

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

**Civil Appeal
Case No. 20/99 CoA/CIVA**

BETWEEN: TIFFANY THORNBURGH

Appellant

AND: BANK SOUTH PACIFIC (VANUATU) LIMITED

Respondent

Coram: *Hon. Chief Justice V. Lunabek
Hon. Justice J. von Doussa
Hon. Justice R. Asher
Hon. Justice D. Aru
Hon Justice G. Andrée Wiltens
Hon. Justice V. M. Trief*

Counsel: *Mr. J. Malcolm for the Appellant
Mr. G. Blake for the Respondent*

Date of Hearing: *8th May 2020*

Date of Judgment: *15th May 2020*

JUDGMENT

Introduction

1. This is an appeal against that part of a judgment of the Court below which awarded indemnity costs in favour of the respondent.

Background

2. Around 6 December 2013, Mr Dane Thornburgh of Thornburgh Lawyers and his former wife Mrs Tiffany Thornburgh purchased a Toyota Prado motor vehicle from Asco Motors. The financing was made through a loan facility obtained by Thornburgh Lawyers from Westpac Bank now taken over by the respondent, Bank South Pacific (Vanuatu) Limited. In 2015 Thornburgh Lawyers sought additional financial assistance from the bank which was secured by a charge over the Prado.
3. The loan went into default and on 8 April 2019 the bank served a demand notice on Thornburgh Lawyers. Mr Thornburgh in the name of both himself and Mrs Thornburgh responded by filing proceedings alleging fraud against the bank claiming that it had altered the registration book by changing the registration of the motor vehicle to Thornburgh



Lawyers. The main relief sought was for a declaration that the owner of the Prado was Mrs Thornburgh. Other relief sought in the interim period prior to trial was for the defendant to be restrained from claiming ownership or recovering or selling the motor vehicle.

4. The bank in response filed a defence basically denying the claim and cross claimed for orders that the Prado be delivered up to the bank and that the bank be empowered to sell it.
5. Around 27 November 2019, Mrs Thornburgh says that she became aware of the proceedings and thereupon immediately discontinued her claim against the bank by filing a notice of discontinuance. The parties then exchanged correspondence with Mr Malcolm assisting Mrs Thornburgh to try and settle the cross claim.
6. The bank offered not to claim costs against Mrs Thornburgh on the discontinuance of her claim against the bank provided that she cooperated by delivering up possession of the Prado to it. The offer was to remain open until 29 November 2019.
7. The vehicle was not delivered up, but the parties through their lawyers continued to correspond. On 10 December 2019 Mr Blake on behalf of the bank by letter informed Mr Malcolm that an application by the bank seeking orders on the cross claim was listed for hearing in the Supreme Court on 16 December 2019 and that directions had been given for the bank to file evidence in support by 10 December 2019. The bank had filed evidence as directed and copies of the evidence were enclosed with Mr Blake's letter.
8. The parties through their lawyers reached an agreement that the cross claim would be settled on terms of a consent order to be handed up to the judge when the matter came on for hearing. To that end Mr Blake drew up and delivered to Mr Malcolm a consent order for Mrs Thornburgh's signature.
9. On Friday, 13 December 2019 Mr Malcolm signed the proposed order on behalf of Mrs Thornburgh and returned it to Mr Blake. Mr Malcolm then departed for New Zealand to attend to a pressing personal issue. He assumed that the consent order would be signed on behalf of the bank and the matter would conclude with the consent order being endorsed by the court when the matter came on for hearing.
10. On Sunday, 15 December 2019 Mrs Thornburgh contacted Mr Blake direct by email saying that she knew Mr Malcolm was in New Zealand. She expressed concern that the terms of the proposed consent order did not say that the bank would not pursue her further for any debt owed by Mr Thornburgh and she wanted something in writing to that effect.
11. Mr Blake considered that Mrs Thornburgh's email indicated that she no longer consented to an order in terms of the consent order. He tried without success to contact Mr Malcolm.



12. The matter was called on for hearing in the Supreme Court on 17th October at 2019. Mr Blake's instructions from the bank were that they wished to press on with the application to recover the Prado before Christmas. The vehicle had still not been returned by Mrs Thornburgh. Mr Blake informed the court that there had been a proposed settlement by consent order but that had fallen through. He proceeded to obtain the order for possession and the costs order now under appeal.

Judgment under Appeal

13. Judgment was entered by formal orders in the following terms:-

"UPON HEARING Gary Blake counsel for the defendant and upon considering the cross claim filed the sworn statements of Elizabeth David and Aileen Leodoro and noting the failure of the claimants to file any evidence and the discontinuance of Tiffany Thornburgh's claims it is hereby ordered as follows :

1. *That judgment be entered for the defendant on its cross claim filed in the proceedings.*
2. *That the claimants or anyone purporting to claim through them or otherwise being in possession of the Toyota Prado reg. 9726 ("the Prado"), forthwith deliver up possession of the Prado to the defendant or anyone acting on the defendant's behalf including the Court sheriff enforcing these orders.*
3. *That the defendant be empowered to sell the Prado by such means as it thinks fit and to apply the proceeds in reduction of the indebtedness of Thornburgh lawyers to the defendant.*
4. *The claimants pay the defendant's costs of these proceedings on an indemnity basis.*

Dated at Port Vila this 17 day of December 2109.

