

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

*(Civil Jurisdiction)*

**Civil Case No. 109 of 2007**

**BETWEEN: CLAUDINE REGONA**  
First Claimant

**AND: ROSE VANUATU  
LIMITED**  
Second Claimant

**AND: THE DIRECTOR OF  
LAND RECORDS**  
Defendant

*Coram: Justice N. R. Dawson*

*Counsel: Mr. Sugden for Claimants  
Mr. Ngwele for Defendant*

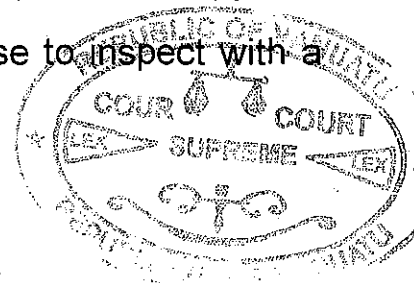
*Date of Hearing: 23<sup>rd</sup> October 2008*

*Date of Decision: 10<sup>th</sup> November 2008*

## **JUDGMENT**

### **Background**

1. This is a taxation hearing matter concerning the costs charged by counsel for the successful Claimants in a decision of Justice Bulu dated 18<sup>th</sup> September 2007. A hearing of this matter commenced at 9 am on 21<sup>st</sup> October 2008. At that hearing an offer was made by Counsel for the Claimants to Counsel for the Defendant to visit his office for checking of all of the Claimants' Counsel's time records and disbursements that the Defendant's Counsel chose to inspect with a



view to trying to resolve as many of the outstanding issues prior to the hearing before the Court. The hearing then recommenced at 9:30 am on 23<sup>rd</sup> October 2008 in order to resolve the outstanding issues.

2. On the 23<sup>rd</sup> October 2008 the Court was advised by Counsel that the inspection had taken place and had confirmed all of the time records of the Claimants' Counsel and a majority of the disbursements, although some issues still remained.

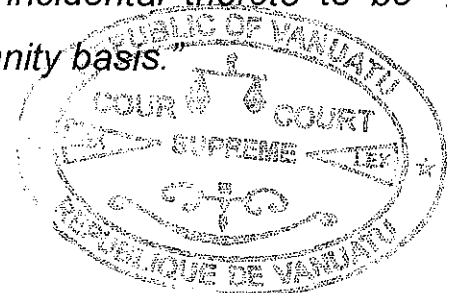
### **Issues**

3. The Court was advised that the following issues remained for resolution:
  - a) Whether the Claimants are entitled to claim for costs in the absence of a cost agreement or retainer with Counsel.
  - b) Whether the quantum of time recorded and claimed by the Claimant's Counsel was reasonable.
  - c) The reasonableness of some of the disbursements claimed.
  - d) Whether the hourly rate charged by Counsel for the Claimants was excessive.

### **Costs Claimed**

4. Counsel for the Claimants filed a Judicial Review Claim on 6<sup>th</sup> July 2007. The matter was heard on 12<sup>th</sup> September 2007 and judgment in favour of the Claimants issued on 18<sup>th</sup> September 2007. In his judgment in paragraph 22 Justice Bulu recorded:

*"(b) Costs of this proceeding and incidental thereto to be borne by the defendant on an indemnity basis."*

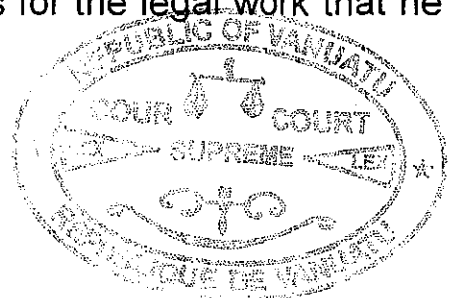


Counsel for the Claimants then sent to Counsel for the Defendant a bill of costs set on an indemnity basis totaling at VT 1,058,927 (including disbursements of VT61,868).

