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

Civil Appeal Case No. 22 of 2015

BETWEEN: OUTRIGGER LIMITED
Appellant

AND: ORIGIN ENERGY LIMITED
Respondent

Coram: ***Hon. Vincent Lunabek, Chief Justice***
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop
Hon. Justice David Chetwynd

Hearing : ***14 July 2015***

Judgment : ***23 July 2015***

Counsel: ***Dane Thornburgh for the Appellant***
Nigel Morrison for the Respondent

JUDGMENT

Introduction

1. This appeal by leave is the result of the failure of the appellant Outrigger Ltd to comply with the case management directions of the Supreme Court under the Civil Procedure Rules 2002 (CPR).

2. It is regrettable that it should be necessary to restate that the Supreme Court must give effect to the overriding objective of dealing with cases justly, and as efficiently and effectively as practicable. Its case management and conference processes mean that the parties (and their legal representatives) must comply with case management directions, and that failure to do so exposes the parties to the risk of a statement of claim or a defence being struck out, or a

claim dismissed. The case management role means that it is not for the parties to decide when and how they will progress a claim. The CPR are intended to have regard to the interests of all litigants and to the responsibility of the Court in the interests of the whole community to ensure a just, speedy and effective resolution of disputes. It is necessary to refer only to the detailed provisions of the Rules 1.2, 1.3, and 1.4 of the CPR to support those comments.

3. Rule 1.5 makes it clear that the parties to a proceeding (and their legal representatives) must help the Court to act in accordance with the overriding objective. This appeal is to be allowed in its very particular circumstances. They are not likely to reoccur. They do not reflect any suggestion that the primary Judge did not properly case manage the claim. To the contrary, his orders were sensible and fair. It is only the final step, in the shadow of the consequences of Cyclone Pam, that causes the Court of Appeal to refer the matter back to the primary Judge for further case management. Outrigger is to pay the costs of the appeal, even though it has succeeded on the appeal, because the appeal was caused by its extensive failure to comply with the Supreme Court's directions.

4. It is obviously necessary to explain why that view has been reached. In the course of these reasons, the Court has taken the opportunity to comment on aspects of the parties material to indicate where it may appear not to fully give effect to the intent of Rule 1.5 of the CPR.

Background Facts

5. At relevant times, Outrigger operated the Nasama Resort on premises occupying Lease Title No.12/0913/610, Strata Plan No.0115 (the Resort).

6. Origin Energy (Vanuatu) Ltd sold, supplied and delivered its gas and gas products in Vanuatu. Part of its business was to sell, install, deliver and maintain gas systems in Vanuatu.

7. On about 6th September 2011, Outrigger and Origin Energy apparently contracted for Origin Energy to construct and install gas fittings, a gas tank, and gas lines at the Resort so that the supply of gas to the tank and then to the gas regulators at each unit at the Resort and in each unit would operate safely and effectively for the domestic and commercial use of gas within the Resort, and according to the applicable prescribed safety standards (it is necessary to say 'apparently' because the defence does not clearly say whether it did any, and if so what, work at the Resort).

8. Unfortunately, on 4th April 2012, an explosion of gas occurred in unit 106 at the Resort, causing loss to Outrigger.

9. Outrigger, in Civil Case 247 of 2014, asserted that the explosion and its consequential loss was due to breach of the contract by Origin Energy, or by its breach of section 7(1) of the Health and Safety Act [Cap 195], or by its negligence. In its statement of claim, Outrigger said its loss was simply:

   1) Loss of trade and past income VT 200m
   2) Interest on that loss of trade and past income from 4th April 2012, accruing at the rate of VT 833.000 per month,
   3) Loss of plant and equipment VT 15m,
   4) Loss of business interruption VT 150m,
   5) Loss of opportunity VT 100 m, and
   6) Loss of future income VT 100m.

10. The basis for the extent of the claimed losses is not particularised. It is also, as a matter of first impression, apparent that there is an overlap between claims (1) and (4), and between claims (5) and (6). It is also a fair initial observation that the claims, particularly claim (1), may not properly reflect the actual loss consequent upon the explosion: the loss would be loss of profit (or anticipated profit) on the anticipated business, not simply the loss of revenue. Finally, as the statement of claim was filed more than 2 years after the explosion, there may be issues about whether Outrigger has taken reasonable steps to mitigate its loss from the explosion. However, they are not matters which are presently relevant. Origin Energy filed a defence on 14

August 2014. Its defence is largely uninformative, except that it agrees there was an explosion of gas on 4th April 2012. It says the explosion was the result of the negligence of Outrigger by its servants or agents.

