IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 28 of 2014

BETWEEN: LOA DAMENA and GEORGE NAKOU trading as PACIFIC LAWYERS
Claimants

AND: RIVAREC LIMITED
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. G. Nakou (deceased) for the Claimants*
Mr. K. Loughman for the Defendant

Date of Judgment: *23 June 2017*

JUDGMENT

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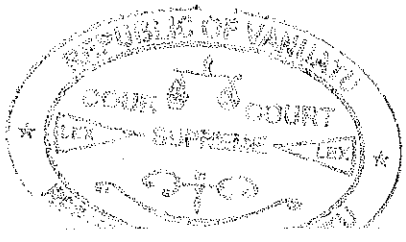
1. In this application the claimants seek to set aside a default judgment entered against them on 10 February 2015 on a counterclaim filed by the defendant company on 18 December 2014.

2. The default judgment after reciting the circumstances of the claimant's default, is in the following terms:

> *"1. Judgment in the sum of VT1,205,375 (being default rental payment for 32 months being the period May 2012 to December 2014) be entered against the defendant to the counterclaim.*
>
> *2. The defendant to counterclaim shall also pay any accrued outstanding rent after December 2014;*
>
> *3. The defendant to counterclaim shall vacate forthwith the premises at Pacific Building in Port Vila currently used by the defendants as office of Pacific Lawyers.*
>
> *4. The defendants to the counterclaim shall pay the counterclaimant's costs."*

3. Prior to the grant of the default judgment the claimants who were represented throughout by the second-named claimant, were ordered by the Court after hearing counsels on 25 November 2014: "*... to respond and file an amended reply and defence to counterclaim by 14 December 2014*" (extended by order dated 18 December 2014, when the counterclaim was actually filed, till 30 January 2015). Plainly the claimants did not comply with the Rules or with the Court's orders.



4. This, however, was not the first court proceedings between the parties. There were prior proceedings issued in the Magistrate's Court in Civil Case No. 36 of 2013 wherein the defendant company obtained a summary judgment on 1st August 2013 against the claimants for unpaid rental arrears in the total sum of VT750,768.

5. The claimants lodged an appeal against the Magistrate's Court judgment in the Supreme Court in Civil Appeal Case No. 08 of 2013 and whilst the appeal was still pending a hearing and determination, the claimants quite improperly in my view, issued the present claim on 19 February 2014. On 25 April 2014 the summary judgment in the defendant company's favour was set aside in its entirety after the defendant company consented to the claimant's appeal being allowed.

6. In their claim the claimants who are both legal practitioners under the name and style of: "*Pacific Lawyers*" operating out of office premises leased from the defendant company aver, that the commercial lease entered into with the defendant company was not executed by a director and was therefore null and unenforceable. The claimants also say that the title of the property over which their lease was executed and granted had been surrendered and new leasehold titles were issued in its place with a change of name of the registered proprietor from Société Rivarec Limited to Rivarec Limited.

7. Before dealing with the claimant's substantive application and for completeness, I record the further applications filed by the claimants after receiving the defendant company's defence and counterclaim namely:

   (1) A Third Party Notice dated 22 May 2015 directed to BBV Limited and Loic Bernier;

   (2) An Application to Add Third Parties of the same date and referring to the above-mentioned Third Party Notice; and

   (3) An Application to Re-open Proceedings pursuant to Rule 12.10.

8. The main reason for the first two applications as deposed by the second named claimant was to put pressure on the named third parties to pay his outstanding legal fees for work done for the first named third party (BBV Limited) in a large subdivision it had in Luganville, Santo and/or force the defendant company to have their lease executed by a director(s) of the defendant company. It is not deposed however that the defendant company (Rivarec Limited) owes the claimants any legal fees and therefore the application is strictly, not a proper counterclaim in terms of Rule 4.8 which must be directed against the claimant.

9. Even if a counterclaim against a third party might be brought under Rule 4.9 such a counterclaim must assert liability on the part of the claimant and the relief sought against the third party (ie. the payment of outstanding legal fees incurred)

must be: "*... related to or connected with the original subject matter of the proceeding*". In this latter regard there is not the slightest doubt in my mind that the claim for unpaid legal fees is unrelated to and unconnected with the substantive claim which challenges the legality of the lease between the claimant and defendant company. It is also unrelated to the defendant's counterclaim which seeks payment of arrears of rent and vacant possession. The applications in (1) and (2) above must fail.

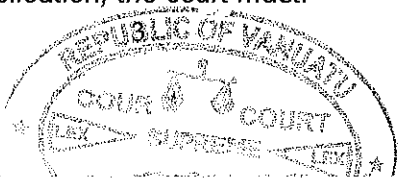
10. In my view the mere commonality of Loic Bernier to Rivarec Ltd. and BBV Ltd. is an insufficient reason or basis to make either him or BBV Limited, a proper defendant to the present proceedings or a proper third party to the claimants defence to the counterclaim.

11. Furthermore the Third Party Notice was misconceived and improperly filed in so far as Rule 3.7(3) requires the claimants to "*... obtain permission of the Court (leave of the Court)*" if the notice is served after the defence has been filed. No such leave was either sought or granted. Furthermore, in the present case whilst the claimants were strictly defendants in the counterclaim, default judgment had already been entered against them by the time their third party notice and joinder applications were filed.

