

BETWEEN: ETP Limited
Claimant

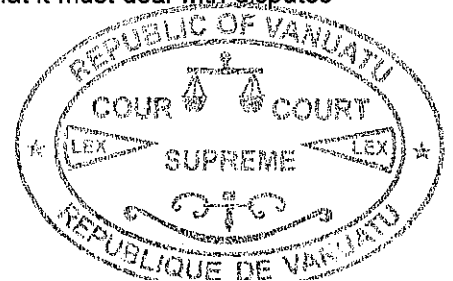
AND: Vanuatu Beverage Limited
Defendant

Date of Hearing: 25 March 2021
Before: Justice G.A. Andrée Wiltens
Counsel: Mr A. Bal for the Claimant
Mr M. Fleming for the Defendant
Date of Judgment: 9 August 2021

Judgment

A. Introduction

1. ETP Limited ("ETP") and Vanuatu Beverages Limited ("VBL") entered into a construction contract whereby ETP would construct a factory building for VBL. ETP claims the agreed contract price has not been paid in full, and it sued VBL for what it alleges was owing under the contract. VBL maintained that ETP had employed poor workmanship which required remediation, and entitled it to use the agreed retention funds to pay for the same. As well, VBL maintained that certain of the contractual conditions had not been met which entitled it to penalties, and the counter-claim set out what penalties were sought and for which breaches of the contract.
2. At the date of trial, Mr Espinasse, the principal of ETP, was in New Caledonia for health reasons and unable, due to the effects of Covid-19, to return to Vanuatu in time for the trial. Although Mr Fleming was tempted to apply on behalf of VBL to strike out the Claim, it was eventually agreed between counsel that the case be dealt with on the papers filed, bearing in mind the Court's over-arching obligation set out in CPR Rule 1.2 that it must deal with disputes of this kind justly.



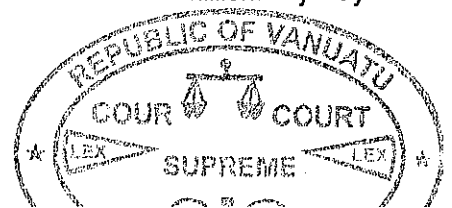
3. One of the difficulties in dealing with the Claim on this basis is that the contract entered into between the parties was written in French, as was the correspondence between the parties. There were translations of most of these documents on the file. Who made these translations and with what accuracy is not always clear. The Court had to simply rely on what was provided, on the basis that, if there was inaccuracy, the parties and counsel were in a position to point such matters out to the Court. There being no such challenges to any of the material provided, what was available on the file as English translations of the primary documents written in French was accordingly accepted at face value.
4. Initially the Claim was filed against VBL and Mr E. Durand as the Director and shareholder of VBL. However, the Claim against Mr Durand was subsequently discontinued. Mr Durand's sworn statement is accordingly not relevant to the issues that remain to be determined.

B. Contract

5. The contract document is dated 22 September 2016. VBL agreed to pay VT 53,538,232 for the construction work was. Following 2 weeks of site preparation, the work was to be completed in 2 tranches; the first taking 12 weeks, and the second taking 8 weeks. There was then to be a period in which VBL-reported remedial work was to be undertaken by ETP at its expense prior to the completed project being handed over to VBL. A 6-month long guarantee period was to then follow, after which the 5% retention funds agreed to be withheld were to be paid over to ETP. During that 6-month period if there was further remediation required it would be done by ETP at its expense.
6. The contract provided for certain penalties. Of particular particular, if there was delay beyond the time agreed to complete the project, the penalty against ETP was set at VT 10,000 per calendar day. Further, if there was delay by ETP in the delivery of technical and administrative documents asked for by the project manager, there was provision for a penalty against ETP of VT 5,000 per calendar day.

