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

Civil Case No. 78 of 2010

**BETWEEN: FAMILY KALTEREKIA**
Claimant

**AND: BRETT HARRIS**
Defendant

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

***Counsels:*** ***Mr. C. Leo for the Claimant***
***Mr. D. Thornburgh for the Defendant***

***Date of Ruling:*** *20 October 2011*

# RULING

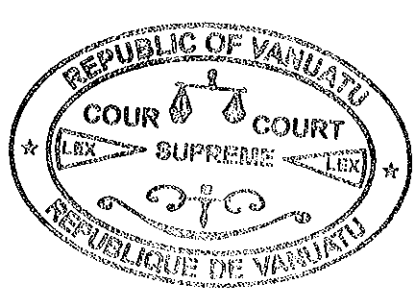
1. This is an application for summary judgment that arises out of a dispute over a 15m long concrete jetty with deep water mooring, that the defendant built on the foreshore adjoining his leasehold title No. **12/0911/326** at **Warauloa Point Estate, South Efate**. The claimant is the custom owner of the land on which the defendant's lease is situated.

2. The brief chronology of this action so far, is as follows:

**November 2006** - Defendant purchased leasehold title **No. 12/0911/326** a waterfront property situated at Worauloa Point Estate, South Efate. The claimant consented to the purchase as the custom owner and registered lessor of the property;

**March 2007** - Defendant obtained necessary planning approval from **Shefa Provincial Council** pursuant to the **Physical Planning Act** [CAP. 193] to build a residence on his leasehold property;

**July 2008** - Defendant applied paid the fee for and obtained the grant of a **Permit Licence No. 10/2008** from the Minister responsible for Ports and Harbour, to construct a 15 metres jetty and deep water mooring on the foreshore area adjoining his leasehold property;



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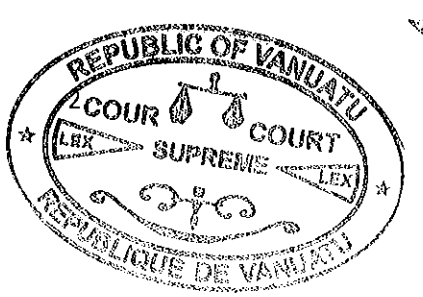
|---|---|---|
| **Late 2008** | - | Defendant completed construction of the jetty; |
| **March 2009** | - | Claimant wrote a "*without prejudice*" letter to the defendant making various demands including a "*once only payment of VT5 million*" as compensation for the building of the jetty; |
| **June 2010** | - | Claimant issued Supreme Court proceedings seeking damages for trespass and an order for the removal of the jetty; |
| **November 2010** | - | Defence filed; |
| **February 2011** | - | Claimant filed a reply and sworn statement in support of the claim; |
| **March 2011** | - | Defendant filed an application for summary judgment with sworn statement in support. |

3. The claimant's complaint is that the defendant's jetty was built without their consent or permission as custom owners of the land over which it was erected. The jetty is also said to obstruct the claimant's unimpeded access to the beach and foreshore area over which it is built and constitutes a trespass on the claimant's customary land which extends to **all** the land below the mean high water mark adjoining, but outside, the boundaries of the defendant's registered lease.

4. The defendant in his defence, disputes the claimant's asserted custom ownership of the land on which the jetty was built and, alternatively, the defendant denies that the claimant's consent was required. In any event, the defendant confidently asserts that the **Minister** responsible for ports and harbours approved the construction of the jetty in accordance with **Section 23** of the **Port Act [cap 26]** which relevantly provides:

> "*The Minister may, subject to such conditions as he may deem fit and on payment of such fee or annual fee as may be prescribed by order, licence and permit any part of the tidal lands and waters of a port to be used or occupied for all or any of the following purpose –*
>
> .....
>
> *(b) the erection of and use of any ... landing place or wharf;*



*Provided that the Minister may at any time revoke such licence without prejudice to any claim for compensation by any party adversely affected by such revocation."*

5. The claimant filed a reply denying that the Minister's permission provided: "*... a valid excuse in law for the defendant to construct the jetty on the claimant's customary land*". The claimant also filed a sworn statement in support of its substantive claim which annexed photos of the jetty together with a registered surveyors report on the placement of the jetty relative to the defendant's leasehold title and the area of land occupied by the jetty.

