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

Civil Case No. 1644 of 2016

BETWEEN: SAM KALSAU
LEITARE KALSAU
Claimants

AND: VANUATU PROJECT MANAGEMENT UNIT
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

Coram: ***Mr. Justice Oliver A. Saksak***

Counsel: ***Eric Molbaleh for the Claimant***
Jelinda Toa for the Defendants

Date of Hearing: ***14th August 2017***
Date of Judgment: ***20th December 2017***

JUDGMENT

Introduction and Background Facts

1. The Claimants are husband and wife. Both are joint lessees of Leasehold Property Title 12/054/002 situate at Kakola Station Quarry, North of Efate Island. The husband Sam Kalsau Langwor is the custom-owner of the land.

2. On 24th August 2009 the Government through the Millenium Challenge Account (the MCA) Vanuatu, signed an agreement with the Claimants to extract limestone from the quarry on their leasehold property for the purposes of construction of the Efate Ring Road.

3. A quarry permit was issued. An agreement was reached. Extraction of materials was done. The Claimants issued an Invoice for payment. No payment was made.

4. The Claimants filed their proceeding claiming-
   a) Premium payment of VT 25.000.000.
   b) Payment for supply of 39, 769 cubic meters of quarry at VT 397, 690, 000.

c) Royalty payment of 40% at VT 39, 769,000.

d) General and special damages to be assessed.

e) Costs, and

f) 12% interests applied to each head of damages.

Defence

5. The defendant's defence is that the Claimants have been paid royalties at 40% for 39, 767 cubic meters at VT 490 and are not entitled to anymore payments. They deny the claimants are entitled to any premium payment and damages.

Evidence

6. The Claimants rely on the evidence in the two sworn statements of Sam Kalsau Langwor and one sworn statement of Leitare Kalsau filed respectively on 20th May 2016 in support of their claims. Sam Kalsau Langwor filed a further sworn statement on 23rd May 2016 and three statements in response filed on 9th November 2016. The Claimants also rely on the sworn statement of Samantha Kalsau and Marie Kalsau filed on 20th May 2016.

7. The defendants rely on the sworn statements of Brooks Rakau filed on 29th July 2016, of Johnson Wabaiat and Toney Tevi filed respectively on 2nd September 2016 and a further sworn statement of Brooks Rakau filed on 24th August 2017.

Discussions

8. Facts are not in dispute. On 14th August 2017 the defendant sought leave to file an amended defence. Counsel for the Claimants did not object and leave was granted. The Court gave directions for the filing of written submissions by 18th September 2017 for the claimants and by 2nd October 2017 for the defendants. The defendants filed their written submissions on 31st October 2017. The Claimants have not filed any written submissions. Counsels were reminded by email dated 6th September 2017 to file submissions within 7 days. It is unfortunate the claimants have not filed their submissions.

9. From the written submissions filed by the defendants three issues have been raised-

   a) Whether the claimants are entitled to be paid royalties for quarry extracted in the amount of VT 1.000 per cubic meter?

   b) Whether the claimants are entitled to be paid premium for the quarry extracted from their lease?

   c) Whether the claimants are entitled to be paid for the supply of quarry for the amount of quarry extracted from their lease?

10. The relevant legal provisions are sections 67 and 69 of the Mines and Minerals Act]CAP. 190] (the Act) which states:

" ***67. Royalty on minerals obtained under mining licence, etc.***

(1) Subject to this Act, the holder of a mining licence shall, in accordance with his licence and this Act, pay to the Republic royalty in respect of minerals recovered by him in the mining area.

(2) Where provision is made in a mining licence for the payment of royalty in kind, the word "pay" and cognate expressions in section 49(4) and this part shall be construed accordingly.

(3) Subject to this Act, the holder of a claim or a quarry permit shall, in accordance with this Act, pay to the Republic royalty in respect of minerals recovered by him in the claim area or the permit area.

(4) Royalty is payable –

(a) pursuant to subsection (1) –

(i) at the rate fixed in, or computed in accordance with the provisions of, the mining licence concerned; or

(ii) if no rate is so fixed or provision so made in the mining licence concerned, at the rate prescribed; or

(b) pursuant to subsection (3), at the rate prescribed.

(5) Provision may be made in the regulations for payment of royalty in respect of minerals obtained in an exploration area or a prospecting area.

(6) There shall be paid to the custom owners of the land and to the Local Government Council of the Local Government Region from which the minerals or building materials come an amount not exceeding 40 per cent and 20 per cent, respectively, out of the revenue received in respect of royalties in each particular case in accordance with this section.

(7) In subsection (6), "custom owners" shall have the same meaning assigned thereto by section 72.

(8) For the avoidance of doubt, the provisions of subsection (6) shall not apply in respect of minerals or building materials obtained or recovered from the seabed and subsoil beneath the territorial sea or from the seabed and subsoil

of the continental shelf or beneath the waters of the exclusive economic zone."

(My underlining for emphasis)

"69. Remission and recovery of royalty, etc.

(1) The Minister may, on application made to him by a holder of a licence, claim or quarry permit and after consultation with the Minister responsible for finance –

(a) remit, in whole or in part, any royalty payable; or

(b) defer payment of any royalty,

on such conditions (if any) as he may determine and specifies in the instrument of exemption.

(2) Royalty payable under section 67 is a debt due to the Republic and may be recovered in a court of competent jurisdiction.

(3) A certificate of the Minister certifying that a specified amount of royalty is payable by a person identified in the certificate shall, in any proceedings instituted against that person for the recovery of any such royalty, be received as evidence of that fact, but without prejudice to the right to adduce evidence in rebuttal.

