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

Civil
Case No. 22/1261 SC/CIVL
(Temp. Ref # 22/32)

BETWEEN: **BLUE SPRING GROUP LTD. represented by HAN YEQU currently kown as HAND YQ HAN**
Claimant

AND: **PONATOKA DEVELOPMENT COMPANY LTD.**
First Defendant

AND: **PHILIP KALTANGO METO**
Second Defendant

Date: ***20th day of February 2024***

Before: ***Justice W. K. Hastings***

Distribution: ***R Rongo for the Claimant***
V Muluane for the Defendants

DECISION

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1. The second defendant has made two applications. The first is to strike out the claimant's claim. The second is for costs.

2. I will deal with the strike out application first.

The strike-out application

3. Application is made under r. 9.10 of the Civil Procedure Rules (2002) to strike out a claim that Mr Rongo filed on 22 November 2022 on behalf of the claimant. The second defendant is said to be a director of the first defendant. The claimant asserted in the claim that it was "*a legally registered proprietor over sublease title number 12/0822/386 and 12/0822/387.*" The claim concerned incidents in which the defendants allegedly interfered with the ability of guests, staff and vehicles to enter and leave Mele Cascades. The claimant also alleged the defendants encouraged people from Mele and Melemaat Villages to use the facilities causing damage to them, and that the defendants took entrance fees from tourists to which the claimants were entitled. The claimants allege that tours booked through overseas travel agents had to be cancelled as a result of the defendants' actions.

4. Also on 22 November 2022, the claimant applied for restraining orders against the defendants on an ex parte basis. These were granted by the judge on 23 November 2022 on the basis of the evidence before him.

5. On 5 December 2022, the defendants applied to set aside the restraining orders. The same Judge was presented with new evidence by the defendants. The sublease on which the claimant's claim depended had been terminated and a notice to the claimant to vacate was given to the claimant on 10 November 2022. There appeared to have been no separate challenge to the termination of the sublease and no evidence substantiating the claimant's right to remain on the property. This information was not conveyed to the Judge when the ex parte application was made. As a result, the Judge set aside the restraining orders he made on 23 November 2022 and commented that the premise of the claim was no longer true. Indeed, it had never been true. The Judge invited Mr Rongo to consider whether a discontinuance of this proceeding was to be filed.

6. No discontinuance was filed.

7. On 3 February 2023, a different judge directed the parties to file a joint memorandum by 2 February 2023 advising the Court if these proceedings were to continue. The judge stated that if no memorandum was filed by that date, the proceedings "*will be dismissed without further notice to the parties or counsel.*" No further conference date was set as a result.

8. No memorandum was filed. Nor were the proceedings dismissed.

9. On 24 February 2023, the claimant purported to discontinue this proceeding against the first defendant but not the second by filing a notice of discontinuance. The notice of discontinuance was, however, filed by Mr Nalyal as "*Counsel for the Applicant*," not by Mr Rongo. There appears to be no notice of beginning to act filed by Mr Nalyal, and no notice of ceasing to act was filed by Mr Rongo until 15 February 2024. Mr Rongo therefore remained counsel of record for the claimant throughout this proceeding until 15 February 2024.

10. On 16 August 2023, the second defendant made an application to strike out the claim against him, and an application for indemnity costs.

11. It appears two file numbers were assigned to this matter, I am told as a result of the hacking of the government's digital information system which includes the Court system. After making inquiries, there appear not to be two separate physical files, or if there were, they have been consolidated.

12. There does not appear to be any proof of service of either of the present applications on Mr Rongo on this file. A conference was set down for 20 November 2023, but Mr Nalyal was incorrectly served on 7 November 2023 with the notice of conference, so Mr Rongo would not have known to attend. I directed the Minute of 20 November 2023 be served on Mr Rongo. That Minute referred to the two applications, and directed Mr Rongo to file and serve a response to the two applications by 24 November 2023. There is proof on file that Mr Rongo was served with the Minute of 20 November 2023 via email on 21 November 2023 and by personal service on 24 November 2023.