6. What happened next can only be described as unusual, the defendant then filed an application for summary Judgment in the belief that the claim has no real prospect of success based on the dual grounds that:

   (a) The claimant has no evidence to support the claim and/or is ill-founded in law;

   (b) The defendant has complied with the statutory obligations at law to construct the jetty.

7. The application is supported by a sworn statement deposed by the defendant and annexes a permit license **No. 10/2008** dated 15th July 2008 granted to the defendant by the Minister of Infrastructure and Public Utilities for the: "*... construction of a 15m jetty and a deep water mooring*" at Warauloa Point.

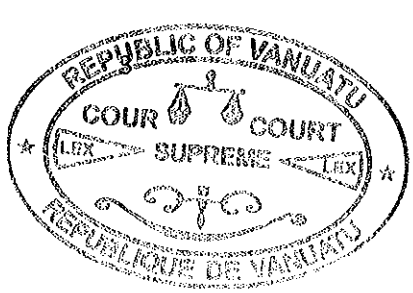
8. In opposing the application the claimant denies that its claim has no prospect of success and, alternatively, "*... the defendant has no legal standing under the Civil Procedure Rules to initiate this proposed application*" ('the locus argument').

9. Written submissions were ordered and filed by the parties. I have read and considered the competing submissions which I found most helpful.

10. As for '*the locus argument*', defence counsel whilst conceding that there is **no** specific Rule in the Civil Procedure Rules allowing for an application for summary Judgment by a defendant, nevertheless, cryptically submits:

> "..... *that the defendant, has the right to commence this application under the veil of S 28(1)(b) S 65 (1) of the Judicial Services and Courts Act and r 1.2 & r 1.7 of the Civil Procedure Rules and/or the exercise of the Court's inherent Jurisdiction*".

11. In support of this submission defence counsel relies on three decision:



- **Republic of Vanuatu v. Vallette** [2001] VUCA 23;
- **Kensington Publications Ltd v. G. Gee and Partners** [2003] VUSC 14; and
- **Whitesands Resort Ltd and Dominique Dinh v. Merilne Meyer & Others** [2008] VUCA 21.

I have read the decisions and can find no assistance in them on the question of whether a defendant (as opposed to a claimant or counter claimant) can obtain in defence counsel's words: "*summary judgment on the claimants claim in favour of the Defendant.*"

12. Nor am I assisted by reference to the provisions of the **Judicial Services and Courts Act** which refers to the unlimited nature of this court's jurisdiction and the inherent power of the Court to do what is necessary to carry out its functions. In this latter regard the Court's inherent power is made expressly subject to inter-alia ... "*the constitution and any other written law*" which latter expression would, by definition, include the **Civil Procedure Rules 2002** made pursuant to **Section 30** of the **Courts Act** [CAP. 122] and continued under **Section 66 (6)** of the **Judicial Services and Courts Act** [CAP. 270].

13. In my view resort to the Court's inherent jurisdiction or power is only possible where there is **no** "*written law*" covering the particular situation that has arisen before the Court **viz** an application for summary judgment and therefore the defendant's reliance on **Rule 1.7** of the Civil Procedure Rules, is, in my view, misplaced.

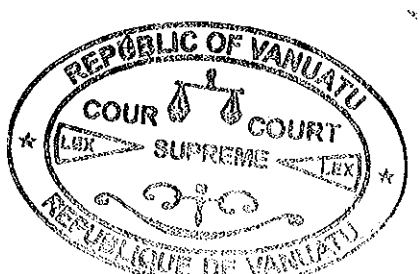
14. Claimant's counsel in opposing the application submits that:

> "*the only party who has legal standing under the Rules to lodge any Application for Summary Judgment would be the claimant*",

and further,

> "*the defendant's approach was misconceived as the defendant was inter-connecting two different legal regimes* (namely, an application to strike out a claim and an application for summary judgment) *with different procedures to achieve a purpose which has no basis in the Rules.*"

15. I accept that the **Civil Procedure Rules** which applies in all civil proceedings in the Supreme Court does **not** in the words of defence counsel, "*provide a statutory right of the defendant in their standing as a 'defendant' to bring the Application for Summary Judgment*' **but**, that is not the same as saying, that the "*Rules do not deal with a proceeding or a step in a proceeding*" in order for the

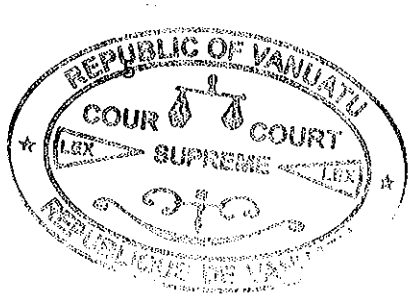


Court to invoke its residual powers under **Rule 1.7 (b)** to achieve "*substantial justice*".