C. Pleadings

7. ETP's position was that, once ETP had completed the 20-weeks construction of the factory building, VBL had advised ETP of some remedial works still required, all of which ETP had completed by 26 June 2017. Accordingly, ETP claimed that the retention funds withheld by VBL for 6 months ought to have been paid out to it on 23 December 2017. ETP is still waiting for that to be paid.
8. A second aspect of the Claimant's position is that VBL requested that ETP install some electrical materials in the newly constructed building. ETP purchased the necessary materials at a cost of VT 644,000. However, this arrangement was subsequently cancelled, leaving ETP out of pocket and it looked to VBL to make good this loss.
9. The Claimant was seeking (i) the retention funds of VT 1,976,951, (ii) interest on that sum at 15% p.a., (iii) reimbursement of VT 644,000 for materials ordered but ultimately not required, (iv) unspecified damages in the amount of VT 7,379,049, and (v) costs.
10. The Defence denied all aspects of the Claim, and as already stated, pointed to faulty workmanship by ETP. The costs to rectify that were said to amount to VT 2.2 million. By way



of counter-claim, VBL accordingly sought VT 1.6 million for repairs that had to be made to the roof of the new building, VT 600,000 for plumbing and incidental works, a further VT 320,000 for Mr Durand to have had to project manage the necessary repairs, and VT 100,000 for time spent on the problems arising from the contract between the parties by the VBL Directors. As well, due to alleged construction delays, VBL sought to claim penalties under the contract of VT 440,000; and a further VT 1.8 million as penalty for the failure by ETP to supply VBL with a technical report, namely that relating to concrete strength. VBL also sought costs.

11. A Defence to the counter-claim was then filed disputing the entire counter-claim.

D. Claimant's Evidence

12. In support of the Claim, ETP produced a sworn statement by Mr M. Bechani. He appended the design for the construction works which he had prepared, and commented that in his view ETP had fulfilled its obligations under the contract. This comment carried little weight as there was no indication on what basis Mr Bechani was able to make such assessment.

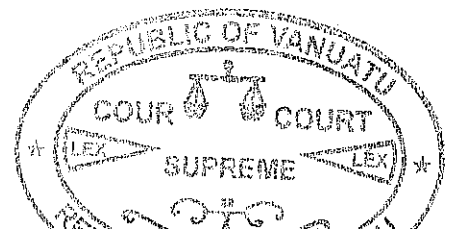
13. In addition, ETP relied on sworn statements by Mr M. Loisel and Mr D. Espinasse filed in response to the counter-claim filed by VBL. Mr Espinasse also filed a later sworn statement in response to that of Mr M. Durand from VBL.

14. Mr Loisel was assigned to be the project director for VBL. He commented that from his perspective as project director, ETP had not breached their contractual obligations with VBL. He confirmed that on 26 June 2017, at an on-site meeting, VBL and ETP had agreed on a list of 50 items of remedial work required to be completed by ETP at its cost. The due date for completion of those matters was 11 July 2017. Mr Loisel confirmed further that on 10 July 2017 he had been advised by ETP that those works had been completed. Mr Loisel had inspected the remedial work said to be completed and on 26 July 2017 he reported to both ETP and VBL that he was satisfied with the same. He ceased to be employed by VBL thereafter due to no longer being paid. It is unclear whether that factor impacted on his evidence.

15. Mr Loisel attributed delays in completion of the project to VBL, and also attributed holes in and rust to the roof to be due to defective materials supplied by VBL. He further stated that all plumbing issues were the responsibility of VBL. I noted that both these contentions were not countered in any way by later evidence on behalf of VBL. In the circumstances, I accepted both contentions.

16. In his first sworn statement, Mr Espinasse stated that he was a director of ETP. He maintained the defence and counter-claim were baseless, faulty and bereft of the truth. He was adamant that ETP had fulfilled all its obligations under the contract with VBL. His position was that as later confirmed in writing, by 11 July 2017 ETP had completed all the remedial work required. He postulated that ETP had accordingly handed over the completed project to VBL by that date. He agreed with Mr Loisel's chronology of events. He pointed to delays in completing the project being caused by VBL, and he was critical of the defective materials supplied by VBL, especially in relation to the roof.

17. Mr Espinasse stressed that under the contract VBL was entitled only to obtain calculation notes of construction methodology by which the plans for the building had been implemented. He

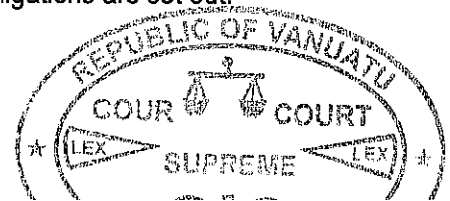


considered that any other documents VBL may have wanted, it should have obtained from engineering consultants, not ETP.

