IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU CIVIL CASE NO.84 OF 1999

(CIVIL JURISDICTION)

BETWEEN: SUSAN JAYNE EBBAGE

Plaintiff

AND: RAYMOND JOSEPH EBBAGE as Personal representative of the Estate of Paul Gerrard Ebbage (deceased)

Defendant

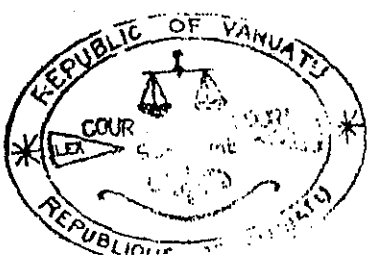
Ruling Re Costs

To the layman, even one reasonably knowledgeable in legal matters, the subject of this Ruling might appear to be. It does, in fact, raise important questions of law concerning the liability for the costs of an action, questions which are especially important to countries like Vanuatu.

The plaintiff and defendant reside in Australia. (The defendant is in fact the personal representative of the estate of a deceased). The action was brought and fought in Vanuatu. Both parties had Australian solicitors who engaged Vanuatu solicitors. The latter appeared upon the record. Application for temporary admission in Vanuatu for this case was made and refused. The action itself was dismissed and the defendant awarded costs.

The plaintiff argues that no costs are in fact payable. She says the Vanuatu solicitors were the agents of the Australian solicitors; the Australian solicitor was the client of the Vanuatu Solicitor. Costs are "awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation". There was never any contractual links between the defendant and the Vanuatu solicitors. The latter's costs are therefore not recoverable.

Further, the plaintiff argued, the Australian solicitors are not qualified as solicitors in Vanuatu. They were therefore the lay client of the Vanuatu solicitors. The work the Australian solicitors carried out would have been legal work if done by a practitioner with a right of practice in Vanuatu. But



they had no such right. Therefore that money cannot be recovered under a costs order.

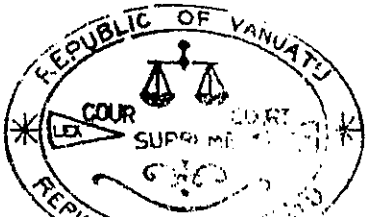
The plaintiff continued that this was not a case where the solicitor was qualified but uncertificated, and monies actually paid before taxation to that solicitor could be recovered in a costs order. The defendant's solicitor was simply unqualified (in Vanuàtu) and, paid or not, the costs were irrecoverable. TNT Bulk Ships Limited v. Hopkins (1989) 98 FLR p 352 was cited in support of this proposition. It made no difference that the beneficiary of the costs order paid money to the non-qualified solicitor (lay person) who used some of it to pay a properly qualified lawyer. Nothing prevented the estate from instructing solicitors qualified in Vanuatu. This would not only have reduced fees considerably but any works carried out by the Australian solicitor at the behest of the Vanuatu solicitor would have been recoverable subject to reasonableness.

The plaintiff further argued that the court should not stop at the face of the record, which shewed only the Vanuatu solicitors name. The admitted reality was that most of the work had been done by the "unqualified" Australian solicitor.

The plaintiff urged that it would be contrary to public policy to allow the costs of a solicitor not qualified to practice in the jurisdiction. Further, it would mean cases were being prepared and run by persons who were not subject to the disciplinary control of the court where the action was taking place, namely Vanuatu.

The defendant responded that the costs were recoverable, subject to taxation. The starting point was commercial reality. There are other actions in Australia and New Mexico and California in the United States of America concerning the estate. It made common and commercial sense that the estate should engage Australian solicitors who would, as the need arose, engage solicitors qualified and admitted or certificated in the jurisdictions concerned as and when litigation was taking place. This is precisely what has occurred in this case.

The Australian solicitors have a long running historical involvement with the estate and easy access to the client. It would be convenient and make economic sense for them to do most of the preparatory work. The



engagement of Vanuatu solicitors to conduct that part of the litigious affairs of the estate which were taking place here was required and proper.

The defendant has lodged an affidavit showing that the estate has paid all its own costs relating to this action to its Australian solicitors. Whether enforceable or not as a debt between a solicitor and his own client, it has in fact been paid, and should be recoverable under a costs order.

The defendant further argued that the Vanuatu solicitors are the ones on the face of the record here. The bill of costs shows that "they carried out directly a substantial part of the litigious work. In that situation it is not open on taxation to inquire into whether in fact the solicitors on the record had the conduct of the litigation. As far as other parties to the litigation are concerned, absent express admission to the contrary, it is to be taken on taxation that the solicitors on the record had the conduct of the litigation", Kearney J. in Elders Trustee and Executor v. Herbert [1996] 132 FLR24 at page 37.