12. As for re-opening the proceedings, Rule 12.10 which comes under Part 12 of the Civil Procedure Rules headed: "TRIAL" and which applies "*... after trial but before judgment*", has no possible application to the present circumstances where there has been no trial and where a judgment has already been entered albeit by default.

13. Returning to the substantive matter at hand. Rule 9.5 of the Civil Procedure Rules 2002 provides:

> *(1) A defendant against whom judgment has been signed under this Part may apply to the court to have the judgment set aside.*
>
> *(2) The application:*
> *(a) may be made at any time; and*
> *(b)* ***must set out the reasons why the defendant did not defend the claim****; and*
> *(c)* ***must give details of the defendant's defence to the claim****; and*
> *(d) must have with it a sworn statement in support of the application; and*
> *(e) must be in Form 14.*
>
> ***(3) The court may set aside the default judgment if it is satisfied that the defendant:***
>
> ***(a) Has shown reasonable cause for not defending the claim; and***
> ***(b) Has an arguable defence, either about his or her liability for the claim or about the amount of the claim.***
>
> (my highlighting)
>
> *(4) At the hearing of the application, the court must:*



(a) *give directions about the filing of the defence and other statements of the case; and*
(b) *make an order about the payment of the costs incurred to date; and*
(c) *consider whether an order for security for costs should be made; and*
(d) *make any other order necessary for the proper progress of the proceeding.*

(5) *These Rules apply to the proceeding as if it were a contested proceeding.*"

14. It is clear from sub-rules (2) and (3) that an applicant to set aside a default judgment must provide reasons explaining why he did not file a defence and must also give details of any defence he has to the claim. Furthermore such an applicant is seeking the exercise of the Court's discretion and bears the burden of satisfying the Court on a balance of probabilities.

15. In conceding there was failure by the claimants and in seeking to explain and excuse the considerable delay in not filing a defence to the counterclaim, the second named claimant refers to the official court recess period between 22 December 2014 and 23 January 2015 and deposes that "*the opening of the courthouse was only in or about January 30, 2015*". I reject the explanation as not showing any reasonable excuse for not filing a defence to the counterclaim.

16. In the first place, the claimants were served with the counterclaim on 18 December 2014 and were ordered to file and serve a defence to the counterclaim by 30 January 2015 which is a week after the designated court recess had ended and the day when the courts were officially opened for 2015. The claimants were given 6 weeks to prepare and file their defence to the counterclaim and did nothing.

17. A further 2 weeks elapsed after 30 January 2015 before default judgment was eventually entered against the claimants on 10 February 2015 and only after a further 3 weeks had passed did the claimants apply to set aside the default judgment. In total, the claimants were inactive for almost 3 months and during that whole time, except for the period between 23 December 2014 and 3 January 2015, the court registry remained "*open and operative*" for normal business including receiving and issuing court documents.

18. As for the second cumulative requirement that the claimants must fulfill, namely, providing details of any defence they have to the counterclaim and in the absence of a draft defence to the counterclaim, the second named claimant deposed:

"*... it was never the intention of the claimant to refuse to make payment (of rent) but the reasons for holding onto the payment or refusing payment was a protest against the agent (the defendant) to refer the tenancy agreement to the directors of the defendant to sign the tenancy*".

and:

"*The tenancy agreement was never been signed by the directors of the defendant until today ...*"

and lastly:

"*... I have also paid already VT1,000,000 to the defendant's lawyers to hold in trust until my claim is determined*".

Implicit in the above extracts is the admission by the Claimants that rent was owed to the defendant and was withheld. In other word the claimant's rent was in arrears. There is no denial of the receipt of the defendant's notices to quit or any challenge to their validity.

19. In short and without saying so, the claimants rely on their substantive claim as being their so-called defence to the counterclaim in so far as it raises the legality and enforceability of the tenancy agreement including the validity of any rental increases. There is no denial however that rent was owed in arrears and had not been fully paid.

20. Having carefully considered the competing submissions and mindful that the claimants bear the onus of satisfying the Court, I can confidently say I prefer and accept the submissions of defence counsel that the rented premises was being managed by Caillard Kaddour, a real estate firm acting as agent for the property owner (defendant company) and with ostensible authority to execute the tenancy agreement on the defendant company's behalf (*see:* **para. 4** of the amended defence).

21. As defence counsel writes:

"*at the time of entering the tenancy agreement and subsequent renewal of same, the said agreement was never an issue until the defendant/counterclaimant commenced proceeding to recover rental arrears*"

and

"*The rental increase was not an issue and the claimants paid the rental increase until about May 2012 when the ceased to pay the rent*".

and lastly:

"*The claimant has at the very outset acknowledged and admitted the rental arrears and has paid part of the arrears* (in the sum of VT1,000,000)".

22. Furthermore Section 46(b) of the Companies Act provides:

"*(b) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged, may be made on behalf of the company in writing signed by any person acting under tis authority express or implied*"

And by subsection (2):

"*a contract made according to this Section shall be effectual in law, and shall bind the company and its successors and all other parties thereto*".

23. In light of the foregoing there is no merit in the claimant's assertion that the written tenancy agreement was invalid and unenforceable. Accordingly, I am also not satisfied that the claimants have raised an "*arguable defence*" to the defendant's counterclaim for rental arrears and for vacant possession.

24. The application to set aside the default judgment is dismissed with costs summarily assessed at VT100,000.

DATED at Port Vila, this 23rd day of June, 2017.

BY THE COURT

D. V. FATIAKI
Judge.