

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

Civil Case No.174 of 2010

BETWEEN: **BRIAN and PAM FISHER**
Claimant

AND: **BOB and CORNELIA WYLLIE**
First Defendants

AND: **GEOFFREY GEE & PARTNERS**
Second Defendant

Coram: *Justice D. V. Fatiaki*

Counsel: *Mr. R. Sugden for the Claimant*
Mr. N. Morrison for the First Defendants
Mr. P. Finningan and Mr. J. Malcolm for the Second Defendant

Date of Judgment: *5 April 2012*

RULING

1. On **12 November 2010** the claimants issued the claim in the present proceedings. The first defendants are sued for damages for the breach of a contract of sale and purchase of a business entered into with the claimants, and the second defendant who at one time provided legal advice and services to the claimants, are sued for breach of retainer, negligence, and deceit.
2. The claim is **16 pages** long and is set out in **84** paragraphs. Other than a heading "Claim Against Gee" before **paragraph 54** "Negligence and breach of retainer" before **paragraph 61** and "THE CONTRACT" before **paragraph 70**, no serious attempt has been made in the claim to comprehensively isolate and identify any cause(s) of action by the use of appropriate sub-headings or by separating the remedies or reliefs sought as it relates to each defendant and to each pleaded cause of action. The relief clause however does impliedly, identify the following cause(s) of action; namely, "deceit", "breach of contract and/or negligence".
3. Counsel for the second defendant in a vain attempt to provide an overview of the claim writes:

"In this case, the claimants have pleaded facts as against the first defendants up to paragraph 53. No relief is claimed at that point.



Then from paragraph 54 to 60, under head of Claim Against Gee, the claimants pleads facts expressed to be directed to deceit, and from paragraph 61 to 84, pleads facts to support the negligence claim against Gee. Then the claimants makes one overall claim for relief against all defendants pertaining to all causes."

4. I say "*vain*" advisedly because in so far as the overview may be based on the claimants' headings it is doomed because of the joinder of "*breach of retainer*" and "*Negligence*" and the absence of a heading for a claim in deceit.
5. In passing, I observe that the claimants' heading before **paragraph 54** is framed in the singular, and, noticeable by its absence, is the usual pleading adopting all the preceding paragraphs in the claim ie. **Paragraphs 1 to 54**, if they were being relied upon in the claim against the second defendant.
6. If I may say so the claim is not an easy document to read or digest in its present format and, although the **Civil Procedure Rules** (CPR) does not prescribe any particular form or style of drafting to be adopted in a claim, **Rule 4.1** enumerates the purpose(s) of a statement of the case as being:
 - (a) "*Set out facts of what happened between the parties as each sees them; and*
 - (b) *Show the areas where the parties agreed; and*
 - (c) *Show the areas where the parties disagreed ("called the issues between the parties") that need to be decided by the court.*
(my underlining)
7. Needless to say in the absence of a discernible chronology or the use and adoption of appropriate sub- headings as well as a clear and discrete separation in the claim between defendants, cause(s) of action and remedies, the statement of a case may fall short of fulfilling its purpose(s) to "*set out*" facts, and "*show*" (not merely state) the areas of agreement or issues that need to be decided by the Court consistent with the courts duty to identify issues at an early stage and the parties correlative duty to help the court to achieve it.
8. Similarly the claimed reliefs are contained in a single paragraph and includes "*a declaration*"; "*damages*" (without distinguishing between special and general); "*exemplary damages*"; an "*order for*" repayment of all (undisclosed) sums paid as costs; an "*order for*" delivery of an itemized bill of costs; an "*order for*" taxation of costs; and an "*order of indemnity*" for all (undisclosed) losses suffered (by the claimants).



9. In this particular regard **Rule 4.10** relevantly provides:

4.10 Damages

- (1) *If damages are claimed in a claim or counterclaim, the claim or counterclaim must also state the nature and amount of the damages claimed, including special and exemplary damages.*
- (2) *If general damages are claimed, the following particulars must be included:*
 - (a) *the nature of the loss or damage suffered; and*
 - (b) *the exact circumstances in which the loss or damage was suffered; and*
 - (c) *the basis on which the amount claimed has been worked out or estimated.*
- (3) *In addition, the statement of the case must include any matter about the assessment of damages that, if not included, may take the other party by surprise.*

(my underlining)

Plainly the claimants' composite relief paragraph in its failure to specify amounts and distinguish between general and special damages, is non-compliant with the requirements of the above rule and is therefore defective and would need to be amended. Interestingly, **subrule 4.10 (2)** describes as "*particulars*" what must be included in a claim for general damages.