5. Counsel for the Claimants have prepared an additional bill of costs amounting to VT 658,929 for costs since 19<sup>th</sup> September 2007 for his negotiations with the Defendant's Counsel in relation to the taxation of his original bill of costs and attending Court on the 21<sup>st</sup> October, 2008. At the end of this hearing he advised that he wished to charge for a further 322 minutes for his time taken during the course of the taxation hearing today. That amounts to a further VT 210,938. Counsel for the Claimants is therefore claiming a total sum of VT 1,928,794.

### **Submissions**

6. With respect to the issue in paragraph 3 a) herein Counsel for the Defendant submits that there is an onus upon the Claimants to show that a retainer or cost agreement existed between the Claimants and their Counsel. Without such a retainer it is submitted that the taxation should process on the basis of there being no cost arrangement in place. The Claimants have filed a sworn statement to the effect that the claimants have had legal work done for them on previous occasions by the same Counsel and that the method of charging by Counsel was the same as on previous occasions and that Counsel was acting on instructions of the Claimants for the legal work that he did in respect of this matter.

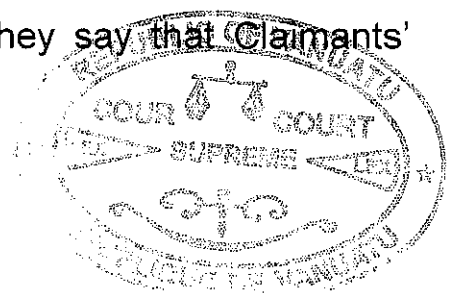


7. With respect to the issue in paragraph 3 b) herein, the Defendant has made a number of submissions to the effect that Counsel for the Claimants spent more time acting on the case for his clients than was reasonably necessary. These are as follows:-

(i) It is submitted that much of the Claimants' Counsel's time was spent on work that predates the filing of the actual Judicial Review Claim or have been incurred after the Order was made by the Court. The matter in dispute between the parties at trial was whether the Claimants were entitled to register a leasehold interest in the land. In order to preserve the Claimant's right prior to a decision being made by this Court, the Claimants' Counsel took steps to attempt to register a caution against the land with a view to preserving the status quo until the Court ultimately made its finding. It is the work prior to the Court proceedings that the Defendant disputes. It is the Defendant's submission that they should be responsible for costs relating to the proceedings only, that is, from the preparation of the filing of the Judicial Review Claim through to the finding of the Court.

It is submitted for the Claimant's that the caution related to the matters raised in the Judicial Review Claim and as the parties were not able to resolve the matter then it was necessary to continue with the claim through the Court in order to obtain a resolution.

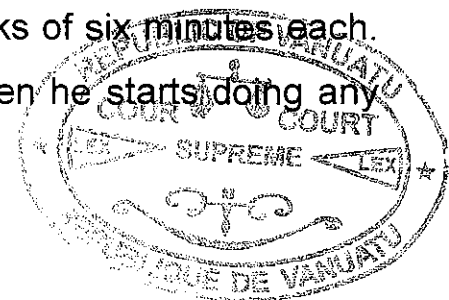
(ii) The Defendant submits that the time spent by Counsel for the Claimants preparing for the Judicial Review Hearing was a repeat of what he had done before. They say that Claimants'



Counsel by correspondence had already made his client's position clear.

The Claimants' Counsel submits that the time he spent on preparation prior to the Judicial Review Claim was necessary and was a reasonable period of time to spend. He submits that it involved further legal research and also involved him writing written submissions prior to the Court hearing. Claimants' Counsel submits that he doubts any other counsel in this jurisdiction could have done the work in the same time. He also submits that if he was unduly careful then that still came within his retainer with his client.

