IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No.10 of 2002

BETWEEN: **THE SANTA CRUZ TIMBER LIMITED** as foreign Company presently in Luganville, Santo in the Republic of Vanuatu

First Appellant

AND: **MR LOUIS BARBOU and LUTE BARBOU** of Luganville, Santo in the Republic of Vanuatu

Second Appellants

AND: **PACIFIC EUROPEAN INVESTMENT COMPANY & INFUNTURMOLMOL of** Luganville, Santo in the Republic of Vanuatu

First Respondent

AND: **MR. JIMMY GIOVANNI** of Luganville, Santo in the Republc of Vanuatu

Second Respondent

Coram: **The Hon. Chief Justice Vincent LUNABEK**
The Hon. Justice Bruce ROBERTSON
The Hon. Justice John von DOUSSA
The Hon. Justice Daniel FATIAKI
The Hon. Justice Roger COVENTRY

Counsel: **Mr. Saling Stephens for the Appellants**
Mr. Ronald Warsal for the Respondents

JUDGMENT

This is an appeal against the reserved judgment of the Supreme Court (O. Saksak J) delivered on 14th May 2002 after a trial, in which he dismissed the appellants claim for general damages and loss arising out of the respondents alleged inordinate failure to comply with the terms of an **Agreement** entered into between the parties on 30th June 2000. In it the respondents undertook inter alia to engage the appellants on their logging operation in Santo in consideration of 4000 CFP per cubic meter of timber supplied by the appellants to a predetermined point on Samasen Wharf.

Pursuant to the **Agreement** on or about 13th July 2000 the appellants transhipped their plant and machinery from the Solomon Islands to Santo and personally relocated themselves and their workers from the Solomon Islands.

Despite their apparent readiness and willingness to perform the **Agreement,** the appellants claims that for over 10 months the respondents did not require them to do any work under the **Agreement** which had a duration of 12 months.

The respondents in their defence generally doubted the legal standing of the appellants to issue proceedings in Vanuatu as a foreign registered company. They also denied the existence of any agreement with the appellants or their entitlement to seek any relief thereunder. No illegality is pleaded and no reference is made to any specific legislative provision nor was any pleaded in bar as ought to have occurred.

The respondents then somewhat inconsistently counter-claim for damages for alleged breaches by the appellants of various clauses of an undefined contract that presumably existed between themselves and the appellants.

Be that as it may it appears from the papers that the first mention of the influence of any statutory provisions, occurred in the respondents counsel's submissions to the trial judge at the hearing where counsel refered to the provisions of the **Vanuatu Foreign Investment Act No. 15 of 1998** as amended by **Act No. 6 of 2001 (the VFI Act)**; the **Companies Act Cap. 191 of 1996;** the **Business License Act** Cap 173 of 1984 and **Labour (work permit) Act Cap** 187 of 1985.

The trial judge in his reserved judgment having concluded that an **Agreement** existed between the parties then set out various provisions of the VFI Act which he found clearly establish that the appellants are a ***'foreign investor'*** in terms of the VFI Act and, as such, were required in terms of **Section 5 (1)** to obtain an approval certificate before investing in Vanuatu. So far so good.

Unfortunately, the learned trial judge did not have his attention drawn to the definition of ***'investment'*** or ***'invest'***, and without referring to them he concluded that the appellants had "invested" by bringing their machinery into Vanuatu as well as their employees and families. The trial judge then made the following critical determination at **paragraph 15.1.6** of his judgment where he says :

> ***'What appears clear to me at this stage is that the plaintiffs were foreign investors to engage in a subcontractual relationship with the defendants. However the plaintiffs have not shown that they have complied with Section 5 of the VFI Act by producing an approval certificates. As such pursuant to section 5 (1) of the Act, I rule that the Agreement dated 30th June 2000 entered into by the plaintiffs (appellants) and the defendants (respondents) is void and of no effect. As such therefore no action or suit can lie from it or an alleged breach of it'***

We say ***'unfortunately'*** advisedly because had the trial judge considered the definition of what is an ***'investment'*** or **'invest'** we are sure that he would have found the following helpful definition in the interpretation provisions of the VFI Act which reads:

> ***'invest' and 'investment' means to be engaged in an activity for the principal purpose of gain (pecuniary or otherwise) but does not include:***
>
> ***(f) entry into and performance of a contract for the supply of goods or services by a supplier who is not a resident of Vanuatu.'***

In this latter regard **clauses 1,2, & 4** of the **Agreement** between the parties state:

'1. The Pacific European Investment Company & Infunturnomol Company will pay to the Santa Cruz Timber Ltd 4,000 CFP per Cubic Meter (On confirmation from the Forest point to Samansen Wharf (storage base). Payment is to be disburse at the end of every 2,000 cubic meter confirmed at the storage base.

2. It is probipitated (sic) for the Santa Cruz Timber Ltd to establish any business dealings in Vanuatu or carry out any business arrangements or operate any other sawmill without the approval consent of the Pacific European Investment Company and Infunturmolmol Company.

4. In the event where the Santa Cruz Timber Ltd wishes to establish its own businesses in Vanuatu, the company is required to follow normal procedures in obtaining a Vanuatu Foreign Investment Board Certificate in order to establish itself in Vanuatu (ie. the company needs to remove itself out of the country either to the Solomons or New Caledonia and then applied for a new investor)'.

The respondents also undertook in terms of the **Agreement** to be responsible for the costs of transporting from **Honiara** the appellant's equipment and machinery to its operation site in Santo and to provide two houses for the appellants management and staff. It also agreed to meet the costs of repatriating the appellants equipment, machinery, management and staff back to Honiara ***'In the event of any over powering circumstances such as land owners dispute or non-performance of the operation due to reasons attributable wholly to the respondents or its associates'.***

We are satisfied from the foregoing that the appellants who were non-residents of Vanuatu (to adopt the language of ***exclusion (f)*** in the definition of '***investment***') entered into and partly performed a contract for the supply of services to the respondents logging operation. Therefore, by definition, the appellants had **not** invested in Vanuatu in breach of the requirements of **Sections 5 & 6** of the VFI Act.

We are fortified by the existence of **clauses 2 & 4** of the **Agreement** which make it plain that the appellants had **not** contracted as foreign investors seeking to establish their own business in Vanuatu nor are they independent contractors or for that matter, subcontractors capable of acting outside the terms of the **Agreement** or for any other party than the respondents. In short, the appellants were engaged by the respondents for the supply of services nothing more nothing less.

In light of the foregoing we are driven to the firm conclusion that the entry into and performance of the **Agreement** between the appellants and the respondents was not an '***investment***' which required an approval certificate in terms of the **VFI Act** and accordingly remains valid and enforceable at the suit of the appellants for the period **30th June 2000** to **1st June 2001** when the appellants gave notice that they would no longer be bound by the **Agreement.**

The appeal is allowed and the case is remitted to the trial judge for assessment of damages on the appellant's claim, and to deal with the respondents counterclaim. During argument on the appeal the parties raised questions about damages which the respondents now claim under an undertaking as to damages given when a MAREVA order was made which led to the seizure of some of the respondents equipment. That claim is for loss of use of the equipment. The trial judge should determine that claim at the same time.

The costs of the appeal is reserved to the trial judge.

Dated at PORT VILA, this 1st day of NOVEMBER 2002.

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Vincent LUNABEK CJ.

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Bruce ROBERTSON J.

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John von DOUSSA J.

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Daniel FATIAKI J.

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R.J.COVENTRY J.

COURT OF APPEAL
REPUBLIQUE DE VANUATU