

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case
No. 13/27 SC/CIVA

BETWEEN: AFRICAN PACIFIC (SINGAPORE) PTE LIMITED
First Claimant

AND: AFRICAN PACIFIC PTY LIMITED
Second Claimant

AND: LOUIS KALNPEL, JOHNSON KAPI, SCOTT
TAVI trading as NPS EXPORT SERVICES
First Defendants

AND: LOUIS KALPNEL
Second Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mrs. M. N. F. Patterson for the Claimants
No appearance for the Defendants

Date of Judgment: 1st December 2017

JUDGMENT

1. This case after several aborted fixtures, was finally set down for trial on 20 and 21 November 2017 by a court notice dated 28 August 2017. When the trial commenced neither defence counsel nor the named individual defendants appeared. In the absence of any application to adjourn, the trial went ahead [**see**: Rule 12.9(1) (c)]. Claimants' counsel opened, and called three witnesses who produced 8 sworn statements to establish its claim namely, **Graham Hack**, **Tal Mifirer** and **Andreas Lombardozi** a director of the Second Claimant and the person who dealt exclusively with Louis Kalpnel at all material times.
2. The "*business arrangement*" between the parties began in October 2009 and concerned the purchase of cocoa beans to be supplied by the defendants using money advanced by the claimants. The defendants were obliged to source, acquire, pack and deliver the cocoa beans to the claimant's local agent at Luganville, Santo (Graham Hack) for eventual export to European buyers. The defendants successfully delivered cocoa beans under the arrangement prior to March 2010.



3. The claim is that in accordance with their business arrangement the claimant advanced a sum of VT2, 331, 000 to the defendant on 26 May 2010 for the supply of 9 metric tons of cocoa beans and a further advance of VT1, 521, 625 on 7 October 2010 for the supply of 6.25 metric tons of cocoa beans. Other than a delivery of 2.75 metric tons no more cocoa beans were supplied by the defendants under the 9 metric tons invoice. In respect of the 6 metric tons invoice no cocoa beans were ever delivered.
4. By way of a separate claim against Louis Kalpnel only, the claimants say he received a personal loan from the claimants in the sum of VT300,000 of which he has repaid only VT210,000.
5. The claimants seek the refund of the VT3, 135, 758 advance payments for which it received no coca beans and the outstanding balance of VT90, 000 for the personal loan provided to Louis Kalpnel, interest and costs.
6. In its defence (advanced by the second defendant) the defendant, admits trading as "*NPS Export Services (a business name)*" but denies it was a partnership. The defendant also admits selling cocoa beans to the first claimant and issuing invoices for each shipment of cocoa beans. Finally the defendant says that any moneys received from the claimants was paid to farmers on Malekula who were the cocoa bean producers.
7. This latter fact is more fully pleaded in the defendants' counterclaim where it says:

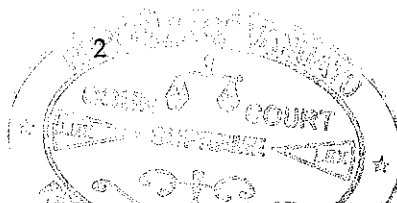
"On or about 2010 the counter claimant (ie. the defendants) did received around three million vatu (VT3,000,000) (the funds) from the defendant (African Pacific (Singapore) Limited).

The funds were for purposes of buying cocoa beans and exporting same to the defendant who in turn would subsequently export same to a buyer in Europe.

The counter claimant used the funds to purchase required amount of cocoa beans from cocoa producing farmers on Malekula, particularly from the areas of Unmet, Brenwei and Leviamp.

On or October 2010, the counter claimant had around 6 tons of cocoa beans ready for shipment/export to the defendant but did not ship/export the cocoa to the defendant."

8. As for the outstanding balance of the personal loan to Louis Kalpnel, the second defendant without denying the loan or the repayments pleaded merely avers: "*... it is a different and private matter and should not be entertained in this claim*". I disagree. The claimant in both claims was the same. Both claims directly involved Louis Kalpnel. The witnesses are the same and both claims



arose during the course of the continuing "business arrangement" that existed between the parties at the relevant time.

9. I am satisfied from the evidence deposed by Andreas Lombardozzi and confirmed by an exchange of emails passing between Louis Kalpnel and Andreas on 12 and 13 April 2010 that Louis Kalpnel was given a personal loan of VT300, 000 by the claimant and the full amount was paid out in cash to Louis Kalpnel by Tal Milfirer of Goodies Limited on 15 April 2010.
10. Accordingly, in the absence of any obvious prejudice of embarrassment to Louis Kalpnel or an application to separate the claims under Rule 3.3(3)(b) of the Civil Procedure Rules or any denial of the claimants pleadings in that regard (see: paras. 12 to 16 of the claim), I consider that Louis Kalpnel has no defence to this particular claim.
11. In light of the admissions set out at para. 7 above, the only common issue that remains in the defence and counterclaim is:

"whether the defendant had available in October/November 2010, 6 tons of cocoa beans ready to supply to the claimant which the claimant refused to accept".

