IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 19/1852 SC/CIVL

BETWEEN: **RMS Engineering & Construction Pty Ltd (ABN 74 128 352 250)**

Claimant

AND: **Republic of Vanuatu**

Defendant

Date of hearing:	3 October 2019
Date of judgment:	29 October 2019
Before:	Justice Viran Molisa Trief
Counsel:	Claimant – Mr Mark Hurley
	Defendant – Mr Sakiusa Kalsakau

JUDGMENT AS TO APPLICATION TO STRIKE OUT CLAIM

A. Introduction

1. The Claimant by this action seeks recovery of unpaid monies pursuant to its contract entered into in February 2016 with the Defendant, represented by the Minister for Public Works and Utilities (as employer). The Claimant agreed in the contract to perform the Works for the Port Vila Urban Roads and Drainage, Phase 1 as part of the Port Vila Urban Development Project (Contract number PVUDP Wa02-15) (the **'Contract'**).

2. The Defendant applied for the claim to be struck out. Subsequently it stated in its defence that it has overpaid the Claimant and relies on its common-law right of set-off. Further and in the alternative, it denies that the Court has jurisdiction to hear the matter as the parties are bound by the terms of the Contract to utilise arbitration to finally settle any dispute arising out of or in connection with the Contract. That arbitration would be in Singapore with the substantive governing law to be the law of the Republic of Vanuatu.

B. The Correct Approach on a strike-out application

3. Harrop J stated in *Tunala v Tabir* CC 313 of 2014 at para. 6:

> *The Court must proceed on the assumption that factual allegations are true or capable of proof but may take into account the sworn evidence before the Court* ***where it is not inconsistent with the allegations in the claim****. Although on the face of this claim a cause of action exists because of the assertion of custom ownership, both parties have had the opportunity to put before the Court on this application all the evidence bearing on that allegation and to make written submissions. I am satisfied that the question of standing can therefore be properly dealt with on this application.*

4. As Lunabek CJ stated in *Cyclamen Ltd v Port Vila Municipal Council* [2014] VUSC 173 at para. 19:

> *A strike out application is not an occasion to determine disputed facts. Where disputed facts exist the claimant's view of the facts must be assumed correct.*

5. In the present case, I therefore proceed on the assumption that despite the denials and defences all of the factual allegations in the claim are capable of proof. I will also take into account, where necessary, the sworn evidence before the Court where it is not inconsistent with the allegations in the clam.

6. The Defendant filed the sworn statement of Nepcevanhas Benjamin Shing in support of the strike out application. The Claimant filed the sworn statement of Richard McDonald in support of its response to the application.

C. The factual allegations in the claim

7. The claim alleges the following which I will assume are true or capable of proof:

Date	Event
10 February 2016	Claimant and Defendant entered into the Contract.
IPC 38	
14 November 2018	Claimant delivered a Statement and supporting documents to the Engineer for Contract Works completed under the Contract up to October 2018 (the **'October Works'**)
20 December 2018	Claimant invoiced the Defendant for the amount of USD$2,141,146.07 in relation to the October Works.
14 January 2019	The Engineer issued Interim Payment Certificate (**'IPC'**) 38 to the Defendant and certified that USD$2,141,146.07 was payable by the Defendant to the Claimant, and the Employer's Representative (being the Defendant's representative) approved for payment to the Claimant that certified amount.
14 February 2019	The Defendant failed to pay the amount certified and approved in IPC 38, within 56 days of 20 December 2018