16. The **Civil Procedure Rules** ('CPR') expressly deals with applications for summary judgment in **Rule 9.6** and reads as far as relevant, as follows:

> ***"Summary judgment***
>
> ***9.6*** *(1)* *This rule applies where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claimant's claim.*
>
> *(2)* *The claimant may apply to the court for a summary judgment.*
>
> .....
>
> *(7)* *If the court is satisfied that:*
> *(a)* *the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
> *(b)* *there is no need for a trial of the claim or that part of the claim,*
> *the court may:*
> *(c)* *give judgment for the claimant for the claim or part of the claim; and*
> *(d)* *make any other orders the court thinks appropriate.*
>
> *(8)* *If the court refuses to give summary judgment, it may order the defendant to give security for costs within the time stated in the order.*
>
> *(9)* *The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."*

Plainly only a "***claimant***" can invoke the Rule by applying to the court for summary judgment on the basis that the facts in the claim are true and the "*claimant believes that the defendant has no real prospect of defending the claim* ...". The Rule is clearly intended to ensure that any defence that is filed to a claim is genuine and arguable and not a mere sham or a delaying tactic. Significantly, the Rule only has application **after** the defendant has filed a defence.



17. To allow the defendant's application to proceed as framed, on a defence that has **no** counterclaim and **no** substantive relief would be wholly incompatible with the clear intent and wording of **Rule 9.6 (7) (c)** of the CPR which directs the court to "*give judgment for the claimant for the claim ...*". The application also completely ignores the "*particular meaning*" given to the term '***claimant***' (the person filing a claim) and '***defendant***' (a person against whom a claim is filed) in **Part 20** of the CPR and how both terms are to be interpreted in the Rules. [*see:* **Rule 1.8**]. If I may say the defendant's application treats both terms in the context of **Rule 9.6** as if they were inter-changeable when clearly they are not.

18. It also overlooks the significance of the defendant actually filing a defence which is a condition precedent to the application and which by itself, indicates an acceptance by the defendant, that there is some substance or merit in the claim worthy of a defence being filed, and which, presumably, a pre-emptive application to dismiss the claim for want of a reasonable cause of action is unlikely to succeed.

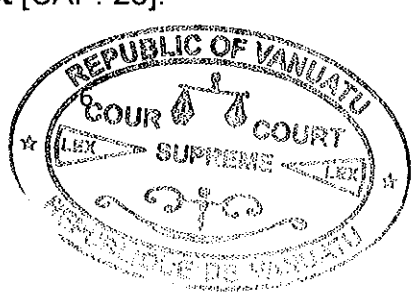
19. In this latter regard, the Court's power to strike out a claim that does not disclose a reasonable cause of action has been affirmed in numerous decisions including in **Naflak Teufi Ltd. v. Kalsakau** [2005] VUCA 15 where the Court of Appeal said:

> "*The Court's power to strike out pleadings are not in doubt. It is to be exercised in plain and obvious cases where the pleadings do not disclose a reasonable cause of action. In considering such an application the Court is obliged to accept that the claimant will be able to adequately establish all allegations and facts that it has advanced in its pleading.*"

20. In my view the appropriate procedure where a defendant considers that a claim has **no** real prospects of success **or** discloses **no** reasonable cause of action, is for the defendant to file an application invoking the Court's power to strike out the claim, and **not**, by filing a defence to the claim and then seeking summary judgment against the claimant as occurred in this instance.

21. For the foregoing reasons the application must fail on "*the locus argument*" and is accordingly dismissed with costs.