10. On **20 November 2010** the first defendants filed a response disputing all of the claim and on **10 February 2011** they filed a defence with a counterclaim for the balance of the purchase price.
11. For its part the second defendant filed a response on **2nd December 2010**. This was followed by a letter dated **30th December 2010** seeking particulars of numerous matters pleaded in the claim. The letter is **13** pages long and identifies in **28** numbered paragraphs the **31** paragraphs of the claim for which "*particulars*" are sought in the form of answers to **118** framed questions.
12. In form, the request for particulars asks a series of questions about matter(s) pleaded in an identified paragraph of the claim presumably with a view to eliciting particulars. If I may say so the request more closely resembles "*interrogatories*" than the usual request for particulars. This is somewhat ameliorated in counsels' written submissions at **paragraph 12**



which seeks to explain why particulars are sought under the enumerated paragraphs of the claim.

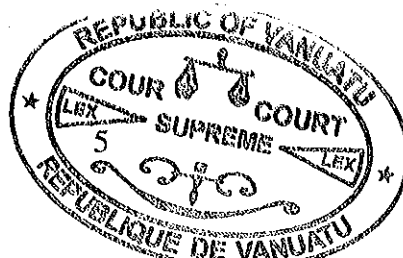
13. Be that as it may on **31 January 2011** claimants' counsel responded to the request for particulars with an indication that the time for filing a defence had long expired. No attempt was made however to provide any particulars other than to say that it "*is likely to take some time*". In response and plainly to forestall any default judgment being entered, the second defendant filed a one-sentence defence which "*denies each and every statement in each paragraph 1 to 84 (inclusive) in the statement of claim*".
14. This led to the claimant filing on **03rd February 2011** a request for default judgment together with an application to strike out the second defendant's defence supported by a sworn statement. On the **11th and 14th of February 2011** the second defendant sent reminder letters to the claimants' solicitors with little success.
15. On **17 February 2011** the second defendant filed an application for an order pursuant to **Rule 4.2(1) (b)** of the **Civil Procedure Rules** that the claimants "*provide answers*" to the particulars earlier sought in the second defendants' letter of **30 December 2010**. The application was supported by a sworn statement deposed by a principal of the second defendant. I would only observe that **Rule 4.2(1) (b)** (which requires relevant facts to be set out in the claim), does not in terms support the application for particulars.
16. Claimants counsel's primary submission in this regard is the strikingly simple one, that "*particulars may not be ordered under the Civil Procedure Rules*" because they cannot add to the relevant and material facts which the claimant relies upon and which must already be included in the statement of their case.
17. Furthermore the combined effect of **Rules 18.16, 19.2, 19.3(1)** and **1.7(a)** is to clearly and intentionally exclude upon the commencement of the **Civil Procedure Rules 49 of 2002**, any and all reference to the old rules of procedure set out in the **High Court (Civil Procedure) Rules 1964**. In short, the present Civil Procedure Rules establishes a new regime unshackled from the worst excesses of the old Rules of civil procedure where the dual processes of discovery and interrogatories were sometimes employed oppressively causing lengthy delays and cost "*blow outs*" to occur.
18. On the **14th March 2011** this court issued numerous directions orders with a view to ensuring that all pending applications would ready to be heard including, the second defendants request for particulars and the claimants application to strike out the second defendants' defence. All applications were adjourned for hearing on **10 May 2011**.



