

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)

CIVIL CASE NO: 19 OF 2013

BETWEEN: MALIBU TRADING LIMITED
First Claimant

AND: DANE WILLIAM THORNBURGH
Second Claimant

AND: LISA PERKO
First Defendant

AND: SATELITE HOLDINGS LIMITED
Second Defendant

AND: REGENT LIMITED
Third Defendant

AND: GEOFFREY GEE & PARTNERS
Fourth Defendant

Coram: Justice Mary Sey

Counsel: Mr Dane Thornburgh for the Claimants
~~Mr Mark Hurley for the First Defendant~~

Date of Hearing: 21 June 2013

Date of Decision: 12 July 2013

RULING ON COSTS

1. This is an application concerning an itemised bill of costs charged by the First Defendant as a result of the Claimant's Notice of Discontinuance filed pursuant to Rule 9.9(4)(c) of the Civil Procedure Rules 2002.

The Notice of Discontinuance reads:

- "1. Lisa Perko commenced proceedings in CC 42 of 2013 subsequent to these proceedings.
2. Lisa Perko did not plead the allegations as pleaded in CC 42 of 2013 by way of Counterclaim in these proceedings.
3. The Claimant has filed a Defence & Counterclaim in CC 42 of 2013 as a direct result of Lisa Perko Claim in that matter which contain the same allegations and claims that appear in these proceedings.
4. As a result these pleadings are now superfluous and can be dealt with in CC 42 of 2013 as all parties can have the matter dealt with in full and resolved with all parties and allegations having been joined by way of Counterclaim.
5. As a result of the above and without prejudice to the Counter Claimants in CC 42 of 2013, the Claimant has discontinued this proceeding against you."

2. **Discontinuing proceedings**

- 3.1 Under Rule 9.9(1) the claimant may discontinue his or her claim at any time for any reason.
- 3.2 Under R.9.9(4) if the claimant discontinues:
 - "a) the claimant may not revive the claim; and
 - b)
 - c) the party against whom the claimant discontinued may apply to the court for costs against the claimant."

3. It is noteworthy that, unlike the rules in many other jurisdictions (for example, England and Australia) which provide that the discontinuing party must pay the other party's costs, R.9.9 (4) (c) is expressed in discretionary terms. However, "the discretion although unfettered is to be exercised judicially and not in any arbitrary or capricious manner detached from the prevailing realities that obtain within Vanuatu." See Hurley v The Law Council of the Republic of Vanuatu [2000] VUCA 10.

4. The procedural history of these proceedings is outlined by counsel at paragraph 1 of the First Defendant's submissions as follows:
 - 1.1. The Claimant's Statement of Claim was filed on 18 February 2013 and served on the first Defendant's solicitors' office on 19 February 2013.
 - 1.2. On 27 March 2013 the first Defendant filed and served an Application to Strike Out the Whole of the Claim against the First Claimant.
 - 1.3. These proceedings were listed for first conference before Sey J on 28 March 2013.
 - 1.4. Following the various submissions made by counsel at that first conference on 28 March 2013, Sey J issued Minutes and Orders.
 - 1.5. Order 1 of 28 March 2013 provides as follows:

"The Claimants are given 14 days from the date of this Order within which to file sworn statements in response to the sworn statement of the 1st Defendant in support of the application to strike out dated 27th March 2013"
 - 1.6. Minute no.4 of 28 March 2013 records that:

"4. Mr. Thornburgh intends to file an application within

14 days to remove both Mr. Hurley and George Vasaris & Co from acting for the first Defendant."

- 1.7. Neither Claimant complied with paragraph 4 of the Orders of 28 March 2013 and Mr. Thornburgh never filed any application to remove Mr. Hurley and George Vasaris & Co from acting for the First Defendant.
 - 1.8. Instead, weeks after the time for compliance with paragraph 1 of the Orders of 28 March 2013 had expired, and without any prior warning, the Claimants filed and served their Notice of Discontinuance on 29 April 2013."
5. It is submitted by counsel for the First Defendant that it was entirely appropriate that the First Defendant did not plead to the allegations in CC 42 Of 2013 by way of Counterclaim in these proceedings for the following reasons:
- a) the simple fact is that the First Defendant did not recognize that the allegations against her in these proceedings raised any reasonably arguable cause of action, for the reasons set out in her Application to Strike Out the Whole of the Claim and her sworn statement in support; and
 - b) CC 42 OF 2013 involves Ms. Perko's claims against additional parties other than the Claimants in these proceedings, such as ANZ Bank (Vanuatu) Limited, The Pines Limited and the Republic of Vanuatu.
6. By paragraph 1 of the Court's Orders of 13 May 2013, the Second and Third Defendants were given 7 days to file an itemized bill of costs.

The Second and Third Defendants filed their itemized bill of costs on 16 May 2013 (and served GV & Co with a copy on 22 May 2013)

7. By paragraph 2 of the Court's orders the Claimants were given 7 days thereafter to file any objections. The Claimants have failed to do so.

8. Given the Claimants' failure to comply with paragraph 2 of the Court's Orders of 13 May 2013, the First Defendant invites this Court to accept the hourly rate for assessment of her costs at VT20, 000 plus VAT. In the absence of any itemized objections to her bill of costs filed on 8 May 2013, the First Defendant seeks a costs award arising from the Claimants' discontinuance of:
 - a) the sum of VT264, 400 as per her itemized bill of costs (which records attendances up to and including 29 April 2013); and
 - b) the sum of VT40,000 for two hours' attendances at court on 13 May 2013, correspondence with Thornburgh Lawyers since 30 May 2013, preparation of these submissions and attendance at the costs hearing on 21 June 2013, being a total costs award of VT304, 400.