	(being the date on which the Claimant delivered the Statement and all supporting documents to the Engineer which was certified by the Engineer on 14 January 2019), that is, by 14 February 2019 being the due date for payment of the IPC 38 amount.
IPC 40	
5 October 2018	Claimant referred a dispute under the Contract to the Dispute Board (**'DB'**) pursuant to subcl. 20.4 of the Contract.
27 December 2018	The DB delivered its decision pursuant to subcl. 20.4 of the Contract in which it decided that, inter alia, the amount of USD$1,294,839.00 was payable from the Defendant to the Claimant (the '**DB Decision amount**').
11 January 2019	The Engineer issued Contract Variation Order No. 79 to, inter alia, give effect to the DB Decision amount.
14 January 2019	The Claimant invoiced the Defendant for the DB Decision amount.
18 January 2019	The Engineer issued IPC 40, which certified that USD$1,294,839.00 was payable by the Defendant to the Claimant, and the Employer's Representative (being the Defendant's representative) approved for payment to the Claimant that certified amount.
23 January 2019	Claimant's Notice of Dissatisfaction given to the Defendant pursuant to subcl. 20.4 of the Contract in relation to the DB Decision dated 27 December 2018.
24 January 2019	Defendant's Notice of Dissatisfaction given to the Claimant pursuant to subcl. 20.4 of the Contract in relation to the DB Decision dated 27 December 2018.
10 March 2019	The Defendant failed to pay the amount certified and approved in IPC 40, within 56 days of 14 January 2019 (being the date on which the Claimant invoiced the Defendant for the DB Decision amount that was certified and approved in IPC 40 on 18 January 2019), that is, by 10 March 2019 being the due date for payment of the IPC 40 amount.
21 March 2019	Defendant's letter to the Claimant reserving its rights in relation to arbitration.
28 March 2019	Claimant's letter of demand to the Defendant for the full amount outstanding under IPC 38 and IPC 40.
	As a result of the Defendant's failure to pay the amounts certified and approved in IPC 38 and IPC 40, the Claimant is entitled to financing charges in accordance with cl. 14.8 of the Contract.
28 March 2019	Claimant's notice of proceedings under the *State Proceedings Act*.
	Neither party has commenced arbitration.
	Neither have the disputes been settled, amicably or otherwise.

	The amounts owed to the Claimant under IPC 38 and IPC 40 remain unpaid.
18 July 2019	Claimant commenced this action seeking payment of sums certified in IPC 38 and IPC 40.

D. The Contract

8. Clause 1.1.4.7 of the Contract provides:

> *"Interim Payment Certificate" means a payment certificate issued under Clause 14 [*Contract Price and Payment], *other than the Final Payment Certificate.*

9. Clause 14 of the Contract provides relevantly:

> ***14 Contract Price and Payment***
>
> ***14.6 Issue of Interim Payment Certificates***
>
> *... **the Engineer shall**, within 28 days after receiving a Statement and supporting documents, **deliver to the Employer and to the Contractor an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due**...*
>
> ***The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate.** A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.*
>
> ***14.7 Payment***
>
> ***The Employer shall pay to the Contractor:***
> ...
> *(b)* ***the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents**; or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the amount shown on any statement submitted by the Contractor within 14 days after such statement is submitted, any discrepancy being rectified in the next payment to the Contractor; and...*
>
> ***14.8 Delayed Payment***
>
> *If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay.*
> ...
> *The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.*
>
> ***[my emphasis]***

10. Clause 20 of the Contract contains the following, relevantly:

> ***20 Claims, Disputes and Arbitration***

20.4 Obtaining Dispute Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB [Dispute Board] for its decision...

*... **The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award...***

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give a Notice of Dissatisfaction to the other Party indicating its dissatisfaction and intention to commence arbitration...

If the DB has given its decision as to a matter in dispute to both Parties, and no Notice of Dissatisfaction has been given by either Party... then the decision shall become final and binding upon both Parties.

...

20.5 Amicable Settlement

*Where a Notice of Dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, the Party giving a Notice of Dissatisfaction in accordance with Sub-Clause 20.4 above should move to commence arbitration **after** the fifty-sixth day from the day on which a Notice of Dissatisfaction was given, even if no attempt at an amicable settlement has been made.*

20.6 Arbitration

*Any dispute between the Parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 above and in respect of which the DB's decision (if any) has **not** become final and binding shall be finally settled by arbitration.*

....

20.7 Failure to Comply with Dispute Board's Decision

*In the event that a Party **fails to comply with a final and binding DB decision,** then the other Party may, without prejudice to any other rights it may have, **refer the failure itself to arbitration** under Sub-Clause 20.6 [*Arbitration*].*

[my emphasis]

11. The procedural rules and requirements of the arbitration contemplated in subcl. 20.6 of the Contract are expressly agreed in Part A – Contract Data as follows:

an international arbitration shall be administered by Singapore International Arbitration Centre (SIAC) and conducted in accordance with the SIAC rules;

the place of arbitration is to be the Singapore International Arbitration Centre; and the substantive governing law is to be the law of the Republic of Vanuatu.