13. No response was filed.

14. The last step taken by Mr Rongo was on 22 November 2022 when he appeared before Justice Harrop seeking restraining orders. His next appearance was excused when Mrs Ferrieux Patterson applied to set aside those restraining orders. It is not clear if Mr Nalyal was acting as Mr Rongo's agent on 24 February 2023 when he filed a notice of discontinuance against the first defendant, or whether there was some confusion about file numbers, one of which he thought he had carriage of. In any event, more than six months have passed since the claimant took any step in these proceedings.

15. Although r.9.10(2)(d) gives the Court a discretion to strike out a proceeding without notice, in this case Mr Rongo must be taken to have known about the strike-out application, and about the application for costs. He did not respond to either.

16. In the circumstances, the application to strike out the proceeding is granted. Out of an abundance of caution, the order striking out the proceeding is made in respect of both defendants.

17. I turn now to the application for costs.

The application for costs

18. The defendants seek a costs order against the claimant on an indemnity basis in the amount of VT807,990, as well as costs of VT30,000 for this costs application. Annexed to the sworn statement of Melissa Charley, an accountant employed by the applicant's law firm, is an itemised bill of costs and disbursements prepared it is said, according to the Deputy Master's format.

19. In the Minute of 20 November 2023, I indicated that "*unless Mr Rongo objects, I will deal with both applications on the papers.*" No objection to deciding this costs application on the papers was received from Mr Rongo. I will therefore proceed to decide this costs application on the papers.

20. Rule 15.5(1) states that costs awarded on a standard basis are "*all costs necessary for the proper conduct of the proceeding and proportionate to the matter involved in the proceeding.*"

21. Rule 15.5(2) states that costs awarded on an indemnity basis are:

> *all costs reasonably incurred and proportionate to the matters involved in the proceeding, having regard to:*
>
> *(a) any costs agreement between the party to whom the costs are payable and the party's lawyer; and*
>
> *(b) charges ordinarily payable by a client to a lawyer for the work.*

22. The applicant in this case relies on rr.15(5)(a) and (b):

> *(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 a misuse of the litigation process;*

23. I accept the applicant's submission that the claimant without good cause prolonged the proceeding by not acting on Justice Harrop's suggestion to discontinue the proceedings on 5 December 2022 because the claim, and the application for ex parte restraining orders, had proceeded on the basis of incorrect or incomplete information. The claimant also prolonged the proceeding by not discontinuing the claim against the second defendant when it discontinued it against the first defendant on 24 February 2023. This caused the second defendant to file a strike out application, taking up more of the second defendant's and the Court's time on a claim that could not have succeeded.

24. I also accept the claimant misused the litigation process by bringing an urgent ex parte application for orders to restrain the defendants, as became apparent, from using their own land. When ex parte orders are sought, counsel need to be aware that they have certain obligations that must be fulfilled before the application is made. This is because an ex parte order is issued in the absence of the party who suffers its consequences: *Green Way Limited v Mutual Construction Limited* [2021] NZHC 1704. The absent party is denied the fundamental rights to know what is alleged and to answer the allegation. Counsel must ensure that they have fulfilled two significant obligations before making such applications on behalf of their client.

25. First, r.7.3 states that an application must be served on each other party unless the matter is so urgent the Court decides it should be dealt with in the absence of the other party. The Court will take into account whether service of the application on the other party would cause undue delay or prejudice to the applicant: *Green Way Limited v Mutual Construction Limited* [2021] NZHC 1704. The default position is that applications should not be made ex parte but if they are, they should only be heard in cases of genuine urgency: *Bates v Lord Hailsham* [1972] 3 All ER 1019 at 1025. If the Court finds there is genuine urgency taking into account undue delay and prejudice, the ex parte order may be issued, but it will have a short return date so that all parties can be heard on whether or not the order should continue: *SCAP Unlimited v Thomson* [1997] VUSC 18.

26. Second, and this is critical in this case, the ex parte application must make full and frank disclosure of all material facts, whether or not they assist the applicant's case: *Wadsworth Norton Solicitors Nominee Co Ltd v Bruns* (1992) 5 PRNZ 481 at 482. A material fact is a fact, the presence or absence of which the Court needs to know when deciding whether or not to grant the application. Material facts include facts that are material to the claim and application, but crucially, they also include facts that are material to any possible defence to the claim and opposition to the application.