The defendant concluded that costs are not to penalise the unsuccessful party, but "to indemnify the successful party in regards to expense to which he has been put by reason of legal proceedings", (Latoudis v. Kasey (1990) 170 CLR534, as per Mc Hugh J. at page 566. They were the arguments of the defendant.

Vanuatu has its own Legal Practitioners Act Cap 119. Section 12 states
" Subject to section 13 any person, not being a legal practitioner or being a legal practitioner but suspended from practice and whether or not such person has at any time before the coming into operation of this Act practised as a legal practitioner in Vanuatu who holds himself out to be entitled to practice or practises as a legal practitioner in Vanuatu shall be guilty of an offence and liable on conviction to imprisonment for 2 years or to a fine of VT40,000 or to both such fine and imprisonment."

However, the Act does not go on to deal with the recovery of costs by an unqualified lawyer from his client, nor the recovery of such costs by a litigant under a costs order.

It is pertinent to note that long ago it was made the subject of statutory provision that an uncertificated solicitor could not recover his costs and his disbursements from his client (Attorneys and Solicitors Act 37 Geo 3 c 90,

section 30). The client himself could recover them from the opposite party (Cockburn C.J at page 336, In the matter of Fowler v. The Monmouthshire Railway and Canal Company [1879] IV QBD p.334) stated, "then came [the Attorneys and Solicitors] Act 37 and 38 Vict 68 which in section 12 introduces new words enacting that no costs or disbursements relating to anything done by an uncertificated solicitor shall be recoverable "by any person or persons whomsoever". The effect of these words is to extend the operation of the former Acts... to prevent, not merely the solicitor himself, but also his client, from recovering such costs".

The position in England and Wales is governed by the Solicitors Act 1974. Section 25(1) states "No costs in respect of anything done by an unqualified person acting as a solicitor shall be recoverable by him, or by any other person, in any action suit or matter." Subsection 2, however, states that "Nothing in subsection (1) shall prevent the recovery of money paid or to be paid by a solicitor on behalf of a client, in respect of anything done by the solicitor while acting for the client without holding a practising certificate, if that money would have been recoverable if he had held such a certificate when so acting." Subsection (3) deals with sections of another Act and the effect of section 25.

In the Northern Territory of Australia, the jurisdiction in which both the TNT and the Elders cases were heard, the equivalent provision to part of section 25 (1) is section 22(4) Legal Practitioners Act 1974. There are similar provisions in other jurisdictions.

These and their attendant provisions create specific regimes of regulation and control backed up by rules and practice directions applicable to the jurisdictions concerned. Whilst the initial basic principles are clear, the provisions themselves differ from jurisdiction to jurisdiction. The decisions in reported cases must have been reached on this basis.

There is no such regime in Vanuatu. Further, no statute of general application has been cited by the parties.

A distinction is made in the cases and the later statutory provisions between the lawyer who is unqualified and the one who is qualified but does not hold an appropriate certificate. There is a also difference in the costs consequences between the two.

In this case the Australian solicitors are unqualified to practice in Vanuatu. They were refused admission on the basis that the local profession was fully competent to handle the case; it was not one that required special expertise not found in the jurisdiction, (see the acting Chief Justice's ruling in this case Legal Practitioner Case 2 of 2000) The refusal was not based on questions of "qualification" as such. Indeed, when admissions occur of Australian solicitors in Vanuatu, generally nothing is required in the way of examination or testing beyond what has already been acquired for practice in Australia. The two jurisdictions are similar in many respects. The position would probably be very different were there to be an application from a non-common law jurisdiction.

It might therefore be argued, that for the Australian solicitors in this case 'admission' here, is more akin to certification. It is, of course, not available as of right even when all the formalities have been observed.

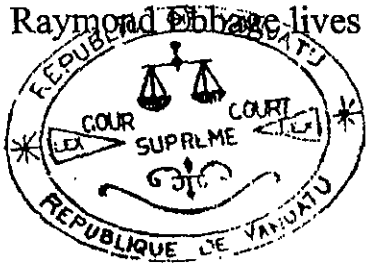
Another consideration is this. Whilst the basic principles are clear, the regimes in other like jurisdictions are not applicable here. They have been developed according to the requirements of those jurisdictions. They have little if any persuasive value.

In Vanuatu there is a criminal sanction for unqualified practice. Legislation and case law are silent on the recoverability of costs between a solicitor and his own client and under a costs order. England, in the eighteenth and nineteenth centuries, passed a succession of Acts to make such costs irrecoverable in both cases. In the absence of such legislation, it can be argued the costs are recoverable.

