

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

CIVIL APPEAL CASE No.13 OF 2015

BETWEEN: FAMILY KALMET
Appellant

AND: FELIX LAUMAE KABINI
First Respondent

AND: FAMILY KALTATAK
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Olive Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop
Hon. Justice Richard Chetwynd*

Counsel: *Mr. J. Ngwele for the Appellant
Mr. F. Laumae for the First Respondent
Mr. J. Tari for the Second Respondent*

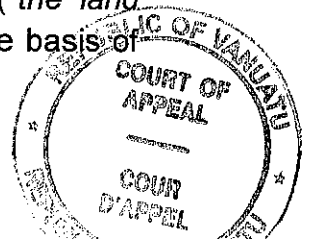
Date of Hearing: 15 July 2015

Date of Judgment: 23 July 2015

JUDGMENT

Background

1. This appeal concerns orders made by consent in Civil Case No. 249 of 2014, in which the First Respondent Felix Laumae sued to recover legal fees of VT17,186,317 against the defendants. The defendants were named as "Family Kalmet and Family Kaltatak represented by Jack Kalmet and Kalkot Kaltatak of Eratap Village, South Efate, Vanuatu".
2. It is accepted that the claim was served on Jack Kalmet, or his son Norris Jack Kalmet, on behalf of Family Kalmet and on Kalkot Kaltatak on behalf of Family Kaltatak.
3. A defence was filed on behalf of both families by James Tari of James Tari & Partners, denying the debt claimed. It admitted that Mr. Laumae had provided legal services in Land Appeal Case No. 71 of 2006 ("the land claim") but it denied the remainder of the allegations, including the basis of

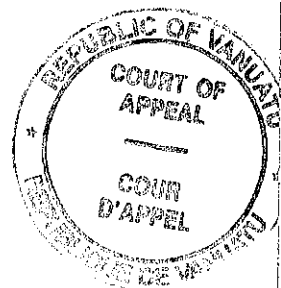


the retainer. It further said that no invoices were issued for the costs claimed, that the land claim was not yet complete, that the costs claimed were excessive, and that an itemized legal bill should be provided. It also said that Mr. Laumae had already been paid over VT12 million, for which credit should be given, and that he had also received other payments or expenses for which he should give credit. The reply by Mr. Laumae disputed those matters. It is not necessary to record his reply in detail. In fairness to Mr. Laumae it should be noted that he identified the invoices he had sent, that he disputed his alleged failure to account for money or services received, and he explained how each was accounted for, and he said (as appears to be acknowledged) that his fees are also related to other proceedings associated with the land claim. He also acknowledged receipt of a further VT1,750,000 so his claim was reduced to VT15,236,317.

4. It appears that the claim for legal costs was progressing towards trial. There are sworn statements of Mr. Laumae, and of Norris Jack Kalmet, dated 29th September 2014 and 24th October 2014 respectively.
5. Then, on 27th April 2015, a consent order was made and judgment was accordingly entered in favour of Mr. Laumae in the sum of VT15,236,317. There were also detailed terms about how that debt was to be paid. The consent order was signed by Mr. Laumae and by Mr. Tari on behalf of the defendants.

Uncontested Facts

6. There are certain facts which are not in issue.
7. Mr. Laumae has carried out extensive legal work under a retainer given for the conduct of the land claim and associated proceedings on behalf of both Family Kalmet and Family Kaltatak. It is clear that he had issued some invoices for payment of his legal fees from time to time, and that some of his legal fees have been paid (although it is not clear precisely who paid them). In fact, Family Kaltatak, through the persons who directly engaged and instructed Mr. Laumae on behalf of that family, do not dispute his current claim to his outstanding legal fees, as recorded in the consent judgment.
8. It is Family Kalmet, now through Chief Andrew Kalpoilep (and the persons who have given him written authorization) who objected to the consent orders.