(iii) It is submitted that the time taken by Claimants' Counsel for the preparation of his bill of costs amounting to 127 minutes is overwhelming and unreasonable. The Defendant submits that had Claimants Counsel kept proper time records rather than notes of time spent by him scattered throughout the file, the time spent on his bill of costs would have been significantly shorter. It also submits that Claimants' Counsel included items not yet completed relating to attendances for the taxation of the bill and for obtaining payment of the bill. Claimants' Counsel submits that on the 18<sup>th</sup> September 2007 he got the decision of the Court and it was then necessary for him to draw up his bill of costs. In his view he had not been made a realistic offer for his costs from the Defendant. He assumed that taxation would be required and prepared his bill of costs accordingly. He also submitted that he does not use time sheets which record periods of time in blocks of six minutes each. He makes his own file notes of exactly when he starts doing any



work on the file and exactly when he finishes. He submits that it was necessary for him is to go back through the file to inform himself and the other side of exactly what times he had recorded in acting for his client.

(iv) The Defendant submits that the time charged by Claimants' Counsel of 45 minutes to receive and to read an email, to provide an opinion, and to write a further email is excessive.

It was submitted for the Claimants that it was not manifestly unreasonable, that he had to read five pages of an email, to provide an opinion, to prepare his own email in response, and received a later email by return. It is submitted that there are three separate lots of attendances that amounted to that 45 minutes.

(v) It was submitted for the Defendant that an item in the bill of costs amounting to 158 minutes being recorded for writing a letter to the defendant is an excessive amount of time for a lawyer of the Claimants' Counsel's experience, particularly when the letter was essentially giving similar advice covered in the email and referred to in paragraph 7 (iv) above.

It was submitted by Claimants' Counsel that it was a four page letter of advice that went far beyond the advice given in the earlier email. It was also submitted that the earlier email was to the client whereas the letter in dispute here was to the Director of Land Records setting out the Claimants' case as persuasively as he could. He submitted that it was a very important letter which covered a wide amount of ground and called upon his long experience of the law to write it.

8. With respect to the issue raised in paragraph 3(c) above the Defendant submits that some of disbursements that are claimed by Claimants' Counsel should be covered by his hourly rate and as part of the overhead costs of running a practice and should not have been charged as a disbursement. In particular the Defendant points to the disbursements of called "*stationery*".

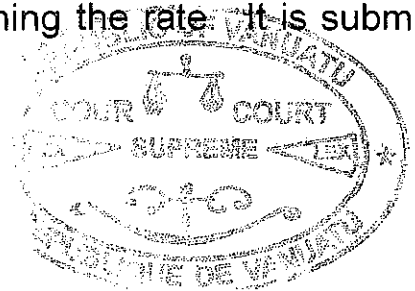
The Claimants submit that there is no rule that counsel must use to charge his client. He submits that he had an agreement with his client as to how they would pay and they agreed to pay him accordingly. This agreement meant that he charged for "*stationery*" as a disbursement, which included the typing time of his secretary and the paper used. His time was charged for his attendances with the "*stationery*" component removed as an overhead. He submits that stationery as a disbursement has been allowed for in this jurisdiction for some years and his clients had full knowledge of his method of costing and accepted it.

9. Concerning the issue in paragraph 3 (d) above, the Defendant submits that the standard rate for the charging of counsel's time in Vanuatu is VT 20,000 per hour. It is submitted that this is the amount set in Hurley v. Law Council of the Republic of Vanuatu [2000] VUCA 10; CA 12/99 (10<sup>th</sup> May 2000). The Defendant submits that since there is only a oral retainer between the Claimants and their counsel then it is incumbent upon Claimants to provide proof that the Claimants accepted the charge out rate of VT 25,000 per hour from counsel. It is also submitted by the Defendant that VT 20,000 per



hour is still a reasonable hourly rate and if should be increased than it is incumbent upon the Claimants' Counsel to prove why.