The Conduct of the Action

11. The present appeal arises from the dismissal of Outrigger's claim on 24th June 2015. It is necessary to explain how that came about.

12. The action was listed for conference on 9th October 2014 (uneventfully) and then on 31st October 2014. On that date, Outrigger was given 45 days to file and serve sworn witness statements, and Origin Energy given a further 45 days to file and serve sworn witness statements. That was a sensible first step, as it may have avoided any issues about the adequacy of the statement of claim, and the respondent's statements would have given a clear indication of the real issues. Outrigger did not comply. At the next conference on 2nd February 2015, the time for witness statements was extended by a further 45 days, and a further conference fixed for 4 May 2015. That period was overtaken by Cyclone Pam, but only for the final 6 or so days. It is clear that Outrigger was not going to comply with the order of 2nd February 2014. The conference was put off to 8th May 2015 and then to 19th May 2015 due to Cyclone Pam.

13. On 19th May 2015, Outrigger did not appear by its counsel. Counsel for Origin Energy understandably sought and was granted costs for the further adjournment of that conference. It was adjourned to 24th June 2015. The time for filing and serving Outrigger's witness statements was extended to 16th June 2015, and it was ordered to respond to the request for particulars made by Origin Energy on 6th February 2015 by 6th June 2015. In addition, the Judge conducting the conference ordered:

"In the event the Claimant does not comply with orders 2 and 3 above (the times for it to supply particulars, and to supply witness statements), it is required to show cause on the next return date why its statement of claim ought not be dismissed for want of prosecution."

Those orders were notified to the legal representatives of Outrigger in a timely way by the Court.

14. On 12th June 2015, Outrigger applied under Rule 18.1 of the CPR to extend time to file and serve its evidence until 16th July 2015, that is a further 30 days. The application said it had engaged forensic accountants in Australia, but they had not been given all the required documentation as Outrigger had " been focused primarily on recuperating its business" following the effects of Cyclone Pam, and because a director had had a prolonged absence due to surgery in New Caledonia which impeded the collation of the relevant documents. The supporting affidavit of Paul Vogelsberger (one of the two directors of Outrigger, with Frances Vogelsberger) confirmed those matters. He does not say when the forensic accountants were engaged. The exhibit include an email from the forensic accountants of 25th May 2015 to ask " how things are progressing with this matter" , and an email of 29th May 2015 from the solicitors for Outrigger to SGS Leeder (a different firm from the forensic accountants) referring to their report and asking that it be checked and be supported by the endorsed statement (to be sworn) and be returned by 8th June 2015. SGS Leeder is said to have given an expert report on the gas composition, as supplied by Origin Energy. There is material between Mr Vogelsberger and the solicitors for Outrigger between 19th May 2015 and 5th June 2015 referring to the need for Mr Vogelsberger to have urgent surgery to his left ear, about the availability of surgical dates, and his anticipated return to Vanuatu on 5th June 2015. The email of 5th June 2015 says Outrigger has the intention of engaging the forensic accounts, and that there was a period of 5 weeks or so when the servers and telephone lines of the Resort were damaged, so that Mr Vogelsberger could not send or receive communications for that period.

15. The clear inference is that, up to 5th June 2015, the forensic accountants had not been formally instructed so that they could prepare a report on the amount of the alleged loss and damage from the explosion.

16. On 23rd June 2015, Origin Energy applied for the proceeding to be struck out under Rule 9.10 of the CPR as Outrigger had not complied with earlier orders, and had not taken steps to progress its claim. Its supporting affidavit complains of the failure to

provide particulars of the claim as first requested on 4th August 2014, until they were provided on 27th January 2015, and the refusal to provide further particulars as requested on 6th February 2015. Outrigger had said on 29th May 2015 that it did not consider it necessary to provide further particulars. It also complains of the failure to provide any sworn statements, despite the orders to do so.

17. The request for particulars made on 4th August 2014 is very detailed, and "old-fashioned". That is, it is formulaic and as comprehensive as it could possibly be. Depending on the real issues, it requests information which in a number of respects may have been unnecessary. The defence filed on 14th August 2014, also appears to be "old-fashioned" to use a kind word. It is hard to see how it is intended to assist in refining the issues. The denials include that Origin Energy is incorporated in Vanuatu, although that fact is positively asserted in its solicitors' correspondence! There is a denial of the contract. Strictly speaking, unless it is the case that Origin Energy carried out no work at the Resort from about September 2011, it should not at the trial be permitted to assert facts different from those pleaded by Outrigger about the terms of any contract as it has not asserted any contract with different terms. As noted the only substantive pleading is in para 25 of the defence, asserting the admitted explosion was the fault of the Outrigger by its employers because Outrigger failed to respond quickly and properly to a reported gas leak. The defence denies the alleged losses. That is very understandable. They are not particularised. The request for particulars relating to the issue of damages is entirely understandable. Outrigger's response that the request is not a proper one is wrong and disingenuous. It should have been in a position to, and should have, provided proper particulars of its losses.