12. The defence evidence in support of this issue is deposed by Louis Kalpnel in his sworn statement dated 20 November 2014 as follows:

"The arrangement was that Mr. Lombardozzi would advance some money to NPS Export Services. NPS Export Services would use the money to acquire cocoa beans from the cocoa farmers on Santo or Malekula and then export same to the European buyer through Mr. Lombardozzi.

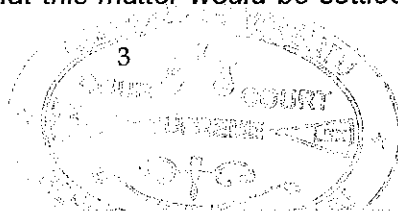
This arrangement was in place for quite a while until the last time when the claimant advanced vt3,852,625 to the defendant. This amount was used to acquire cocoa from the Malekula cocoa farmers.

All the cocoa bought from the farmers. Five (5) cocoa beds were full of cocoa ready for export to Mr. Lombardozzi when suddenly Mr. Lombardozzi contacted me and said he would not accept the cocoa from us anymore. The reason was because he was no longer in business with the European buyers of the cocoa beans.

I told Mr. Lombardozzi that five (5) cocoa beds were full of cocoa beans ready for export. Still Mr. Lombardozzi said he would not be able to accept the cocoa beans. I informed the Malekula farmers and they were very disappointed because it meant a big loss for them.

Due to Mr. Lombardozzi not accepting NPS Export Services cocoa export all the most of the cocoa was wasted, some were locally sold but the money made was insufficient to cover the costs.

In the meantime I have had numerous contacts with Mr. Lombardozzi and Mr. Lombardozzi kept telling me that this matter would be settled out of court because in



not accepting our cocoa he has also put NPS Export Services out of business and that I should not worry about the court case. He paid me visits every time he was in Vanuatu.

(my highlighting)

13. Unfortunately the defence evidence is untested because Louis Kalpnel failed to appear at the trial despite having been advised by counsel for the claimants that he was required for cross-examination. Notwithstanding that, the evidence as deposed lacks crucial credit-enhancing details such as the names of the cocoa farmers on Malekula who allegedly supplied the cocoa beans; the quantity of beans each supplied; and the payment(s) each received out of the money advanced by the claimant to the defendant. Additionally no sworn statement(s) has been provided from a single cocoa bean producer or buyer of the rejected cocoa beans to corroborate the defendants bald assertions.
14. The sworn statement, in parts, is also self-contradictory in so far as Louis Kalpnel deposes that the VT3,852,625 advanced by the claimant was "... *used* (past tense) *to acquire cocoa from Malekula cocoa farmers*" and "*All the cocoa bought* (past tense) *from the farmers ...*" and later in the sworn statement, he claims that the claimant not accepting the cocoa beans: "... *meant a big loss for* (the farmers)" – How could this "*big loss*" occur if the farmers had already been paid as earlier deposed? Likewise, how did the non-acceptance of the defendants' allegedly available cocoa beans (some of which was sold locally to unidentified purchasers), "... *put NPS Export Services out of business*" when it had already received cash advances for the purchase of the cocoa beans from the claimant?
15. Having said that and although the claimant's evidence was not tested in cross-examination, I am satisfied on a balance of probabilities that it has established the following facts:
 - (a) That all dealings between the claimants and the defendants was conducted by and through Louis Kalpnel and Andreas Lombardozzi and involved no other entity or individual;
 - (b) That the defendants received from the claimants two advance payments in the sum of VT2,331,000 on 22 June 2010 and VT1,521,625 on 7 October 2010 for the purchase and delivery of a total of 15.25 tons of cocoa beans;
 - (c) That the defendants delivered a total of 2.75 tons of cocoa beans valued at VT712,250 in fulfillment of the claimants' purchase order of 15.25 tons and nothing more;
 - (d) That Louis Kalpnel personally received a sum of VT300,000 from the claimant on 15 April 2010 as a personal loan which was to be fully repaid by the end of May 2010;



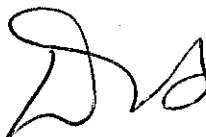
- (e) That Louis Kalpnel repaid a total of VT210,000 on his personal loan and still owes the claimant an outstanding sum of VT90,000; and
- (f) Lastly, I reject the defendants unproven claims that there was a further 6 tons of cocoa beans ready to be supplied to the claimants in October/November 2010. I also reject the defendant's unsupported assertion that it was the claimant that refused to accept delivery of the said 6 tons of cocoa beans thereby causing damage to NPS Export Services.

16. In light of the above findings I enter judgment against Louis Kalpnel as follows:

- (a) Damages for breach of contract in the sum of VT3,140,375;
- (b) Damages for breach of loan agreement in the sum of VT90,000;
- (c) Interest on the sums awarded at the rate of 8% per annum with effect from 27 February 2013 until fully paid up;
- (d) The first defendant's counterclaim is dismissed; and
- (e) The claimants are awarded one set of costs on a standard basis to be taxed if not agreed.

DATED at Port Vila, this 1st day of December, 2017.

BY THE COURT


D. V. FATIAKI
Judge.