10. The Defendant also submits that in the first paragraph of page 4 of the Hurley decision said *"Needless to say we remain entirely unpersuaded that "substantial justice" to adopt the words of Article 47 (1) of the Constitution, requires that the losing party in a civil action reimburses the solicitor of the winning party the whole of his costs. Such a submission is plainly wrong. It ignores and minimises the equally important constitutional precept of equality before the law and access to the Courts."*
11. In an overall submission the Defendant submits that the length of time for the claim period of only 2 to 3 months from when the claim was filed to when judgment was delivered means that costs of this amount should not be awarded for up to 3 months work. Defendant submits this will be a matter for the Court's discretion.
12. The Claimants have argued that there is no such thing as a prescribed rate for solicitor-client charge out rates. It is submitted that it is a contract between the client and counsel and there is nothing in any legal authority to say otherwise. It is also submitted by the Claimant that Counsel's charge out rate was no more than other lawyers in this jurisdiction of similar experience. It is submitted that if a figure was genuinely agreed between counsel and client then it should be allowed unless the client was misguided in this agreement or the counsel acted improperly concerning the rate. It is submitted



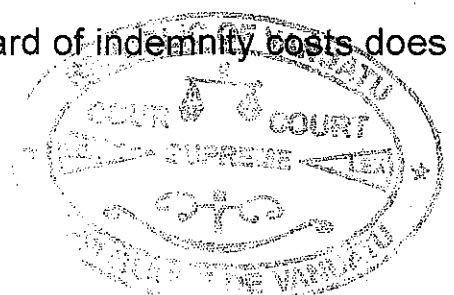


that it is the same rate as that charged to all his clients and there is nothing to suggest that he has charged over the odds or that his clients have agreed to pay over the odds. Finally it is submitted that is for the Defendant to show unreasonableness in the charge out rate.

13. The Claimant submits that in Hurley's case it was an award of a party to party costs, not indemnity costs awarded as in this case. It is submitted that there is nothing in Hurley that is relevant. It is submitted that the Judge in this case in his judgment clearly regarded the case as "*plain as the nose on your face*" and the Claimants should not have been put to any costs. It is for that reason that the Judge awarded indemnity costs.
14. The Claimants submits that all items listed in its bill of costs are fair and although it may seem a lot, there are occasions when such a cause of action can result in higher costs.

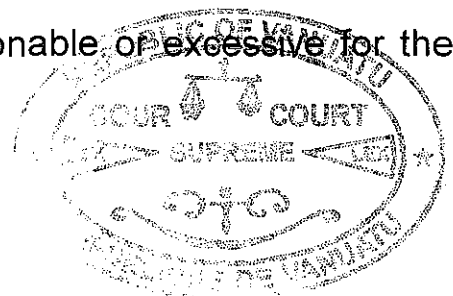
### Reasons

15. It must first be acknowledged that in Hurley's case the Court of Appeal was dealing with a taxation of costs where costs had been awarded on a party to party basis. In this case Justice Bulu in his judgment made it quite clear that costs were awarded on an indemnity basis and he must have come to this conclusion after considering the merits of the case along with any other considerations he might have had. An award of indemnity costs does



not mean that Hurley's case is irrelevant to this matter. On page two of Hurley the Court of Appeal said *"it is appropriate that we should accept the counsels invitation to proffer some guidance to the Courts and practitioners"*. The principles outlined by the Court of Appeal in Hurley are apposite to this case provided the distinction between party to party costs and indemnity costs are kept in mind.

16. On page 4 of Hurley the Court of Appeal said *"Just as the Court must determine what hours are reasonable for the preparation and conduct of the case in deciding what is a proper award of costs, the Court must also determine what is a proper rate. This is not a question of interfering with contractual arrangements between a client and their own lawyer nor is it merely a question of market forces. It is what is a proper and reasonable contribution. The Court must weigh fairness to both parties, fundamental concepts of equal access to justice and a myriad of competing social and economic interests."*
17. The award by this Court of indemnity costs to the Claimants cannot be taken to mean that a Claimant's Counsel can charge in any manner he chooses provided his client has agreed to that method of charging. It has to be accepted that not all lawyers charge in the same manner or at the same hourly rate. However there must be an element of proportion in the manner and rate charged by the successful party's counsel. The losing party should not be required to pay for prolixity, where it exists, of the successful party's counsel or to pay at an hourly rate which is unreasonable or excessive for the work required.