10. It is further submitted by the First Defendant that, given the usual presumption that the claimant discontinuing is liable to pay the other party's costs, there is no evidence in the present case as to why that presumption should be displaced. For example, there is no disentitling conduct on the part of the First Defendant such as breach of the Court's directions and/undue delay.

11. Furthermore, it is submitted that, in any event, given that in Thornburgh Lawyers' open correspondence of 20 June 2013 the Claimants offered to pay the First Defendant's costs in the sum of VT 75,000 (annexure "Q" of Dane Thornburgh's sworn statement filed on 20 June 2013), the Claimants cannot seriously argue that the First Defendant is not entitled to a costs award arising from the discontinuance.
12. In opposing the application, the Claimants' contention is two-fold. On the one hand, counsel argued that the First Defendant is not entitled to costs. He referred to the Australian case of Kinabulu Investments Pty Ltd v Barron & Rawson Pty Ltd (No 2) [2009] FCA 57 and he submitted that the ordinary rule is that cost follows the event. Counsel further submitted that the conduct of the First Defendant should be taken into consideration and he referred to the letters of Mr. Hurley dated 14th February 2013 and 28th February 2013 respectively. Counsel urged the Court to depart from the usual manner and to make no order as to costs.
13. On the other hand, counsel contended that in the event the First Defendant is entitled to any costs, what is being requested is too much. Counsel referred to the case of Kontos v Dinh [2010] VUCA 36, in which the award was VT500,000 for a 3 day trial, and he submitted that an award of VT100,000 based on an VT10,000/HR would be appropriate in the circumstances.

Quantum of Itemized Bill of Costs

14. In deciding the issue of costs in 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 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."

15. The First Defendant is seeking to recover an hourly rate of VT20,000 plus VAT on the standard basis in her itemized bill of costs filed on 8 May 2013. It is submitted that pursuant to her retainer agreement with George Vasaris & Co, the First Defendant has paid GV & Co the solicitor/client rate of VT35, 000 per hour plus VAT for attendances on her behalf related to these proceedings. Counsel further submitted that, clearly, the First Defendant has been put to significant expense in this matter and she is entitled to an award of costs arising from the Claimants' unilateral discontinuance.

16. It is further submitted that part of the ratio of the decision in *Hurley's* case was the Court of Appeal's acceptance of the then prevailing minimum wage prescribed for an ordinary worker in Vanuatu of VT16, 000 per month pursuant to the *Minimum Wage and Minimum Wage Board (Amendment) Order No. 5 of 1995*. That the present position is that the minimum wage prescribed for an ordinary worker in Vanuatu is VT170 per hour that is, based on 22 working days per month and 8 working hours per days amounts to VT29, 920. (See *Minimum Wage and Minimum Wage Board (Amendment) Order No. 109 of 2012*. That is, an increase of 87% since *Hurley's* case in 2000 and that it is

unrealistic that the standard costs recovery rate should remain static over the same 13 years period.

17. In all of the above circumstances, the First Defendant submitted that on any objective view the costs of legal practice in Vanuatu have undoubtedly increased since 2000 and so too has the minimum wage of ordinary workers. It is therefore submitted that it is entirely appropriate for this Court to accept that an appropriate standard hourly rate for a costs award in 2013 is VT20, 000 per hour plus VAT.
18. I find the First Defendant's arguments sound and logical. I also accept Dawson J's observation in Regona v Director of Land Records [2008] VUSC 80 that:

".....Hourly rates are not static and will adjust over time to keep pace with inflation and other costs. The increase from VT20,000 per hour to VT25,000 per hour for experienced counsel from 1999 to 2007 some eight years later may well be justified."

19. Be that as it may, I am unwilling to differ from the approach and assessment made by the Court of Appeal in the Hurley case and I adopt the Court's reasoning that:

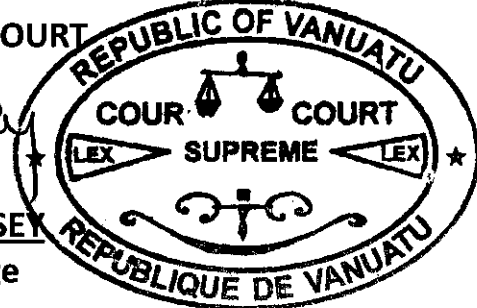

"In the absence of new arguments or persuasive relevant evidence VT10,000 should prevail as the norm subject always to the ability of counsel to make submissions on the unique circumstances of a case. For the avoidance of doubt we should also remind all interested that the fact that a practitioner has spent a stipulated time on a file does not necessarily

mean that on a party and party basis all will be reflected."

20. Having heard argument, I have concluded that the First Defendant is entitled to recover costs on the standard basis. It is pointless to go through the itemised bill of costs item by item and making deletions and/or additions to every attendance. I am inclined to exercise my discretion to use the lump sum approach in considering the appropriate total sum of costs payable.
21. In the circumstances, I make a total costs award of VT200,000 in favour of the First Defendant.

DATED at Port Vila, this 12th day of July, 2013.

BY THE COURT



M.M.SEX
Judge