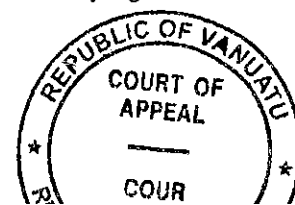
BY ORDER OF THE COURT

....."

(emphasis added)

Appeal

14. The appeal relates to order (4). The notice of Appeal argues that there should have been no order for costs, or alternatively that the application should have been adjourned for seven days to await the return of Mr Malcolm, with at most an order for costs thrown away that day.
15. Mr Malcolm submitted in oral argument that the appellant all along was unaware of the claim in her name and when she became aware she discontinued her claim against the bank and made attempts to settle the cross claim. Upon reaching agreement, the bank prepared consent orders which he signed and returned to the bank to enable judgment to be entered in his absence.



16. It was submitted that the appellant's email to Mr Blake was not a withdrawal of consent and the matter should have been adjourned for a week until Mr Malcolm returned or alternatively the bank should have obtained an order for possession but without any order for costs.
17. Mr Malcolm finally submitted that given the appellant's lack of knowledge and her attempts to resolve the matter, she should only pay fixed costs or no costs at all for providing the motor vehicle to the respondent.
18. Mr Blake in his response submitted that the indemnity costs order should be upheld. He submitted that the primary judge correctly exercised his discretion given the history of the proceedings and the appellant's failure to return the Prado before the hearing on 17 December 2019 when judgment was entered. The proposed consent order had fallen through because of the appellant's email which left the bank with no alternative other than to proceed with its application for possession. It was submitted that in the circumstances rule 15.5(5) of the Civil Procedure Rules applied and an award of indemnity costs was warranted.
19. In relation to the appeal, it was submitted that the respondent is also entitled to indemnity costs on the basis that although the motor vehicle was eventually recovered, the appellant was in control of its whereabouts up to the date of judgment.

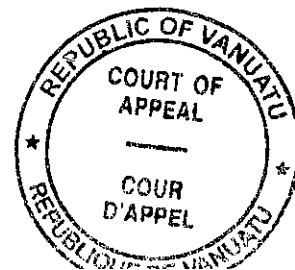
Discussion

20. The starting point for consideration is rule 15.5 (5) which states:-

"(5) The court may also order a party's costs be paid on an indemnity basis if:

- (a) the other party deliberately or without good cause prolonged the proceeding; or*
- (b) the other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or*
- (c) the other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or*
- (d) in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate. "*

21. Although Mr Blake submitted that the above elements of r.15.5(5) had been made out, it is not clear that they were specifically considered by the primary judge in the uncontested application before him.




22. It is quite obvious from the papers that the appellant was not aware of the proceedings filed by Mr Thornburgh in her name as they had separated. When the matter was brought to her attention she reacted immediately by discontinuing her claim.
23. Mr Malcolm, though not on the court record, assisted the appellant to try to settle the matter. The matter was by that time already listed for hearing. It cannot be said that she was guilty of prolonging the proceedings: paragraph (a). Nor can it be said that she brought proceedings in circumstances that amounted to an abuse of process: paragraph (b). In the time between the appellant becoming aware of the proceedings and the hearing on 17 December 2019 her conduct may have added slightly to the respondent's overall costs (paragraph (c), but that increase would not warrant an order for indemnity costs against the appellant for the whole of the cross claim proceedings. In all the circumstances (paragraph (d), on the facts made known to this court, we do not consider that there was a basis under r.15.5(5) for an order for indemnity costs.
24. However, we cannot agree with Mr Malcolm's submission that there should be no order for costs. The respondent's firm instructions to Mr Blake to proceed to obtain an order for possession are understandable as the appellant had not cooperated in the return of the Prado. We agree that the respondent could not proceed on the consent order after the appellant had required an additional condition that had not been agreed. The evidence to support the order for possession had been prepared and filed before Mr Malcolm had signed the consent order on behalf of the appellant. In these circumstances we consider the respondent was entitled to costs, but on the standard basis.

Result

25. The appeal is allowed. The order made in the Supreme Court for indemnity costs is set aside. In lieu thereof it is ordered that the appellant pay the costs of the cross claim in the Supreme Court on the standard basis.
26. In this Court the appellant has succeeded in part only and in the circumstances we order that each party bear their own costs of the appeal.

DATED at Port Vila this 15th day of May, 2020

BY THE COURT


.....
**Hon. Chief Justice
Vincent Lunabek**