### Costs Agreement [3(a)]

18. It is quite apparent from the Sworn Statements from a Claimant that a cost agreement existed albeit in oral form. Claimants' Counsel clearly charged that client and family for other matters on exactly the same basis as charged in this matter. The Sworn Statements made it clear that the method of charging was acceptable to the client. Nor is there any requirement that such a retainer be in written form and adequate proof has been provided that such a retainer existed.

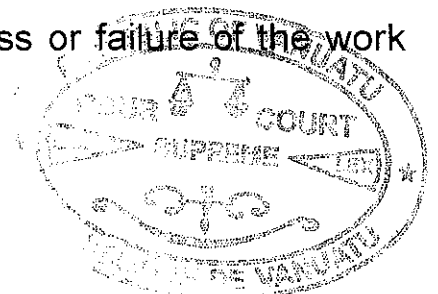
### Quantum of Time [3 (b)]

19. Following inspection of the Claimant's Counsel's file it was accepted by the Defendant's counsel that times claimed by the Claimant's counsel were all recorded on the file and no claim has been made for time not recorded on the file.
20. The claim by the Defendant that times spent by Claimants' Counsel on matters preceeding the Judicial Review Claim should not be paid for by the Defendant, cannot be accepted. Justice Bulu in his decision recorded that "*Costs of this proceeding and incidental thereto will be paid by the Defendant on an indemnity basis.*" It was anticipated that costs beyond the actual hearing of the Judicial Review Claim were included. The time spent by the Claimants' Counsel with respect to registering a caution on the title was an attendance properly made by him for the purpose of preserving his client's position until there was a judgment of the Court. In the case of Societe Anonyme Pecheries Ostendaises v. Merchants Marine



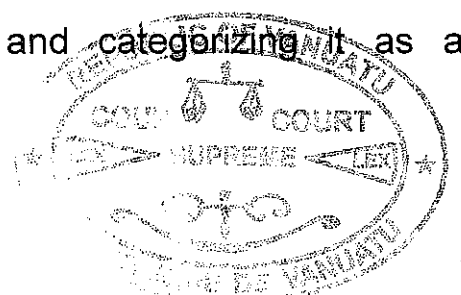
Insurance Company [1928] 1 KB 750 Lord Hanworth MR, noted on page 756 *“that the expense proved useful in the action, and have been incurred at a time when it was right and proper that the outlay should be made in order to safeguard the position of the intending litigant. It appears to me, therefore, that there is power in the Master to allow costs incurred before the action brought, and that if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs, which he probably will exercise in favour of a party incurring them, because they have been made use of during the cause of the action.”*

21. The time spent by Claimants' Counsel in respect to the caution was a necessary attendance and is properly payable by the Defendant under the award of costs made by Justice Bulu.
  
22. The time spent by the Claimants' Counsel preparing and appearing for Judicial Review Claim hearing, the time taken by him to prepare his bill of costs, to receive, peruse and reply to emails, and the time taken by him to write a letter referred to in paragraph 7(ii) to (v) are all matters of proportion. There are a number of factors which must be taken into account when assessing the proper level of costs charged when an award has been made on an indemnity basis. Counsel for the successful litigant should be paid on a proper and reasonable basis, taking into account these factors. The factors include matters such as the type of action before the Court, its complexity, the level of urgency for the client, the level of experience required to deal with such an action expeditiously, and the success or failure of the work



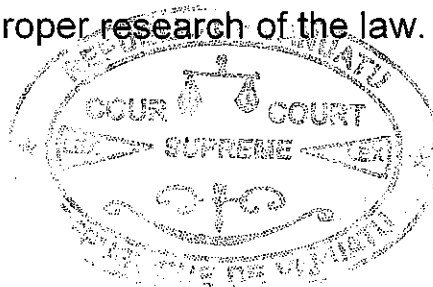
undertaken by counsel. It is proper that successful counsel should be fairly rewarded but an award of indemnity costs cannot be regarded as an open cheque book or an amount might be claimed by the successful litigant that is excessive and unfair in all of circumstances. A successful party cannot be indemnified for prolixity, repetition or pedantry by its counsel on the basis of an award of indemnity costs.