A reply might be made that any contract in which one party is acting unlawfully should not be enforced, but then that is a matter between the state and that party and should not affect the innocent party under a costs order, certainly if it involves the recovery of money he has paid out bona fide.

Before giving a ruling it is necessary to set out the facts upon which it is made. I find that :-

1. Raymond Joseph Ebbage as personal representative of Paul Gerard Ebbage (deceased) has engaged Australian Solicitors to look after the legal affairs of the estate and is the defendant. Raymond Ebbage lives in Australia.



2. The plaintiff commenced her action against the defendant in Vanuatu.

3. The Australian solicitors appointed Vanuatu solicitors to be their agent in this jurisdiction. The Australian solicitors were the 'clients' of the Vanuatu solicitors.

4. The Australian solicitors are not qualified to practice in Vanuatu. Application for admission was made and refused.

5. The Australian solicitors carried out most of the preparatory work. They have a lengthy history of involvement with the estate.

6. The Vanuatu solicitors were the solicitors on the record here.

7. The Vanuatu solicitors actually conducted the interlocutory and principal hearings.

8. The defendant was awarded costs.

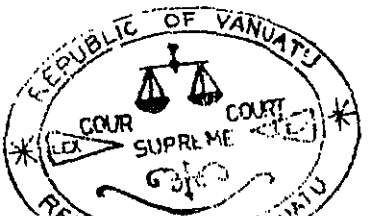
9. The defendant has paid his Australian solicitor all the costs for this case. The Australian solicitor has paid the Vanuatu solicitor's costs from that payment by the defendant.

10. The Australian solicitors had carriage of this matter (see later).

11. There was no privity of contract between the defendant and the Vanuatu solicitors.

In my opinion the only Vanuatu statute or case law directly bearing upon the issues in this case is section 12 Legal Practitioners Act. That prohibits, on criminal sanction, an unqualified person from practising. I find the cases and statutes from overseas do not assist, other than in the most basic principles. Provisions in other jurisdictions have been developed according to the requirements and wishes of those jurisdictions.

I find that whilst it might have been necessary in the nineteenth century to pass legislation to prevent an unqualified lawyer from suing for his fees, nowadays it is an accepted fact he cannot do so. The debt is there, it is



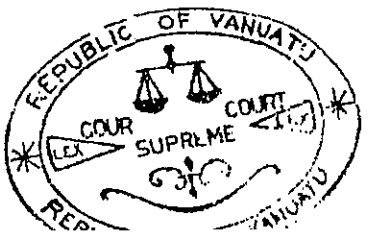
unenforceable. It would have benefited everyone had specific provision been made in the Legal Practitioners Act.

It is similarly an accepted fact throughout the common law world that such fees are not recoverable under a costs order. However, as the debt exists, but is unenforceable, it would follow that any monies actually paid before taxation can be recovered under a costs order.

The early cases (In re Jones 1869, Equity case p 63, In re Hope [1872] LR 7 Ch App 766, Fowler-v- The Monmouthshire Railway and Canal Company, ibid, In re Pomeroy and Tanner (1897) 1 Ch D p. 284 and In re Sweeting 1898 ChD p 268) treated unqualified and uncertificated as the same, although those cases involved practice by uncertificated lawyers. The TNT Bulkships case distinguished between the two by making the costs of an unqualified solicitor completely irrecoverable under a costs order, whereas they were recoverable if the solicitor was qualified but uncertificated and the client had paid before taxation. This is a distinction which appears in that case to stem from s 22 (4) Legal Practioners Act of the Northern Territory of Australia.

There are wider public policy considerations.
The overseas solicitor is not subject to the disciplinary and other controls of the Vanuatu Courts. The position must be considered of the overseas solicitor who does virtually everything whilst the 'on record' Vanuatu solicitor is little more than a puppet. Further, what redress is open if the overseas solicitor were to suborn a witness, completely unknown to the Vanuatu solicitor ? Would it mean an overseas solicitor, as long as he obtained payment from the client in advance, could virtually practice in Vanuatu without being admitted, and without control ? Is there not a risk that an overseas client, perhaps even in cahoots with his solicitor, might forbear to pay his own solicitor until the costs outcome was known, and then hastily do so before taxation if there was a favourable costs order. (It is not suggested for a moment that this is what is happening in this case).

Cannot the Courts of Vanuatu expect that the "carriage" of any case before them, or at the very least the majority of the relevant work be carried out by a solicitor qualified in the jurisdiction and subject to their control?



Should the Courts look no further then the face of the record? Will not any bill of costs presented for taxation necessarily disclose where and by whom the work has been carried out. In those circumstances is it not artificial to stop at the face of the record?