E. Strike-out application and submissions

12. The grounds for the application and Mr Kalsakau's submissions in short are that the parties have agreed at subcl. 20.6 of the Contract that any dispute arising out of or in connection with the Contract shall be finally settled in arbitration, and that that term of the Contract is valid and binding on the parties. Further, that by commencing this claim in this Court, the Claimant is in breach of the Contract and consequently, the Court does not have jurisdiction to consider the Claimant's claim.

13. The Claimant seeks in response to have the strike out application dismissed on the basis that the Court has jurisdiction to hear the matters outlined in its claim.

14. Accordingly, I will answer the following issues in this judgment:

    a. Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 38?
    b. Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 40?
    c. Is subcl. 20.6 of the Contract valid and binding on the parties?
    d. Has the Claimant breached the Contract by commencing its claim in this Court?

F. Issue: Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 38?

15. Mr Hurley submitted in relation to both IPC 38 and IPC 40 that the Claimant's claim is for debt recovery as the amounts were certified **and** approved. The claim alleges that the Engineer issued each IPC pursuant to subcl. 14.6 of the Contract. Sub-clause 14.6 provides, relevantly, that the IPC shall state the amount which the Engineer fairly determines to be due. The claim further alleges that after the Engineer issued each IPC, the Employer's representative (being the Defendant's representative) approved for payment to the Claimant the certified amounts.

16. Mr Hurley's submission also is that the amounts that the Defendant (through the Engineer) has certified are **not** in dispute.

17. Mr Kalsakau submitted that the Court should respect the parties' intention as expressed in the Contract that all disputes arising out of or in connection with the Contract shall be finally settled in arbitration.

18. However in relation to IPC 38, he did not argue that the parties must be allowed to proceed to arbitration at this stage. Instead, he submitted that the process set out in subcl. 14.6 of the Contract applies and is currently being utilised by the Defendant in relation to IPC 38. Sub-clause 14.6 provides that the Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate.

19. By letter dated 19 March 2019, the Claimant demanded payment of the amounts in IPC 38 and IPC 40. Mr Shing's evidence is that on 17 April 2019, the Defendant responded to that letter of demand by disputing the amount of IPC 38. Further, that on 19 July 2019, the Engineer notified the Claimant of his intention to correct the amount previously certified in IPC 38. Subsequently, the Engineer has organised a reassessment of the bill of quantities involved and sent this to the Claimant for comment. Both Mr Shing and Mr McDonald gave evidence that this was underway. Finally, Mr Kalsakau submitted that the amount of IPC 38 is in dispute and should be finally settled under the cl. 20 process before coming to this Court.

20. In my view, what is being undertaken in relation to IPC 38 arises from the Defendant's disagreement with the amount certified in IPC 38. This is a dispute as to the amount certified however there is **no** suggestion that this must be referred to arbitration at this point. Instead, the Defendant is utilising a term of the Contract other than the cl. 20 dispute resolution process –subcl. 14.6– to resolve this dispute in accordance with the parties' intention as expressed in the Contract. As well it can.

21. In my view, what the Defendant has underway in relation to IPC 38 does not assist its argument that all disputes arising out of or in connection with the Contract shall be finally settled in arbitration and hence the Court does not have jurisdiction to hear the matter. In my view, the parties are currently engaged in a process envisaged within the Contract for working out their differences in relation to the amount previously certified in IPC 38. If this is not accepted by the Claimant, it could then refer a dispute to the DB pursuant to subcl. 20.4, and the rest of cl. 20 would apply.

22. Accordingly, I find that the Defendant's submissions in relation to IPC 38 are no bar to the Court and the Court does have jurisdiction to hear the claim for recovery of unpaid monies certified in IPC 38.

23. To the question, "Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 38? my answer is, "Yes".

G. <u>Issue: Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 40?</u>

24. As set out above, the Defendant is currently utilising a term of the Contract other than the dispute resolution process set out in cl. 20 to resolve its disagreement with the amount previously certified in IPC 38. This demonstrates that the parties are bound by the terms of the Contract not just in relation to the dispute resolution process set out in the Contract but also in relation to correcting or modifying a previous Payment Certificate.