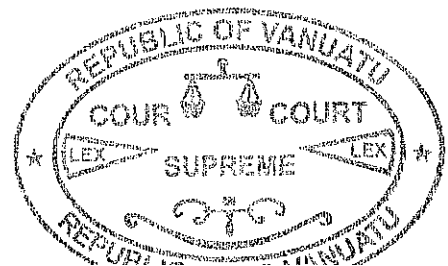
18. In relation to complaints regarding the concrete structure, Mr Espinasse was of the view this was due to VBL not requiring an inspection prior to the concrete being poured. As well, he maintained that site inspections had taken place regularly, with the final sign-off being given by VBL on 26 June 2017 followed by written confirmation on 11 July 2017. Accordingly, Mr Espinasse considered that VBL was not now able to claim in respect of this aspect of the counterclaim. This was an argument based in estoppel.
19. Mr Espinasse was strongly of the view that the matters raised in the counter-claim ought to have been included in the list of items requiring remediation. Such matters as not then listed could not, in his view, be subsequently raised by way of counter-claim. Again he was raising estoppel.
20. Mr Espinasse also disagreed with VBL's engaging a third party to do remediation work during the 6-months guaranty period without first notifying ETP. He pointed out that the contract made no provision for such. He was critical that ETP first learnt of this development on 10 January 2018, some 24 hours prior to the VBL-calculated 6-months guaranty period expiring. Mr Espinasse considered the 6-month period had come to end well prior to that.
21. In response to the sworn statement filed by Mr M. Durand, Mr Espinasse repeated that the counter-claim relating to penalties for lateness was without merit as the delays had in fact been caused by VBL, not ETP. He had already responded to this contention in an e-mail of 20 June 2017 to Mr Loisel, and he repeated his assertions as to the causation of delay. As ETP had been paid for work done despite any delays, he impliedly suggested that VBL should not subsequently be permitted to assert delays by ETP as the payments made were clear indications that any delays had been accepted.
22. Over and above the delays already referred to, Mr Espinasse stated that the VBL's change of VRD plans under the concrete slab resulted in a pause of construction of about a month; and bad weather associated with a tropical cyclone had degraded the work and caused a further 15-day delay. He asserted that changes to the plans, and delays in the supply of the steel structure, caused another 20 days pause in construction. Mr Espinasse went on to state that there was a further delay of a month in the pouring of the plate due to non-delivery of anchor sticks, and 15-20 days due to requiring replacement screws for the roofing to come from New Caledonia.
23. Mr Espinasse asserted that technical reports of the construction had been prepared on 11 January 2017 and were served on Mr Loisel prior to 14 March 2017. He appended a copy of the same, with the date clearly obvious. He assumed that Mr Loisel had not forwarded them to VBL, but ETP should be held responsible for that if that were so. He disputed that any penalty was appropriate.

E. Defendant's Evidence

24. Mr M. Durand produced a sworn statement with a number of annexures, including most helpfully the contract, which appears to have comprised two documents, and his translation of the first part of the contract in which the pertinent contractual obligations are set out.



25. He agreed that the works had commenced on 10 October 2016, and further that Mr Loisel, the project manager, had written to ETP on 20 June 2017 confirming the due date for completion was 28 May 2017. This letter set out that the contract completion date was 10 May 2017, but that VBL recognised some of the delays involved in the project were beyond ETP's control and made allowance for that by accepting completion by 28 May 2017. The letter made plain that completion after that date did attract penalties. It further made mention of penalties for non-delivery of the concrete analysis since March.
26. Mr Durand appended a Works Report dated 14 June 2017, which clearly showed as a requirement that ETP provide concrete tests for the concrete slab by 14 March 2017. It was marked as reminder #3. That report concludes with Mr Loisel setting out that later penalties were to commence from 28 May 2017. Mr Durand maintained the concrete test report has still not been provided. He suggested penalties of 1135 days be applied, being a total of VT 5,675,000 as at 22 April 2020, the date of his sworn statement.
27. Mr Durand further appended a letter of 26 June 2017, which recorded VBL's provisional acceptance of the works, subject to certain issues being resolved. Attached to the letter was a list of those items which VBL had identified as defective. ETP was required to rectify those items listed before 11 July 2017.
28. Mr Durand accepted that all those items were properly completed by ETP in the time permitted, as otherwise stated by Mr Loisel and Mr Espinasse.
29. Mr Durand then pointed to a further letter from Mr Loisel to ETP of 3 July 2017. He considered that this letter notified ETP that as a result of 2 further matters of supplementary work, the project would be completed in a further week and a half. Mr Durand accordingly considered the contract continuing on foot until 11 July 2017, following which the 6-month guarantee period would follow to 11 January 2018. Following this logic, Mr Durand considered ETP to have completed the project 44 days late, with the resulting penalties amounting to VT 440,000.
30. Next Mr Durand appended a letter by him to Mr Espinasse of 10 January 2018. That confirmed his contention of completion being 44 days late, but also referred to other relevant matters. The letter baldly stated that VBL refused to pay ETP the guaranty retainer, and cited 2 reasons for doing so. Firstly, it was said that defects in the drainage systems in the toilets and the changing room (as shown in attached photographs) required repair, which an outside contractor completed at a cost of VT 600,000. Secondly, there were defects in the roofing, with leaks and rust which also required repairs, and the outside contractor had completed that at a cost of VT 1.6 million. As the guaranty retainer was VT 1,963,183, VBL used that to partly pay for the work. The bills reflecting the payments to Ebenezer Construction were also attached to the letter.
31. Mr Durand commented generally on what he regarded as ETP's defective work in relation to plumbing and drainage matters as well as the roofing. He produced photographs of the work done in comparison to the plans prepared and explained what he considered to be the obvious anomalies. He commented that in his view ETP's work was incompetent.
32. He also related attempts between himself and Mr Espinasse to avoid the need to come to Court, which unfortunately did not succeed.



