

(Civil Jurisdiction)

BETWEEN : BRYAN WHITFORD

(First Plaintiff)

AND : DONNY MACLEOD

(Second Plaintiff)

AND : ROBERT MURRAY BOHN

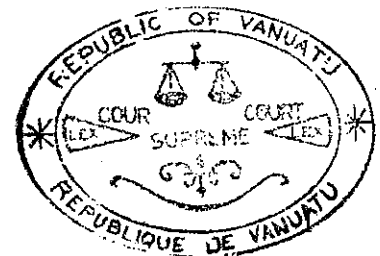
(Defendant)

Ruling on Costs

The Court must decide the issue of costs as between the parties pursuant to my judgment of 22 April 2001. I have expressed concern at the mounting costs in this case at various stages. I have heard argument over approximately one and half hours as to who should bear those inter-party costs. It would become wholly disproportionate to set another hearing date for any further amplification of the arguments before me.

The defendant claims party and party costs to 3rd November 2000 (the date of the letter of offer to settle) and thereafter indemnity costs. They say the principal claim should never have been brought and at best the only viable claim was well within the Magistrates Court jurisdiction.

The defendant says an open offer to settle was made on 3rd November and rejected. That offer was more generous than the eventual result. The fact no money was paid in, as events turned out, was irrelevant, nothing was awarded.



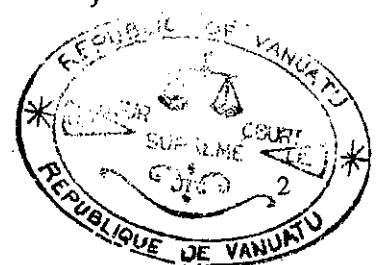
The defendant disputed the suggestion that he failed to abide by the mediation, and even if he did that would have been a simple action for the plaintiffs to bring to enforce it.

At the start of the trial the defendant suggested hearing the issue concerning whether or not the plaintiffs were employees, and if no contract of employment was found then there would be no reason to proceed with the counterclaim. The plaintiffs successfully opposed this.

The plaintiffs resisted indemnity costs. They conceded costs on a party and party basis on their claim and asked for party and party costs on the failed counterclaim. They said it was the defendant's failure to keep his promise to abide by the mediation which provoked the proceedings. The offer of 3rd November was not accompanied by any payment into court. A substantial part of the preparation and trial itself was directed towards the allegations in the counterclaim, particularly concerning the competence of the plaintiffs and the control of the operation. They averred the counterclaim was more tactical than real in its nature. There was a point at the interlocutory stage when the defendant said the case was settled, the plaintiffs denied this.

I find the plaintiffs did make a claim which failed. In my judgement I found there was no evidence to support the principal claim. There was an offer to settle by the defendant which if accepted would have been enforceable. It was not taken up by the plaintiffs. The initial question of whether or not there was a contract of service could have reasonably been decided as a first point before proceeding further.

The only realistic claim of the plaintiffs was within the magistrates court jurisdiction. That is where this action should have commenced, if indeed it should have commenced at all. It would then have been upto the defendant to decide whether or not to counterclaim and if so whether to limit it to that jurisdiction. It cannot be said with certainty a counterclaim would have been lodged, nor that it would not have been limited to that jurisdiction.



On the other hand the defendants did plead a counterclaim and maintained it to the end. That counterclaim did involve much preparatory work and a substantial portion of the trial.

It must be stated that this case was crying out for and was amenable to early settlement. I cannot say who is responsible for the failure of the mediation award. The plaintiffs were offered and rejected solutions to this dispute which would have been substantially to their benefit, particularly as far as legal costs are concerned. The defendant claimed a total of Vt2,317,000 in costs.

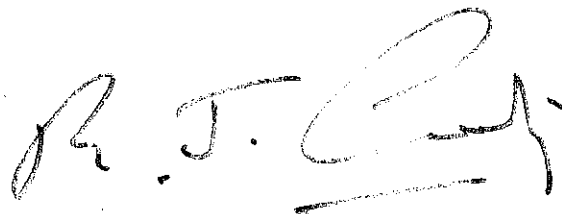
I exercise discretion. Any ruling I give will necessarily appear to give greater weight to some factors and less to others. However, I consider it right to make such a ruling and make it now to prevent a further spiraling of costs.

Although both claim and counterclaim have failed. I find the plaintiffs should pay the defendants assessed costs of Vt. 750,000. I make no other order as to costs.

- I further inform counsel for the plaintiffs under Order 65 rule 8
- that this Court calls upon him to shew cause why the inter partes assessed costs and the costs as between himself and his client should not be paid personally by him. I will hear submissions on that matter on 7 June at 9.00am.

Dated at Port Vila this 27th day of April 2001.

BY THE COURT



R. J. COVENTRY

Judge