19. On **15th March 2011** counsel for the claimant filed an amended application against the second defendant which sought several unusually worded alternative orders including an order restraining the second defendants "*from giving legal advice to the first defendant*". At the hearing of the application however claimants' counsel properly withdrew the request for an injunction which was not sought in the substantive claim.
20. On **18 March 2011** the first defendants filed an expanded counter claim containing more particulars than earlier provided.
21. On **19 April 2011**, the 10 May 2011 hearing date was adjourned at the request of the second defendant to **16 June 2011** in order to accommodate their overseas counsel's commitments. The first defendants were also given leave to file an application for security for costs against the claimants who are resident in Australia.
22. On **10 May 2011** the Court ordered *inter alia* that the claimant's application to strike out the second defendant's defence was adjourned to abide the determination of the second defendant's application for further and better particulars.
23. On **16 June 2011** this Court heard oral submissions on the second defendants' request for particulars and despite the above order, the claimants' application to strike out the second defendants' defence as filed. Helpful written submissions were also filed by counsels representing the second defendants and claimants.
24. In brief, the claimants' submissions are that the defence filed by the second defendants "*breaches all of the substantive requirements of paragraph 4.5 of the Civil Procedure Rules*" and is "*a cynical attempt to delay and put the claimants to unnecessary expenses*".
25. In this regard **Rule 4.5** of the Civil Procedure Rules states:

4.5 Defence

- (1) If the defendant intends to contest the claim, the defendant must file and serve a defence on the claimant within the period required by Rule 4.13.
- (2) The defence must contain a statement of the case.
- (3) **A defendant must not deny the claimant's claim generally, but must deal with each fact in the claim.**



- (4) If the defendant does not agree with a fact that the claimant has stated in the claim, the defendant must file and serve a defence that:
- (a) denies the fact; and
 - (b) states what the defendant alleges happened.
- (5) **If the defendant does not deny a particular fact, the defendant is taken to agree with it.**
- (6) **If the defendant does not know about a particular fact and cannot reasonably find out about it, the defendant must say so in the defence.**
- (7) The defence must be in Form 8.

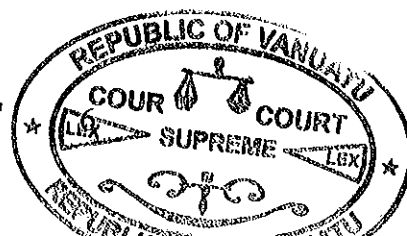
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Sub-Rules (3), (4) & (6) above makes it clear that a defendant has a duty, in his defence, to "*deal with*" each fact pleaded in the claim including those that he "*does not know about*", for instance, the existence of a belief or a party's awareness or the state of a person's knowledge.

26. Plainly the one-sentence defence filed by the second defendants falls well short of complying with the requirements of the above **Rule** and constitutes "*an irregularity*" which may be dealt with by the court in any one of six ways provided in **Rule 18.10 (2)** including, declaring a document "*to be ineffectual*".
27. The second defendants equally forceful submission is that **before** it is or should be required to file a defence, the claim must itself, properly comply with the requirements of the **Civil Procedure Rules** especially **Rule 4.2** which provides:

4.2 Content of statements of the case

- (1) *Each statement of the case must:*
- (a) *be as brief as the nature of the case permits; and*
 - (b) *set out all the relevant facts on which the party relies, but not the evidence to prove them; and*
 - (c) *identify any statute or principle of law on which the party relies, but not contain the legal arguments about it; and*
 - (d) *if the party is relying on custom law, state the custom law.*



- (2) *If the statement of the case is set out in a claim or a counterclaim, it must also set out the remedies or orders sought.*

(my underlining)

The underlined phrase indicates the subjective nature of a statement of the case not only as to “*relevant facts*” but also “*any statute or principle of law*” such as, implied terms in contracts; the necessary elements of negligence and an action in deceit.