33. Mr Durand related further that when the drainage/plumbing and roofing repairs were undertaken, he had taken on the role of project manager for both works. He considered he should receive compensation for that from ETP at the rate at which Mr Loisel had been paid by VBL when he project-managed the building construction. On that basis he included in the counter-claim the sum of VT 1.8 million, which he calculated was fair for 8 weeks effort. Further, Mr Durand stated that the Directors of VBL had spent numerous additional hours in meetings dealing with the issues that had arisen as a result of entering into the contract with ETP. Mr Durand was of the view that an additional VT 100,000 should be paid to the Directors in respect of this by ETP.

F. Discussion

34. ETP was fully entitled to rely on VBL's provisional acceptance of the construction work following the on-site meeting on 26 June 2017. The list of remedial works was supplied and ETP was obligated pursuant to the contract to attend to those matters by 11 July 2017. It did so, and handed the project over to VBL. That was confirmed by Mr Loisel in writing by his letter of 26 July 2017 and also in his evidence.

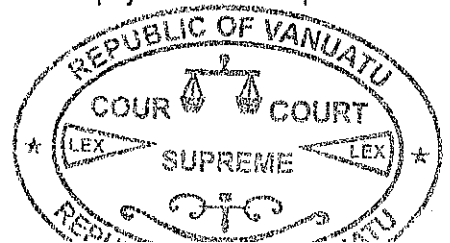
35. Mr Durand pointed to a further extension of the contract which he considered was set out in the letter by Mr Loisel to ETP of 3 July 2017, which required 2 further unspecified matters to be completed. There is no evidence whether this additional work was completed or not. However, I take it, as there is no complaint about it not having been completed that it was satisfactorily done.

36. The position then is that the unconditional contract completion date was 11 January 2017. That signalled the end of the 6-month guaranty period at the conclusion of which ETP could expect to receive the 5% retention funds.

37. However, ETP did not receive the retention funds, despite the 6-month guaranty period expiring at around that time, or indeed at any time since. As set out in Mr Durand's letter to ETP of 10 January 2018, the funds were instead completely expended on largely paying for further remedial work that VBL had passed on to a third party, Ebenezer Construction. There was no provision in the contract for this to occur.

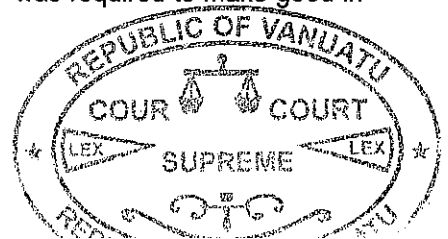
38. ETP rightly pointed to the fact that it was only advised of this development 24 hours prior to the end of the guaranty period. ETP had no ability to agree or disagree for the need for this work to be done. It is obvious, as Mr Espinasse stated in his final sworn statement, that ETP would have raised the fact that the roofing materials and inadequate nails were supplied by VBL. Mr Espinasse also commented that VBL ought to have picked up any issues with the concrete slab prior to any concrete being poured; and further, by subsequently accepting the works and not requiring remediation, VBL was now estopped from complaining about the drainage and plumbing. I agree.