23. It is argued by the Defendant that Hurley's case is a record of an hourly rate of VT 20,000 per hour being established for experienced counsel in 1999 when that case was before the Supreme Court. The submission is that 8 years later the same hourly rate should apply to counsel of similar experience. That submission is difficult to maintain. Hourly rates are not static and will adjust over time to keep pace with inflation and other costs. The increase from VT 20,000 per hour to VT 25,000 per hour for experience counsel from 1999 to 2007 some eight years later may well be justified.
24. No evidence was produced that in 1999 items such as "stationery" were at that time charged as a disbursement. Whilst an increase in hourly rate in VT 20,000 per hour to VT 25,000 per hour may be justifiable, it is not justifiable to also deduct from the 2007 hourly rate an overhead that was covered by the charge out rate in 1999 and call it a disbursement in 2007. That is not comparing "like with like". Counsel in this case is effectively claiming an increase in an hourly rate over the period of eight years. However the net return to him on the hourly rate in 2007 is effectively increased by the deduction of an overhead from the 1999 hourly rate and categorizing it as a



disbursement in 2007. It could be unfair and unjustifiable to claim an increase in the hourly rate over eight years and also to change an integral overhead cost in 1999 to a disbursement in 2007 at the same time. In setting an appropriate figure for, payment to the Claimant's Counsel, this must be taken into account.

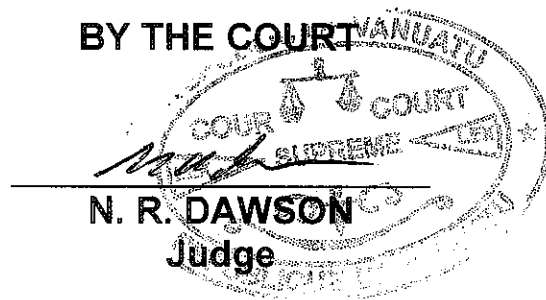
25. What must also be taken into account is that at the end of the Claimant's Counsel's first bill of costs is an allowance of two and half hours for the future attendances relating to the taxation of the bill and a further allowance estimated at one hour for obtaining payment of the bill. The second and third bill of costs for negotiations and taxation of the first bill of costs do not take into account the three and a half hours already allowed for in the first bill of costs.
26. There is little to be gained by going through the Claimant's Counsel's bill of costs, item by item and making additions or deletions to every attendance. What is necessary is for the Court to take into account the factors mentioned in paragraph 22 above and set an appropriate figure that is proportionate to all those factors. It is not a strict mathematical exercise.
27. There is to a degree a level of prolixity and repetition in this matter by Claimants' Counsel which could best be described as an over assiduity to his task. However, it is often a fine line to draw between a careful approach and over statement of the case. Counsel should not be criticized for thoroughness and proper research of the law.



28. After taking into account the factors mentioned in paragraph 22 herein, the submissions of Counsel for the Defendant and the Claimants, from a perusal of Claimants' Counsels file and the Court file relating to this matter, it is the view of this Court that the appropriate total sum of costs payable to the Claimant for the indemnity award of Justice Bulu is the sum of VT 850,000 (including disbursements) and the sum of VT 200,000 for taxation of the costs (including disbursements) amounting to a total sum of VT1,050,000.

**Dated at Port Vila, this 10<sup>th</sup> day of November, 2008**

**BY THE COURT**



**N. R. DAWSON**  
**Judge**