The Statement of Claim

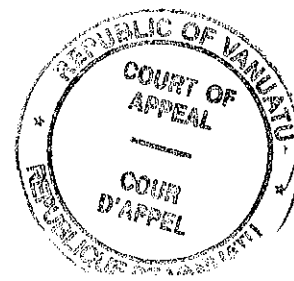
9. The statement of claim says the retainer to Mr. Laumae was partly written, partly oral and partly to be implied. It does not say how the retainer was agreed, but it was said in submissions by Mr. Laumae that Jack Kalmet gave instructions on behalf of Family Kalmet (as confirmed by his letter of 25 November 2013) and Kalkot Kaltatak gave instructions and entered the retainer on behalf of Family Kaltatak (as confirmed by his letter of 21 December 2013). Correspondence also indicates that at certain points Andrew Kalpoilep also gave instructions to Mr. Laumae. It is clear that each of Jack Kalmet and Kalkot Kaltatak is committed to paying the proper legal fees of Felix Laumae, and that they agree that the amount of the consent judgment reflects the amount presently outstanding.

The issues on the appeal

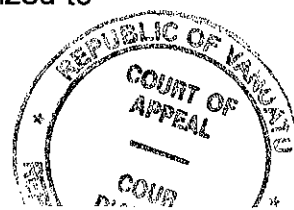
10. The principal issues on this appeal are: (1) Whether Andrew Kalpoilep may have the standing to bring this appeal, as he purports to do on behalf of Family Kalmet; (2) If so, whether the claim for fees was properly instituted with the defendants as named (as set out above) because if the proceeding is not properly instituted then the judgment by consent should itself be set aside and the matter remitted to the Supreme Court to give Mr. Laumae the opportunity to regularize the action; and (3) if it was properly instituted, whether the consent judgment could have been entered in its terms or should be set aside. In the event, the third issue does not arise.

Consideration

11. In land claim proceedings, it is common for family groups to assert that, as a family, they are the custom owners of particular land. It is also common for a family group to engage a legal representative to represent that family group, and to receive and act on instructions from nominated representatives of that family group. So long as there is no division within the family group as to who their nominated representatives are, and no disputes within the family group or significant sections of it as to what instructions are to be given, that process works perfectly well. It does not follow that the legal representative so engaged or retained is entitled to recover fees from each and every member of that family group. It is appropriate and prudent for that legal representative to make sure that the person or persons giving him or her direct instructions is in a position to make payment of legal fees properly incurred from time to time, or to have made other proper arrangements for payment of legal fees.

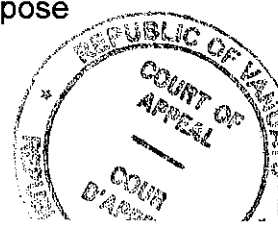


12. The problem on this appeal arises from the direct transition of the practices of conducting land claims in the way described to the enforcement of a contract to provide legal services. For that is what Mr. Laumae, by his Supreme Court claim for fees, is attempting to do.
13. For a contract to be enforceable, it must be with a legal entity, either a particular person or persons, or a company (which is given legal entity status under the Companies Act [CAP. 191] section 21). The concept of a family group, as explained, is not itself a legal person for that purpose: see: Civil Procedure Rules, rule 3.1. At a practical level, that point was illustrated in the course of its submissions, by exploring whether the consent orders could be enforced by Mr. Laumae directly against any member of Family Kalmet, including young children.
14. There is a procedure under Rule 3.12 of the Civil Procedures Rules by which a person bringing a proceeding may obtain an order that the proceeding is a representative proceeding, provided that the relevant criteria are met. Once a representative order has been made that a proceeding is against a representative party, that order may be enforced against a person not named as a party only with the Court's leave: Rule 3.12(4), and an application for leave to enforce the order must be served on the person against whom enforcement is sought as if it was an application for a claim: Rule 3.12 (5). That did not occur in this instance. It reinforces the problem that arises by the inappropriately commenced proceeding against a family or families, and the risk (as appears to be a real one) that Mr. Laumae may wish to enforce that order against other members of the family than the persons who directly instructed him without the protection of the sort of procedures prescribed by Rule 3.12(4) and (5).
15. Accordingly, the consent order is not effective at all because it does not actually identify the persons who, under the legal retainer, are liable for the fees. It appears the retainer contract was with Jack Kalmet (and possibly others, if they specifically adopted that arrangement) and Kalkot Kaltatak, rather than with the uncertain and unidentified membership of a particular family groups.
16. In fact, the evidence shows that there is some division between or within the members of Family Kalmet whether to dispute the basis of, or the extent of, the legal fees charged by Mr. Laumae.
17. The submissions on behalf of Family Kaltatak say that they are made also on behalf of or for Jack Kalmet, who is the duly appointed representative of Family Kalmet. Those submissions refer to Chief Andrew Kalpoilep as a person who previously was one of the two authorized persons to give instructions on behalf of Family Kalmet, but say he is no longer authorized to



