

BETWEEN: CLAIRE DORNIC
Claimant

AND: FELIX LAUMAE
Defendant

Coram: *Justice S M Harrop*

Counsel: *Marie- Noelle Ferrieux Patterson for the claimant*
No Appearance for the Defendant (Daniel Yawha)

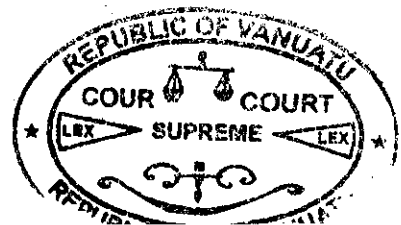
Conference/hearing date: *Wednesday 30 September 2015 at 9:00am*

Judgment date: *Thursday 1 October 2015*

**RESERVED JUDGMENT OF JUSTICE SM HARROP AS TO
CLAIMANT'S RULE 18.11 AND INDEMNITY COSTS
APPLICATIONS**

Introduction

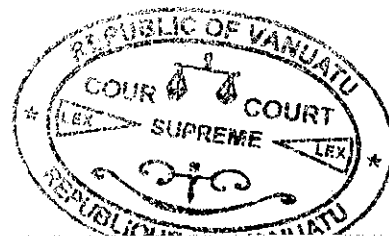
1. The claimant has filed two applications. On 10th November 2014, she sought pursuant to rule 18.11 of the Civil Procedure Rules an order striking out the defendant's defence and counterclaim and debarring him from defending the case, together with costs in relation to that application. On 27th May 2015, she applied for indemnity costs in the sum of VT 253,485 in respect of serial procedural defaults by the defendant.
2. Both applications are opposed and on the defendant's behalf on 10 June 2015 Mr Yawha filed formal written responses, including effectively submissions.
3. On 22 September 2015 I allocated a conference to deal with these outstanding applications for Thursday 1st October 2015 at 9:30am but this turned out to be unsuitable for Mrs Patterson. Counsel were asked if 9:00am on Wednesday 30th September 2015 would suit them. Both counsel confirmed that it was suitable; Mr Yawha did so by an email to my associate on Wednesday 23rd September 2015 at 4:17pm. Despite that he did appear at the conference/hearing and no explanation has been provided as to why not. Efforts by my Associate to contact him at 9:00am were unsuccessful and after waiting in vain for him to appear, the conference began at 9:12am.
4. Mrs Patterson relies on her documents but orally proposed an alternative means of dealing with the rule 18.11 application if the Court found it to be justified. She



suggested under rule 18.11 (4) (b) that rather than striking out the defence and counterclaim and debarring the defendant from defending the case the Court might instead make an order for security for costs against the defendant in respect of his counterclaim. She made an oral application pursuant to rule 15.18 (2) and I accept this was appropriate. While the details of this case may complex, the application is not because it is based on the same information already before the Court in respect of the rule 18.11 application and the costs application. This is a good example of why it is important for counsel to attend conferences. Mr Patterson was perfectly entitled to make that oral application but Mr Yawha was not present to respond to it as he should have been.

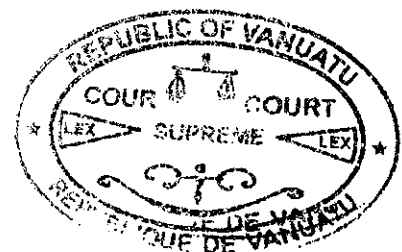
Discussion

5. The ground on which the rule 18.11 application is made is that the defendant failed to comply with an order made on 15th September 2014, which lead to an order made on 14th October 2014, that he pay VT104,930 to the claimant by 4:00pm on 20th October 2014.
6. There is no doubt that the defendant failed to comply with that order. Mr Yawha submits that there is no longer any basis on which the Court can entertain the rule 18.11 application because those costs have now been paid in full (albeit not until 26th May 2015).
7. Mr Yawha's submission is misconceived. The order contained two requirements:
 - (a) To pay the sum of VT 104,930 and;
 - (b) To do so by 4:00pm on 20th October 2014.
8. The order was not complied with by meeting one of the requirements but not the other. Paying the sum in full at some later time did not comply with the order any more than it would have been complied with by paying VT10 by 20 October.
9. There is no doubt that the defendant not only failed to make the payment when required but that it took him approximately seven months to make payment of what is relevantly a small sum. It is also clear that even that was only done after various efforts to extract payment were made by the claimant. These are detailed in the various minutes on this file notably those dated 5th February, 23rd February, 24th February, 8th April and 27th May 2015.
10. I therefore uphold the claimant's application pursuant to rule 18.11.
11. Although the defendant by his conduct has put himself in a position where he could have no complaint if his defence and counterclaim were struck out and he were debarred from defending the case, the Court is always very reluctant to prevent a party being heard and will always look for appropriate alternative orders where that is possible.
12. In this case, as suggested by Mrs Patterson, there is an alternative of making an order for security for costs. She has applied orally for such an order. I am satisfied this application is well-founded because of the considerable difficulty the claimant had in