(4) Subsections (2) and (3) do not apply in any case where the royalty concerned is payable in kind."

11. Section 32 D of the Land Leases Act [CAP. 163] as amended states:

"32D. Premium payable for the issue of a new lease

(1) This section applies to:

(a) a new lease on land not previously subject to a lease; or
(b) a new lease as part of a subdivision; or
(c) a new lease as part of a strata title development.

(2) A new lease is not to be issued unless the lessee or the registered proprietor pays to the lessor a premium based on the full rental value of the unimproved value of the land as determined by the Minister from time to time and the contract rent as agreed to by the lessor and the lessee.

(3) A lessee must pay to the Minister the premium referred to in subsection 32D(2) before the lease is issued to the lessee.

(4) The Minister may by order, prescribe the full rental value of the different classes of leases which are to be reviewed every 5 years"

12. The evidence of Sam Kalsakau by sworn statement dated 20th May 2016 annexes as " SKL2" an Associated Works Consent executed on 24th August 2009. It states the "likely maximum volume to be extracted to be 40.000 bcm". The claimants placed

their signatures to that document showing they agreed the quantity and the category or quality. Further annexed as "SKL6" is an invoice dated 6th July 2010 from Sam Kalsau to MCA Director for 39, 769 cubic meters at VT 1.000 making a total of VT 397, 690.000. Annexure "SK L 5" shows a confirmation of 39, 769 m3 as "(loose measure)" by Craig Smart the Stakeholder Liaison Manager. In Brook Rakau's statement dated 29 July 2016 annexure " BR 7", it is recorded that from Kakola station, the coral extracted was 39, 769 cubic meters as " Loose on Truck" equivalent BCM= 26, 513 cubic meters.

13. In Toney Tevi's evidence by sworn statement dated 2nd September 2016 as former Commissioner of Mines, he prescribed the VT 500 charge per cubic meter of BCM for raw material aggregates pursuant to section 67 (4) of the Act. 10vt out of VT 500 was remitted pursuant to section 69 of the Act, leaving the balance of VT 490. Annexure " BR 8" shows the calculation of 26, 513 at VT 490= VT 12, 991, 370. And 20% of this amount is given at VT 2, 598, 274. Doubling the amount, the sum of VT 5, 196, 548 which represents 40% of the royalty are due to the claimants. In the annexure " BR 2" to the further sworn statement of Brooks Rakau dated 24th August 2017 shows LPO No. 350-018915 dated 25 August 2015 in favour of Sam Kalsakau for the sum of VT 5.196.548. This sum has been received by the Claimants.

Findings

14. Applying the law to the facts, I find as follows:-

a) The prescribed charge of VT 500 per cubic meter of raw material was lawfully made under section 67 (4) of the Act.

b) The remission of VT 10 leaving the balance at VT 490 per cubic meter of raw material was lawfully made under section 69 of the Act.

c) The Claimants had no basis to charge VT 1.000 per cubic meter of raw material when in his case a charge of VT 500 was prescribed.

d) The Claimants have been paid their 40% of royalties calculated at VT 5.196.548.

e) There is no legal basis for the claimants to claim for premium payments.

f) The Claimants agreed to extraction of 40.000 BCM and they are bound by their agreement. They have only provided 26, 513 cubic meters for which they have been paid royalties in the sum of VT 5.196.548.

g) The Claimants have no pleadings and evidence showing any special damage or general damages. I accept the defendant's submissions the claimants did not raise any specific damages in their claims and on the basis of Republic.v. Emil [2015] VUCA 16, this is disallowed.

15. For the above reasons I answer all three issues raised under paragraph 9 (a) (b) and (c) of this judgment in the negative.

The Result

16. The claimants are unsuccessful in their claims against the defendants. Their claims are dismissed in its entirety.

Costs

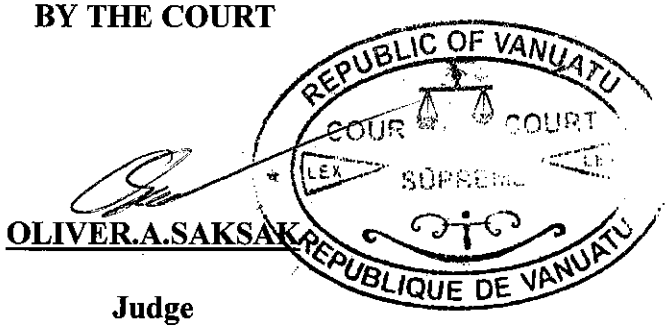
17. The defendants claim costs in the sum of VT 500.000. I decline to award costs in this case. The claimants were perfectly entitled to institute this proceeding. One can understand their grievances when they were made to agree to coral being extracted from their property and some 39,769 of the 40,000 cubic meters were extracted. Out of that quantity only 26, 513 had to be paid VT 490 in royalty to him. In my view there appears to create some room for unfairness when the prescribed rate of VT 500 has to be determined alone by the Commissioner of Mines. I think there is room for a compromise to achieve fairness by having the prescribed charge jointly determined by the Commissioner and the custom-owner of the quarry site or land. This in my view would justify the unused portion of the raw material extracted which basically

changes the landscape and use of the land being quarried, leaving room for potential claims for damages.

18. For the reasons given, there will be no order as to costs. Each party will bear their own costs.

DATED at Port Vila this 20th day of December 2017

BY THE COURT



OLIVER.A.SAKSAK

Judge