18. So the primary judge, on 24th June 2015, was facing

1) The adjourned conference, in the light of his remarks of 19th May 2015 set out above,

2) The application of Outrigger for a further extension of time to file witness statements, and

3) The application of Origin Energy to strike out the statement of claim and dismiss the action.

19. Counsel for Outrigger did not attend the conference on 24th June 2015. His absence was not at the time explained. Counsel for Origin Energy pressed for the statement of claim to be struck out.

20. The primary Judge acceded to that application, and struck out the statement of claim and dismissed the proceeding with costs under Rule 9.10 of the CPR. His Lordship, after noting the unexplained absence of counsel for Outrigger, gave 3 reasons for doing so:

1) He accepted the reasons of counsel for Origin Energy in support of the strike out application,

2) He would refuse the application of Outrigger for an extension of time, even if Counsel for Outrigger had been present and made submissions, because Outrigger had had more than ample time to file its evidence, and his Lordship did not regard Cyclone Pam as an adequate reason for not complying with previous directions or for any further extension of time, and

3) Outrigger had not paid the costs of VT 10.000 ordered to be paid on 19th May 2015, so it could not be expected to pay any larger sum if a further extension of time were granted.

Consideration

21. The affidavits before the Court on behalf of Outrigger show that the VT 10.000 was paid on 1st July 2015. They explain the absence of Counsel for Outrigger at the conference on 19th May 2015 as he was in Australia for medical treatment. More importantly, they explain why Counsel for Outrigger did not attend the conference on 24th June 2015. His office was aware of the date of the conference, and entered it in the electronic diary system. That system was prone to failure and it did fail. The office checked the published weekly list of hearings at the Supreme Court Registry, but for the week starting 22nd June 2014 unfortunately the list of hearings before the primary Judge did not appear. There was no telephone inquiry made on 24th June 2014 about whether the counsel had overlooked the conference.

22. The proposed grounds of appeal are somewhat repetitive, but in essence are that the primary Judge:

a) Wrongly proceeded on the basis that counsel for Outrigger was present at the conference on 19th May 2015 when the further and restricted extension of time was granted, and when the costs order was made, when in fact counsel was not present on that occasion.

b) Failed to give proper weight to the impact of Cyclone Pam, which happened on 13th March 2015 (39 days after the conference directions of 2nd February 2015), and which disrupted the Supreme Court's processes and litigants' processes (significantly those of Outrigger as the affidavit of Mr Volgelberger shows), leading to the conference of 4th May 2015 being vacated and relisted on 19th May 2015 without reference to Outrigger's counsel.

c) Proceeded with the conference on 24th June 2015 when Outrigger's counsel was not present.

d) Entertained the strike out motion on 24th June 2015, although the 3 clear days notice required by Rule 7.3 (2), of the CPR had not been given as it was served only at about 11am on 23rd June 2015,

e) Took into account the failure to pay the costs ordered on 19th May 2015, when Origin Energy had not written requesting payment of those costs, and it was not a matter raised by Origin Energy on its strike out application,

f) Failed to consider the evidence of Mr Vogelberger about the impact of Cyclone Pam on Outrigger and about his need for medical treatment overseas,

g) Failed to stand over the conference of 24th June 2015 for a short time to enquire why the counsel for Outrigger had not attended; and

h) To the extent that the primary Judge took into account an alleged failure to provide proper particulars of the claim, he should not have done so as there was a dispute about whether further particulars were required.

23. Several of those grounds of appeal are readily disposed of.

24. Ground (a) has no merit: it is accepted that Outrigger was promptly informed by the Supreme Court of the Orders made on 19 May even though its counsel was not present at the conference that day.

25. Grounds (b), and (f) are based upon a somewhat semantic analysis of part of the reasons. It is not made out that the primary Judge did not appreciate the contents of the affidavits relied on by Outrigger, including about the effects of Cyclone Pam on its communications or the assembly of its records or about the illness of Mr Volgelsberger.

26. Grounds (c), (d) and (g) are addressed below.

27. Ground (h) is unimportant. The primary Judge did not take into account the alleged failure to provide particulars.

28. There is no evidence about what was done, if anything, about assembling the sworn statements of evidence by Outrigger either in the period up until the commencement of the claim, or from that time until Cyclone Pam, except the reference to the SGF Leeder Report.