28. And counsel for the second defendants submits that until counsel for the claimants summarized its three (3) causes of action as being, “*breach of contract of solicitor-client retainer by acting in a conflict situation for the first defendants against the claimants*” (whatever that may mean), fraud and negligence, “*the second defendants was unaware that these three causes of action were relied on. The statement of claim informs the second defendant of causes in deceit and breach of duty of care*”.
29. I turn next to the specific matters raised in the second defendant’s application. In doing so I have noted claimants’ counsel’s submissions and the six (6) pages of written objections to the request for particulars.
30. At the outset and despite the absence of a specific **Rule** relating to the ordering of particulars, I am satisfied that the Court may give such a direction if the Court considers it would better “*enable it to deal with the case justly*”.
31. Claimants’ counsel also submits that the requested particulars and second defendant’s questions will be fully answered in the claimants’ sworn statements submitted for the trial. The submission ignores the lateness with which such statements may be filed i.e. “*at least 21 days before the trial*” and, in my view, is not a satisfactory answer to the mandatory requirement “*to set out all relevant facts*” which the claimants rely upon in the statement of their case.
32. After careful consideration I make the following directions:
- (i) The application as it relates to **paragraphs 1, 2, 8, 10 and 13** is disallowed. Having said that, I make the observation that the use of the expression “*going to the root of the contract*” is unhelpful when referring to express conditions of a written contract and is more likely to confuse than clarify.
- (ii) As to **paragraph 32** claimants’ counsel opposes it on the basis that “*none of the questions/requests are about the claimants’ case as revealed by their claim which makes no mention of VIPA or business licenses etc*”.



I am satisfied that **paragraph 32** cannot be read in isolation from its proper context which includes **paragraph 31** which pleads an implied term that the first defendants' company **Rainbow's** business activities not be in breach of the terms of the registered agricultural lease held by the first defendants over the land, and also **paragraph 33** which describes the business activities enumerated in **paragraph 32** as "*not permitted under the agricultural lease and carrying them on could result in forfeiture of the lease*".

Within that context it is sufficiently clear that a claim was being made against the first defendants, at least, that they were acting in breach of the terms of the agricultural lease which exposed it to the risk of forfeiture. How **paragraph 32** affects the second defendant is not as clear, but, plainly **Rainbow** was "*carrying on*" (in the present active tense) the impermissible business activities during a time when it is alleged the second defendants were acting for the claimants under a retainer and were presumably safeguarding their (the claimants) interests.

I am satisfied that the second defendants are entitled to know the identity of the individual(s) who were conducting such impermissible business activities enumerated in **paragraph 32** and, accordingly, I direct the claimant to answer **questions 6 (a)** and **(f) only**, of the second defendant's request for particulars.

- (iii) **As to paragraph 35 (ii)** claimants' counsel refers to several paragraphs before and after **paragraph 35** including **paragraphs 14** and **15** as providing a sufficient answer to the second defendant's request for particulars which seeks to establish the existence/authenticity of a sublease granted by the first defendants over part of the land within lease **No. 12/0631/020**.

It may be noted that **paragraph 35 (ii)** alleges a breach of lease **No. 12/0631/020** by the first defendants in the giving of a sublease over part of the land without any indication as to when the sublease was given? And to whom? It could be at a time when the second defendant's were allegedly acting under a retainer with the claimants and could therefore be relevant to the claim against them [see: for example **paragraph 63 (f)**].

In the circumstances I direct that the claimants provide particulars to **paragraph 35 (ii)** sufficient to establish the date when the sublease was given and the identity of the sublessee.

- (iv) **As to paragraphs 40, 41 and 42** I note that the claimants make a bald allegation in **paragraph 41** that the second defendants



“acted solely in the interest of the first defendants” and not in the interests of the claimants, and then, in the very next **paragraph 42** reference is made to *“the facts pleaded in paragraph 41”* when no facts are pleaded in the paragraph.

No attempt has been made to give instances to support the assertion of the second defendant *“acting solely in the interests of the first defendants”* nor are *“the facts”* made any clearer by **paragraph 42**. Whatsmore it is not an acceptable answer to merely refer to *“paragraphs 1 and 54 to 84”*. Why should it be necessary to read those **33** paragraphs to glean facts which are peculiarly within the claimant’s knowledge?

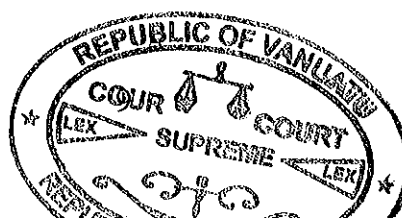
Accordingly, I direct the claimants to provide the following particulars:

- **For para. 40** - the dates and occasions when the claimants consulted the second defendants in relation to their affairs;
- **For para. 41** – the facts that are relied on to support the averment that the second defendants *“acted solely in the interests of the first defendants and not in the interests of the claimants”*;
- **For para. 42** – Identify all additional instances (if any) of the first defendants repudiating conduct before July 2010 other than those particularized in **paragraph 44**;

(v) **As for paragraph 54**: I direct the claimants to provide details and dates of the *“subsequent advice”* provided to the claimants by the second defendant and the total amount that the claimants paid (as averred in **paragraph 55**) for the bills of services rendered by the second defendants.