25. In my view, equally and by the same token, the parties are also bound by the terms of the Contract in relation to the issue of Interim Payment Certificates and Payment (subcls 14.6 and 14.7).

26. Mr Hurley submitted that the relevant term of the Contract in relation to IPC 40 is subcl. 20.4. This provides that the [DB] decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award.

27. It is undisputed that the DB decision has not been revised in an amicable settlement nor an arbitral award. The Claimant asserts that the DB decision dated 27 December 2018 is binding on the Defendant, who should have and has failed to promptly give effect to it. That is, by making payment of the amount certified in IPC 40 which was issued following that DB decision for the amount that the DB had decided in that decision was payable from the Defendant to the Claimant. Mr Hurley submitted that the Claimant has the right to be paid on an interim basis.

28. I agree with the Claimant. Once the DB decision was made and while it has not been revised in an amicable settlement nor an arbitral award, it is binding on both parties as set out in subcl. 20.4 of the Contract and they are required to promptly give effect to it. It is an **interim** and binding decision. Pursuant to cl. 14 of the Contract, once a Payment Certificate is issued certifying the amount for the Defendant's payment to the Claimant as a result of the DB decision, the Defendant must in accordance with subcl. 14.7 pay the amount certified in that IPC within 56 days after the Engineer receives the Statement and supporting documents. For IPC 40, that due date for payment was 10 March 2019. It remains unpaid.

29. If there is any error in a Payment Certificiate, this can be corrected in a subsequent Certificate as set out in subcl. 14.6 of the Contract. As set out above, the Defendant is currently utilising this term of the contract to resolve its disagreement with the amount previously certified in IPC 38.

30. Sub-clause 14.8 of the Contract provides that where the Claimant does not receive payment in accordance with subcl. 14.7, it shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. Further, the Claimant shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy. Accordingly and unsurprisingly, since the amounts in both IPC 38 and IPC 40 remain unpaid, the claim filed in this Court also seeks payment of the financing charges arising in relation to both Payment Certificates.

31. The existence of subcl. 14.8 of the Contract lends weight, in my view, to the interpretation of the Contract that the parties intended that amounts certified in an IPC be paid by the Defendant to the Claimant within 56 days after the Engineer receives the Statement and supporting documents, regardless of whether or not there continues to be a dispute as to the DB decision that preceded that IPC.

32. In the instant case, there **is** a continuing dispute in relation to the DB decision. In January 2019, both parties gave the other a Notice of Dissatisfaction in relation to the DB decision, pursuant to subcl. 20.4 of the Contract. Therefore the DB decision has **not** become final

and binding (see subcl. 20.4). By letter dated 21 March 2019, the Defendant reserved its rights in relation to arbitration. Sub-clause 20.5 of the Contract provides that where a Notice of Dissatisfaction has been given, both parties shall attempt to settle the dispute amicably before the commencement of arbitration. Sub-clause 20.6 provides that where a dispute has not settled amicably in accordance with subcl. 20.5 and where the DB decision has **not** become final and binding it shall be finally settled by arbitration. This is the case here – the dispute in relation to the DB decision dated 27 December 2018 if not amicably settled is to be finally settled by arbitration.

33. That arbitration may well yet occur. The claim in this Court does not prevent any party to refer that dispute to arbitration, as the claim is in relation to recovery of unpaid monies set out in IPC 40, **not** about the dispute in relation to the DB decision.

34. I note that besides the expense that would be involved in a referral to arbitration in Singapore, the arbitrator there would not have any coercive powers over the parties to enforce the arbitral award. Subsection 42F of the *Judicial Services and Courts Act* [CAP. 270] provides that the Supreme Court may, upon application by a party to an award made in arbitration in relation to a matter, in which that Court has original jurisdiction, make an order in accordance with the terms of the award. Subsection 42F(3) provides that subject to subs. (4), an order made under subs. (1) is enforceable in the same manner as if it has been made in an action in the Supreme Court. Accordingly awards made in arbitration outside of Vanuatu may be enforced by way of an application to and an order made by the Vanuatu Supreme Court. However, that would be the end step after an expensive arbitration process had been conducted in Singapore.

35. Given the costs involved, I do not consider the justice of the case allows that **all** disputes arising from or in connection with the Contract, including for debt recovery, must be finally settled by arbitration as the Defendant argued on this strike out application.