29. In our view, the error in the particular matter was to proceed on the basis of Origin Energy's strike out application of 23rd June 2015 on 24th June 2015 when Rule 9.10 of the CPR required 3 days notice of that application to be given. That would have given Counsel for Outrigger the opportunity to have notice of a further hearing date and to attend. Counsel for Origin Energy accepted that that error required the appeal to be allowed. He also submitted that it would have been open to the Supreme Court to refuse the application for an extension of time and to strike out the statement of claim on its own motion without the further three days' notice. However, he accepted that the primary judge did not do that.

30. It is unfortunate that counsel for Outrigger, for the understandable reasons provided, did not attend the hearing on 24th June 2015. This Court does not adopt the observation of the primary Judge that nothing could have been said by counsel for Outrigger at that hearing which might have changed the conclusion that the Court would not, and should not, grant an extension of time to Outrigger to file its statements of evidence.

31. In the course of hearing this appeal, it was asserted by counsel for Outrigger that-

    1) Prior to Cyclone Pam, there had been considerable work done to progress the filing and service of its witness statements including expert reports, and

2) The SGF Leeder Report, which apparently had been provided to Outrigger in draft, could not be filed and served, verified by a sworn statement because its author refused to sign a sworn statement.

32. The Outrigger evidence in support of its extension of time application was clearly confined to the period since Cyclone Pam. It explained, in an acceptable way, why little had been done during that period. But as noted above, the main delays by Outrigger, and its failure to comply with the orders of the Court, related to the period from October 2014 to 12 March 2015. In the absence of other evidence, it was reasonable for the primary Judge to conclude that little had been done to try and comply with those orders and indeed little had been done to assemble material for the claim between the explosion and the start of proceedings. However, as the preceding paragraph notes, there was information that emerged in the cause of submissions which, if established by affidavit, would clearly be relevant to whether Outrigger should be given a further limited period to file its sworn evidence. It is equally likely that counsel for Outrigger on 24th June 2015 would have made the same points. It is hard to understand why that evidence had not already been adduced. But if, as now appears, that was a decision of its legal counsel which is sought to be corrected, it would be appropriate in the interests of justice to Outrigger to allow that to occur. It should not suffer by an error of judgment by its counsel.

33. In those confined and particular circumstances, we consider the appeal should be allowed. The orders of the primary judge made on 24th June 2014 are set aside. The matter is remitted to the primary judge to resume the management of the proceeding, including the two outstanding interlocutory applications.

34. We consider having regard to its delay to date, that Outrigger should pay VT 60.000 on account of costs of the appeal as a condition to it being entitled to maintain its claim. We so order and if it does not do so within 45 days the proceeding will stand dismissed.

35. Obviously, in any event, Outrigger will have to produce the outcome of the extensive preparatory work its counsel referred to very promptly, assuming the primary Judge allows it further time to do so.

Conclusion

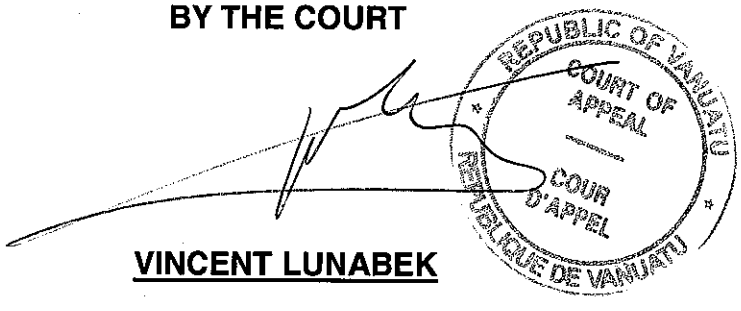
36. Finally, we refer to our introductory observations. This matter, as managed by the primary Judge, emphasises that parties may no longer adopt a serial process (pleadings, particulars, discovery, inspection, other interlocutory processes, statements, evidentiary documents) in the preparation of cases. The primary Judge rightly took the view that witness statements at an early stage would probably obviate the need, or much need, for particulars and would identify the relevant documents relied on by the parties.

37. Hence any separate application for discovery would be very confined. And the statements would enable the Court and the parties to identify what is really an issue between them (not easily discerned from the pleadings) so as to focus the relevant evidence and submissions for the hearing.

38. It is important, to achieve the overriding objective of the CPR, that the orders made by the Court in management conferences are therefore complied with, and the consequences of non-compliance may well be- as they would have been here but for the very particular circumstances - the striking out of the pleading of the defaulting party.

DATED at Port Vila this 23rd day of July 2015

BY THE COURT



VINCENT LUNABEK

Chief Justice