39. VBL presented their position to ETP as a *fait accompli*. However, the contract provided for the guaranty period and the retention of 5% of the project funds for exactly the situation VBL belatedly raised. VBL was entitled to compelled ETP to do further remediation in the 6-month period. However, instead, VBL went outside the terms of the contract by employing Ebenezer Construction, yet seeks to somehow use the contract to make ETP pay. That is inequitable



and has no basis in contract law. VBL must pay Ebenezer Construction for the work it did from its own resources, not use funds properly payable to ETP pursuant to the contract.

40. I find the first part of the Claim made out on the balance of probabilities. ETP is accordingly entitled to judgment in the sum of VT 1,963,183. I accept that ETP is entitled to interest on that sum from the date it was due, but I do not accept the claimed rate of 15% per annum. There is no evidence provided to support anything more than the usual Supreme Court rate.
41. The second part of the Claim is less clear. There is an insufficiency of evidence as to what took place compelling or requiring ETP to purchase the materials it says it did. There is no evidence relating to why the agreement regarding this additional aspect was cancelled. There is also considerable doubt regarding Vate Industries' involvement, if any, in relation to the materials purchased. I note that VBL's defence completely denies all the allegations in relation to this.
42. ETP carries the burden of proof. I am not satisfied, on the balance of probabilities, that VBL should be held responsible for the second aspect of the Claim, and it therefore fails.
43. The third part of the Claim is completely without supporting evidence. There is no basis to grant any of the damages sought.
44. VBL's counter-claim raised ETP's incompetent construction work and sought thereby to justify VBL's use of the retention funds to pay Ebenezer Construction. That has already been discussed earlier, and the argument is rejected.
45. Additionally Mr Durand sought to counter-claim for him having had to project manage those allegedly necessary repairs, and for VBL Directors having to expend time on the problems arising from the contract. Both aspects of the counter-claim fail – there is no legal basis for Mr Durand to ask ETP to pay for his project-management. That was entirely his decision. The fact the Directors had to devote more time than usual to the project is also a matter for VBL, not ETP.
46. As well, Mr Durand sought to impose penalties on ETP under the contract for alleged construction delays, and for ETP's alleged failure to supply VBL with a technical report, namely that relating to concrete strength. Mr Durand pointed to a number of delays in the construction, and Mr Espinasse sought to justify them as being either caused by VBL or out of ETP's control. The simple point is that VBL is unable, in law, to point to further delays than those set out in Mr Loisel's letter of 20 June 2017. There may have been other delays, but it is too late to claim those post-January 2018, by which time all the contractual obligations between the parties had ceased and the constructed works unconditionally accepted by VBL. VBL is limited to what it claimed at the time.
47. In relation to the concrete report, Mr Espinasse made the point that Mr Loisel had asked for it, and he had been supplied with it. He stated that it was done prior to the conclusion of the contract. Further, he facetiously commented that Mr Durand was seeking to extend the life of the contract beyond January 2018 into the future. It is more likely than not, that if the concrete report was critical for VBL, there would have been much more evidence regarding this, and the issue would have been raised on the 50-item list of matters ETP was required to make good in

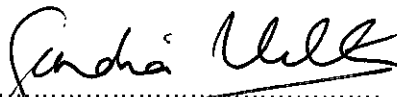


June 2017. The lack of such makes it more likely than not that this is a belated and unjustified attempt by Mr Durand to embellish his counter-claim. I reject this aspect of the counter-claim.

G. Result

48. Judgment is entered in favour of ETP in the sum of VT 1,963,183, together with interest thereon at 5% per annum from 11 January 2018 until fully paid.
49. ETP is entitled to its costs. Once settled, by agreement between counsel or by the Master if there is no agreement, they are to be paid in 21 days.
50. There will be a further conference at 1.30pm on 30 August 2021 for VBL to advise the Court that the judgment has been satisfied or that arrangements have been entered into to enable that to occur. Alternatively, enforcement of the judgment will follow.
51. For that reason, a copy of this judgment must be served on VBL with a proof of service filed in due course.

**Dated at Port Vila this 9th day of August 2021
BY THE COURT**


.....
Justice G.A. Andrée Wiltens