In Hurley –v- Law Council, at first instance (Civil Case 98 of 1999) Von Doussa J. stated "Barristers and Solicitors who have the right to pursue their profession for reward hold a privileged position of trust in the community. By legislation they are given a monopoly to perform legal work (see part IV of the Act). The object and purpose of requiring and prescribing qualifications (see Section 11) and of requiring the formal registration and admission of people as barristers and solicitors is to ensure that only people suitable to be entrusted with that privilege by reason of their character and skills act as barristers and solicitors. The provisions in Section 5 and Part III relating to education, control and discipline have the same purpose".

Further, at page 13, he cited the words of Garden J. at page 442 in Ex parte Meagher (1919) 19 NSW 433.

"By s10 of the Charter of Justice, this Court is only entitled to admit to practice as solicitors men (sic) who are "fit and proper persons". By the words fit and proper persons "it means persons who have been proved to the satisfaction of the Court not only to be possessed of the requisite knowledge of law, but above all to be possessed of a moral integrity and rectitude of character, so that they may safely be accredited by the Court to the public as fit, without enquiry, to be entrusted by that public with their most intimate and confidential affairs without fear that the trust will be abused".

Those are guiding principles. Whilst there is legislation creating the monopoly, and providing for education, control and discipline, it is to the Court and through the Court to the public, that the good standing of barristers and solicitors is maintained.

Accordingly in my judgment an unqualified lawyer may not sue for his fees. Neither should those fees be recoverable by his 'client' under a costs order against another party. Although this has required legislation elsewhere I am satisfied from broad policy it must follow from s12 Legal Practitioners Act.

It is at this point that the legislation provisions in various jurisdictions bring about a divergency. The unqualified lawyer and his client under a costs order

cannot recover. The client of the qualified but uncertificated lawyer can, or can only do so for monies paid before taxation.

Whilst there is some weight in the argument that an Australian or other common law solicitor is in effect qualified but unadmitted in Vanuatu I cannot accept the argument. The admission process and considerations are more than certification. In these circumstances the Australian solicitors are and should be treated as unqualified in Vanuatu.

The carriage of this matter was in their hands. The majority of the work was done by them. The Court will first look at the face of the record. However, the bill of taxation cannot be ignored. If that shews it was not the solicitor on the record who had carriage of the matter, then the Court will find accordingly. That is what I have done in this case.

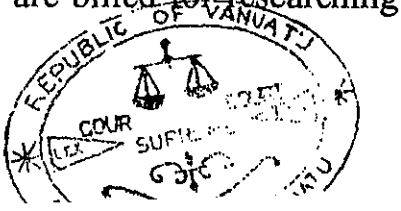
Therefore the Australian solicitors were practising within the jurisdiction of Vanuatu. They were not qualified. Accordingly their costs cannot be allowed.

It was accepted that the Vanuatu solicitors were the agents of the Australian solicitors, or the latter were the clients of the former. In those circumstances there is no privity of contract between the Vanuatu solicitors and the beneficiary of the costs order. Accordingly their costs cannot be allowed.

What abt S+C apay ?

The solicitors who had the carriage of this litigation before the Vanuatu Court were not subject to its discipline and control. It matters not whether the costs were paid or not before taxation.

Where does commercial reality lie? This case illustrates the point highlighted in Hudson and Sugden v Holding Redlich (Appeal Case 5 of 2000) of the importance of setting, at the outset, clear and detailed terms of engagement between the lawyer and his or her client. Had the defendant instructed the Vanuatu solicitors directly to deal with the Vanuatu matters and those solicitors had carriage thereof, the problem would not have arisen. The Vanuatu solicitors could have utilised the Australian solicitors to carry out work which conveniently and economically could be done by them, requested their assessments when the litigation in Vanuatu affected that in other jurisdictions and used them as conduits. Charges for that work would have been recoverable as disbursements under the costs order. (It is pertinent to note that several hours of senior counsel's fees are billed for researching



Vanuatu Law. The plaintiff in the taxation challenges them saying, in effect, a Vanuatu lawyer would not have had to acquaint himself with the basic laws and could have formulated advice in a much shorter time. I make no ruling on the specific challenge in this case. However, where litigation in Vanuatu is conducted for the most part from overseas there is always the danger of such wasted time and costs).

In this way the solicitors on record would be the ones with the carriage of the matter and subject to the Courts discipline and control. I must therefore find costs are not recoverable under the costs Order of 18 July 2000 in respect of the work carried out by the Vanuatu or Australian Solicitors.

DATED AT PORT VILA this 25th Day of June 2001.

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R.J.COVENTRY
Judge