(vi) **Paragraph 56**: states that the basis upon which the claimants’ retainer was terminated by the second defendant was *“that there was a conflict between Wyllie and Fisher (whatever that means) and that they had to continue acting for Wyllie against Fisher”*. The claimants are directed to give details of how the termination of their retainer was communicated to them by the second defendant;

(vii) **Paragraphs 57 and 58**: The claimants’ objectionable response to the request for particulars is to draw attention again to *“paragraphs 1 and 54 to 84”* and to *“paragraphs 2 to 39”* which



latter paragraphs were not adopted as part of the "Claim Against Gee".

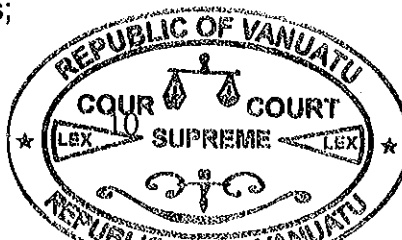
Between them, both paragraphs allege breaches of the claimants' retainer in two (2) respects – "*acting against Fishers interests where (it) conflicted with those of Wyllie*"; and "*in failing to inform Fisher (to) obtain independent legal advice before committing themselves in the contract or the guarantee that they gave*".

33. Both paragraphs precede the claimants "breach of retainer" heading which has confusingly, been joined with "Negligence", and, although there is **no** separate heading for a claim in deceit, **paragraphs 64, 65 and 66** allege false representations were made to the claimants by the second defendant and **paragraph 59** uses the term "*deceiving*".
34. Similarly **paragraphs 70 to 80** under the obscure heading "CONTRACT" alleges numerous failures on the part of the second defendant in advising the claimants about alleged inadequacies in the agreement for the sale and purchase of the first defendants' company, **Rainbow**, and in the **Deed of Release** entered into with the first defendants.
35. The confusion is exacerbated by the claim in **paragraph 84** that "*as a result of Gee's negligence and breach of the implied term of the retainer referred to in paragraphs 57, 58 and 66 to 82 Fisher have suffered loss and damage*". In this regard the **only** references to "*an implied term of the retainer*" are to be found in **paragraphs 61 and 62** and nowhere else.
36. This is further compounded by the particulars provided for **paragraph 84** which "... *repeats the particulars for paragraph 49* (which enumerates the monetary losses suffered by the claimants owing to the first defendants breach of contract) *and also 57* (which refers to a specific breach of retainer by the second defendant) *on the basis of negligence and breach of retainer instead of deceit*" (whatever that may mean). The second particular for **paragraph 84** is even more confounding and confronting where it states:

"In the event that the Fishers' claim is unsuccessful in terminating the contract the loss to them constituted by the difference between VT70 million and the true value of Rainbow".

37. In light of the foregoing I have reached the firm view that the most just way of dealing with the second defendant's request for particulars which are justified, is to order and direct the claimants to amend their claim against the second defendant by:

- (1) pleading each cause of action separately with distinct headings and separate remedies;



- (2) where general damages are claimed, comply with the requirements of **Rule 4.10 (2)** of the **Civil Procedure Rules**;
 - (3) where special damages and specific loss are claimed to specify the item and amount claimed; and
 - (4) provide particulars for exemplary damages consistent with the requirements of **Rule 4.10 (3)** of the **Civil Procedure Rules**.
38. By way of further directions:
- (5) The claimant is ordered to file and serve an amended claim by **15 April 2012**;
 - (6) Thereafter the second defendants are ordered to file an amended defence by **27 April 2012**;
 - (7) The claimants are at liberty to reply to the amended defence by **4 May 2012**;
 - (8) The matter is adjourned to **7 May 2012 at 10:00 a.m.** for review.
39. The second defendants are also awarded costs of the application to be taxed if not agreed.

DATED at Port Vila, this 5th day of April, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