obtaining the relatively small sum of a VT 124.930. That is clear justification for the belief that if the counterclaim were ultimately unsuccessful then the claimant would have great difficulty obtaining payment of the costs she would be awarded in that event.

13. Mrs Patterson seeks an order that the defendant pay VT 1,000,000 into the Supreme Court's trust account and that the counterclaim be stayed until that occurs. In principle this appears to me to be a reasonable request and the Court has power to make such an order if the justice of the case requires it under rule 15.19 (f).
14. The defendant could have no complaint if I granted without reference to him the oral application made by Mrs Patterson because he did not appear at the conference. However in my preference, given that an order for security for costs and any related stay order is a significant one to make, and given there was no advance notice of the application, is to provide Mr Yawha with an opportunity to make any submissions he wishes to make in opposition to the proposed orders.
15. Mr Yawha is to file and serve any memorandum or sworn statement in opposition and **by Friday 16th October 2015**. The application for an order for security for costs and the overall determination of the rule 18.11 application will be made "on the papers" as soon as possible after that date.
16. As to the application for indemnity costs, the claim is for VT 213,835 together with VT 39,650 for disbursements, a total of 253,485. Mrs Patterson also seeks an additional sum of VT 42,500 for the preparation for and attendance at the conference on 27th May. The application is supported by sworn statement from Viska Muluane a legal officer at Mrs Patterson's office which details the attendances. It shows a total time spent of 514 minutes or some 8 and a half hours, between 12 December and 27 May.
17. The disbursements include VT 750 for the costs of the dishonoured cheque provided by the defendant and VT 35,750 relating to an invoice from Barrett and Partners which relates to the preparation of the sworn statement of Mark Stafford dated 30th March 2015. This confirmed that Mr Laumae had received VT3,445,313 on or about 6th November 2014 in connection with work done for Peter Bong, Alan Carlot, Kevin Abel and others who had been represented by Mr Laumae in a claim against Air Vanuatu Ltd.
18. This I accept was relevant and useful information confirming that the defendant had the ability to pay the relevantly small sum of VT 124,930 at around the time the order was made, making it all the more unreasonable that did not do so until some seven months later.
19. Mr Yawha submits the "one page application" could not have cost VT 253,485. He describes the costs incurred "bizarre". He goes on to referred to aspects of the history of the matter and the attempts by Mr Laumae to settle the case.
20. In my view, the application for indemnity costs is substantially justified. The various Court Minutes to which I have already referred clearly recount the frustrating, time-consuming and *costly* history of the efforts of the claimant to secure payment of what the defendant had been ordered to pay by 20th October 2014.



21. In general I accept that the attendances referred to in the bill of costs were reasonable. I accept that in terms of rule 15.5 (5) the defendant has, at the very least, deliberately and for no good cause engaged in conduct that has resulted an increased cost to the claimant. He has provided no sworn statement answering the assertions and the facts in any event are known to the Court and they speak for themselves. As Mrs Patterson observed at the hearing, she was engaged to take over from Mr Sugden in October 2014 and the entire time since then, nearly 12 months, has been spent trying to secure payment of what the Court ordered the defendant to pay by 28th October 2014. No substantive progress with the case has been made.

Conclusion

22. All of that said, in the exercise of my discretion I have decided to award increased, rather than indemnity, costs. **I award the claimant costs against the defendant in the sum of VT 175.000 including disbursements and VAT.**
23. This sum is to paid in full to the claimant, through payment to Mrs Patterson's office, **by 15 November 2015.** If that is not done, then **without further notice or application from the claimant,** the defence and counterclaim will be liable to be struck out and the defendant debarred from defending the claim.
24. Assuming payment is made and that any security for costs ordered following consideration of Mr Yawha's memorandum to be filed by 16th October has been lodged with the Court as required, directions need to be made as soon as possible for this longstanding case to be set down for hearing. It is high time that the merits of this case were determined.
25. There will be a pre-trial conference at 2pm on **Friday 27th November 2015** for appropriate directions to be made.

BY THE COURT