do so as he has been removed as their representative. In addition, they say, Andrew Kalpoilep has made part-payment towards Mr. Laumae's fees. The latter point has no significance. The part payment, if it occurred, does not involve any acknowledgment that all the fees claimed represent work done and properly charged for. There are other assertions in their submissions, and the material referred to in support of it, which do not assist in resolving the present appeal.

18. Andrew Kalpoilep himself recognizes that there are two tribes in Family Kalmet: the Laklakli tribe and the Kalmetlau tribe. He has presented a list of 44 persons who (he says) are members of the Laklakli tribe who have appointed him as a representative of Family Kalmet and have signed that list. He says that a meeting of Family Kalmet on 3 December 2014 which purported to remove him from his representative role was not attended by any or only a few, of the Laklakli tribe and was not therefore a proper decision. His sworn statement has not passed unchallenged: see the sworn statement of Norris Jack Kalmet of 15 July 2015. That exchange and the dispute it reveals serve to make the point about the difficulty presented by the proceeding in its current form.
19. Those matters, including the prospect of Mr. Laumae bringing enforcement proceedings against Andrew Kalpoilep and other members of Family Kalmet who do not accept that his fees have been properly incurred and charged, illustrate why it is appropriate to allow Andrew Kalpoilep on behalf of those who he represents to have standing to appeal against the consent orders. Otherwise they would be vulnerable personally to enforcement procedures, even though they have not had the protection of processes such as those which Rule 3.12 prescribes and even though they say that the fees are not, or not all, payable because they are excessive.
20. This judgment does not consider any of the other issues which Chief Andrew Kalpoilep has raised in relation to the fees of Mr. Laumae. It is not necessary to do so. If this proceeding in the Supreme Court is, upon further consideration, amended to identify individually-named defendants said to be liable for the costs, they will each have the opportunity to say that they did or did not agree to pay Mr. Laumae, or to say that under the retainer contract he did not specify the basis of his costs, or that his costs should be taxed on a certain basis (whether on a party-and-party basis or on the basis of his normal rates or on some other basis). If there is an application to substitute only Jack Kalmet and Kalkot Kaltatak as defendants, and then a representative order sought, those types of issues will be properly addressed at the time. It was apparent in the course of submissions that Jack Kalmet and Kalkot Kaltatak do not themselves accept that only they have the responsibility to pay the costs of Mr. Laumae. However they themselves are prepared to commit others to be liable for, and to expose



others to, be vulnerable to enforcement processes to recover the fees they each think are appropriate.

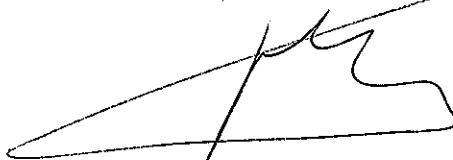
Conclusion

21. For those reasons the appeal is allowed and the consent orders of 27th April 2015 are set aside. The proceeding is remitted to the Supreme Court to give Mr. Laumae the opportunity to consider how, if at all, he wishes to restructure the proceeding by applying to change the names of the defendants. If he makes no application to the Supreme Court in a timely manner (say within 45 days) the Supreme Court will no doubt relist the matter for a further conference with a view to dismissing it. Given that the proceeding is presently not competent because it is not against a legal entity as required by rule 3.1 of the Civil Procedure Rules, that would not preclude Mr. Laumae from separately proceeding with the claim for his costs against the appropriate individual or individuals who, he says, are liable for them.

22. As the appeal was necessary to protect the members of Family Kalmet who do not accept that Mr. Laumae's fees are all reasonable, the costs of the appeal of Andrew Kalpoilep should be paid by Mr. Laumae. They are fixed in the sum of VT30,000.

DATED at Port Vila, this 23rd day of July, 2015

BY THE COURT



Hon. V. LUNABEK
Chief Justice.