36. I note also that the Defendant has known since March 2019 of the Claimant's intention to sue for payment of amounts due and payable under IPC 38 and IPC 40 (by its notice pursuant to s. 6 of the *State Proceedings Act*). However the Defendant has not referred any dispute to arbitration since receiving that notice, nor since the filing of the claim in July 2019. I acknowledge that the Contract does not set a time limit by when a referral to arbitration must occur. What is set out in cl. 20.6 of the Contact is a minimum time period that must elapse –56 days– before the party that issued a Notice of Dissatisfaction refers the dispute to arbitration.

37. The Defendant is the model litigant. The claim in this proceeding is for debt recovery. I consider that the justice of the case is not in favour of allowing the State to succeed on an interlocutory argument that the parties should go to arbitration when it has not commenced arbitration by October 2019 despite reserving its rights to do.

38. For the reasons set out above, my answer to the question, "Does the Court have jurisdiction to hear the Claimant's claim in relation to IPC 40?" is, "Yes".

H. Issue: Is subcl. 20.6 of the Contract valid and binding on the parties?

39. Mr Kalsakau submitted that the terms of the Contract in subcl. 20.6 that any dispute arising out of or in connection with the Contract shall be finally settled in arbitration are substantially similar to the terms of the arbitration clause in *Sacksack v Vanuatu Investment Promotion Authority* CAC 1690 of 2018 (20 July 2018). Consequently, the terms of the contract are therefore a condition precedent to commencing litigation. Mr Kalsakau submitted that given that subcl. 20.6 is a typical *Scott v Avery* clause, it does not oust the jurisdiction of the Court and is therefore not unlawful. In the circumstances, the Court does not have jurisdiction to hear the claim and it should be dismissed.

40. Mr Hurley submitted that while subcl. 20.6 of the Contract is akin to the type of clause considered in *Scott v Avery*, the Contract does not include a valid enforcement mechanism to give practical effect to any final and binding arbitral award. That is, the Contract does not lend itself to the actual recovery of damages or loss the subject of a final and binding arbitral award. As set out above, the *Judicial Services and Courts Act* provisions in relation to arbitration do provide a mechanism to enforce arbitral awards, albeit not as a result of the Contract itself.

41. Mr Hurley also submitted that despite the intention of cl. 20 of the Contract to finally settle disputes, there is no coercive power of an arbitration tribunal to enforce payment if the Defendant elects not to adhere to an arbitral award in the same manner as the Defendant has elected not to adhere to the DB decision dated 27 December 2018. Accordingly, the practical effect of subcl. 20.6 of the Contract is not as a condition precedent to litigation, but rather a permanent ouster of the Court's jurisdiction to compel payment in respect of certified and approved amounts.

42. Given my answers to the preceding two issues in this judgment, I need not decide whether or not subcl. 20.6 of the Contract ousts the jurisdiction of the Court. I would answer however that in my view, subcl. 20.6 of the Contract is valid and binding on the parties as are the other terms of the Contract, which are being utilised by the Defendant in relation to IPC 38 and relied on by the Claimant in relation to IPC 40 that it be paid for amounts certified **and** approved.

43. My answer to the question, "Is subcl. 20.6 of the Contract valid and binding on the parties?" is, "Yes".

I. Issue: Has the Claimant breached the Contract by commencing its claim in this Court?

44. Given my answers to the issues above, I need not determine this issue.

J. Result and decision

45. In conclusion, I answer each of the issues in this judgment as follows:

a. Does the Court have jurisdiction to consider the Claimant's claim in relation to IPC 38? "**Yes**".

b. Does the Court have jurisdiction to consider the Claimant's claim in relation to IPC 40? "**Yes**".

c. Is subcl. 20.6 of the Contract valid and binding on the parties? "**Yes**".

d. Has the Claimant breached the Contract by commencing its claim in this Court? **Given my answers to the issues above, I need not determine this issue.**

46. For the reasons set out above, I decline to strike out the claim and dismiss the Defendant's strike out application.

K. Costs

47. The Defendant sought costs on an indemnity basis in the event it was successful. The Claimant also seeks costs of the application.

48. I will now hear the parties on the question of costs.

DATED at Port Vila this 29th day of October 2019
BY THE COURT

.....
V.M. Trief
Judge