The contract with Mr Mainguy was clearly entered into in the same circumstances which applied to the lead contractor Enterprise DVTL of urgency and without compliance with the *Government Contracts and Tenders Act*. Even so, Mr Mainguy has provided the services that he was contracted to provide as engineer for the VCH project and rendered invoices. Having accepted liability and having already made a significant payment to the lead contractor, it would be unconscionable to permit the State to rely on its own conduct to avoid liability in respect of paying Mr Mainguy's invoices.
29. In the circumstances, Mr Mainguy is entitled to payment of his invoices.
30. Mr Mainguy is also entitled to payment on a *quantum meruit* basis, that is, for the reasonable value of his services in reliance upon the express or implied term that the State would compensate him for the services provided.
31. There is no evidence that Mr Mainguy incurred banking interest losses reasonably calculated to be 15% per annum therefore interest at the usual Supreme Court rate of 5% per annum will apply.

E. Result and Decision

32. **Judgment by default** is entered **for the Claimant** and for the reasons given, the Defendant is to pay the Claimant the sum of VT45,390,529 (the 'judgment sum').
33. Interest of 5% per annum is to be paid on the judgment sum until fully paid.
34. Costs are to follow the event. The Defendant is to pay the Claimant's costs as agreed or as taxed by the Master and once set, paid within 28 days.

F. Enforcement

35. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, this matter is listed for Conference **at 8.40am on 30 January 2024** for the Defendant to inform the Court: (i) that it has paid the judgment sum 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 enforcement action.



36. For that purpose, this judgment must be personally served on the Defendant and proof of service filed.

**DATED at Port Vila this 27th day of November 2023
BY THE COURT**

VM Trief

Justice Viran Molisa Trief