22. If I should be wrong however in my consideration of "*the locus argument*", I turn briefly to consider counsels further submissions. I note immediately that there is extensive argument on what legislation is applicable to the construction of the defendant's jetty, with the claimant relying on the more recent **Foreshore Development Act** [CAP. 90] and the defendant, relying on the permit granted under the much older **Ports Act** [CAP. 26].



23. The defendant in his sworn statement filed in support of the application makes reference to his awareness of the application of the previous owner of the leasehold to construct a jetty and his subsequent decision to make a new application.

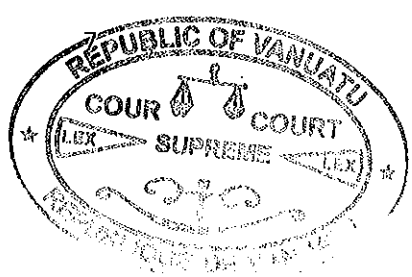
24. However, a quick comparison of the two applications indicates that the previous owners' application dated **11 March 2005** was submitted under the **Foreshore Development Act** [CAP. 190] to build a timber jetty **whereas** the defendant's later application on **15 July 2007** to erect a similar jetty was lodged under the **Ports Act** [CAP. 26]. Why this was done under the Ports Act is not explained whatsmore it is apparent that the defendant's jetty is **not** of timber but is constructed in concrete.

25. A similar comparison of the provisions of the above **Acts** indicates that they are controlled by different Ministers and deal with different subject matters although the areas of foreshore to which they both apply may intersect or overlap in various places. There is no doubting that the older **Ports Act** is more confined in its application than the **Foreshore Development Act** which includes in its definition of "*foreshore*", the ports and harbours within the territorial waters of Vanuatu.

26. On this aspect, in the absence of a survey plan, the defendant's evidence falls well short of affirmatively establishing that the jetty is built in accordance with an approved plan **and**, most importantly, is located within the gazetted limits of the **Port** of **Port Vila** so as to enliven the provisions of the **Ports Act** including **Section 23** on which he relies. In my view the mere grant of the licence does **not** obviate the need for the defendant to establish that crucial fact **nor** does it require the claimant to join the relevant Minister in the claim.

27. Needless to say, the power of the responsible Minister to revoke a licence granted under **Section 23** of the **Ports Act** is a further indicator undermining the suggestion that the grant of the particular licence or permit is a complete answer to the claimant's claim. Nor in my view does such a grant necessarily exclude the applicability of the provisions of the **Foreshore Development Act** [CAP. 90]; the **Physical Planning Act** [CAP. 193] **or** the **Environment Management and Conservation Act** [CAP. 283] to the construction of the defendant's jetty.

28. As for the suggestion that the claimant has **no** interest in the land below the mean high water mark on which the defendant's jetty is erected, suffice it to say that **Article 73** of the **Constitution** recognizes that "*all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants*" **and** the **Interpretation Act** [CAP. 132] defines: "***land***" as including "*land covered by water*", as does, the **Land Reform Act** [CAP. 123] which was passed for the implementation of **Chapter 12** of the Constitution within which **Article 73** is to be found [*see also:* **Willie v. Sarginson** (2000) VUSC 20].

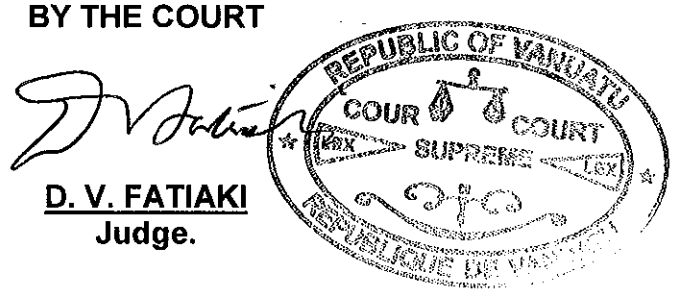


29. In light of the foregoing there is no doubt in my mind that there are substantial legal and factual issues raised by the pleadings and the evidence, that need to be fully canvassed or tried and, on that basis also, it is **not** appropriate to grant the defendant's application.

30. The application is accordingly dismissed with costs of **VT40,000** summarily assessed in favour of the claimant and payable by 28 October 2011.

**DATED at Port Vila, this 20th day of October, 2011.**

**BY THE COURT**




**D. V. FATIAKI**
**Judge.**