27. To satisfy this second obligation, counsel must make reasonable inquiries to ensure the application is accompanied with evidence that both supports the application and any opposition to it. The obligation to make reasonable inquiries was considered by the Court of Appeal of England and Wales in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350:

> *The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.*

28. In this case, the duty of disclosure required counsel to inquire of his client the true nature of their claim to be the "*legally registered proprietor of the sublease.*" It is not enough simply to act on a client's instructions without inquiring if there is a sound basis for those instructions. In this case, counsel would have known the sublease was terminated if he had made reasonable inquiries. Counsel would then have been able to advise his client that the claim as pleaded and the application for restraining orders were unsustainable.

29. Not making reasonable inquiries led to not making full and frank disclosure of a fact that was material to Justice Harrop's consideration of the urgent ex parte application for restraining orders. This amounted to a misuse of the litigation process in terms of r. 15.5(b).

30. The applicant has not submitted that r.15.5(c) applies. That rule states that indemnity costs may be awarded if "*the other party ... without good cause engaged in conduct that resulted in increased costs.*" Had the applicant made that submission, I would have been prepared to hold that conduct resulting in increased costs includes doing nothing.

31. In any event, having decided the claimant prolonged the proceeding without good cause and misused the litigation process, I am prepared to award costs to the applicant on an indemnity basis.

32. This brings me to consider whether a costs order should be made against the claimant's lawyer personally. Rule 1.5 states that the parties to a proceeding (and their lawyers) must help the Court to act in accordance with the overriding objective of enabling courts to deal with cases justly. Implied in that objective is the principle that it is not just to subject a defendant to a proceeding where there is no realistic prospect of success: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [88] – [93]. The parties (and their lawyers) bear a large responsibility for the efficiency of the courts, must bear in mind the case management principles set out in r.1.4, and must apply a common sense approach to the rules: *Municipality of Luganville v Garu* [1999] VUCA 8; *Pooraka v Participation Nominees* [1991] SASC 2692 at [6].

33. The applicant has not sought costs against the claimant's lawyer under r.15.27. However, r.15.26 states that the Court may order that the costs of the whole or a part of a proceeding be paid by a party's lawyer personally if the party brings a proceeding that has no prospect of success or is otherwise lacking in legal merit, and a reasonably competent lawyer would have advised the party not to bring the proceeding.

34. As discussed above, if reasonable inquiries been made by counsel before filing the claim and the urgent ex parte application for restraining orders, those inquiries would have revealed that the sublease had been terminated for non-payment of rent and other breaches of the lease. Neither the claim nor the application for restraining orders had any prospect of success if the claimant had no interest in the sublease. A reasonably competent lawyer would have advised the claimant not to bring the proceeding.

35. This is not a situation in which any particular part of the proceeding has resulted in wasted costs. It is the whole proceeding that incurred unnecessary expense for the defendants. Although it appears Mr Rongo may not have received all the information he needed from his clients, his subsequent inertia seems inexplicable, particularly after Justice Harrop's Minute of 5 December 2022. Any award of costs is in the discretion of the Court. Given his clients appear to be partly responsible for the inaccurate information upon which the claim and application for restraining orders proceeded, there is a risk that Mr Rongo would not be able to fully explain the circumstances in which the claim and the urgent ex parte application for restraining orders were brought without delving into legal professional privilege. I am not therefore minded to make an order that the costs award is to be paid by Mr Rongo personally.

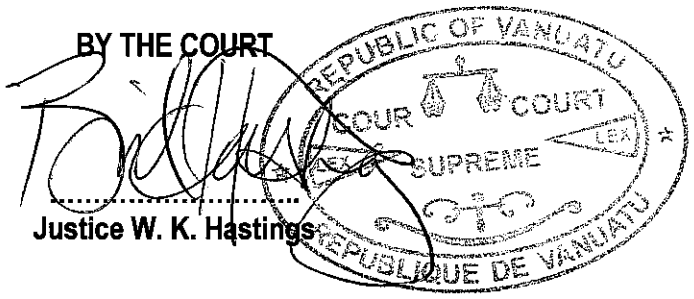
Result

36. The application to strike out the proceeding is granted in respect of both defendants.

37. The application for an award of costs on an indemnity basis is granted, to be taxed by the Master if not agreed.

Dated at Port Vila, this 20th day of February, 2024

BY THE COURT



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Justice W. K. Hastings