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

Civil Case No. 27 of 2013

BETWEEN: AFRICAN PACIFIC (SINGAPORE) PTY LIMITED
First Claimant

AND: AFRICAN PACIFIC PTY LIMITED
Second Claimant

AND: LOUIS KALNPEL
Defendant

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

Counsels: *Mrs. MNF Patterson for the Claimant*
Mr. K. Loughman for the Defendant

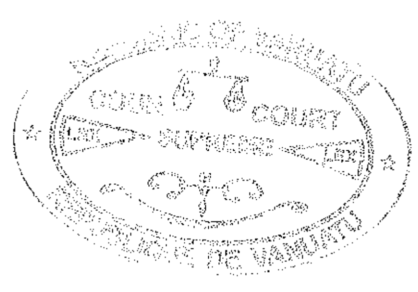
Date of Judgment: *3 July 2015*

JUDGMENT

1. In this application supported by a sworn statement, the claimant seeks summary judgment against the defendant on the basis that the defendant "*... was the only party the claimant dealt with*" and its belief that the defendant has no real prospect of defending the claim.

2. In his sworn statement opposing the application the defendant annexes a Certificate of Renewal of the business name: "*NPS EXPORT SERVICES*" and deposes:

> *"I am not the right defendant because personally I personally have never entered into a contract with the claimant at any time. The invoices by the claimant were addressed to NPS Export Services as the original supplier. The said invoices were not addressed to me and I personally was not the supplier of cocoa to the claimants.*
>
> *Through NPS Export Services, John Kapi, Scot Tavi and I were involved in the business of exporting cocoa. The registered users of NPS Export Services are John Kapi, Scot Tavi and myself Louis Kalnpel, however, the claimant has singled me out in this proceeding. ..."*



3. Plainly the parties disagree fundamentally on the question of whether or not the defendant can be sued as an individual and/or is personally liable for whole of the claim.

4. Pursuant to **Rule 9.6** of the **Civil Procedure Rules** the claimant bears the burden of establishing its application for summary judgment to the Court's satisfaction. In terms of **para. 9** however:

> "*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*".

The Pleadings Conundrum

5. The proceeding was initiated by a claim filed on 27 February 2013 intituled in the name of: "*African Pacific Pty Ltd*" (as claimant) and "*Louis Kalnpel*", "*Johnson Kari*" and "*Scott Tavi*" (as the first, second and third named defendants).

6. Although the intituling of the claim separates the 3 named defendants, **para. 2** of the claim clearly states:

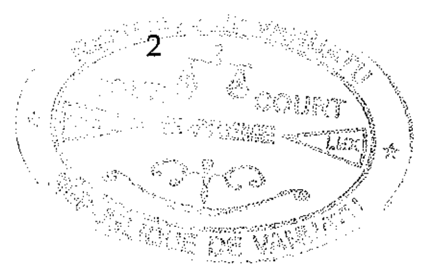
> "*The First, Second and Third Defendants are Ni-Vanuatu citizens, who operated at all material times an export business of cocoa under a business name: NPS EXPORT SERVICES hereafter called 'the defendants';*

And **para. 3** elaborates:

> "*The business name is registered under No. 33929 with the Vanuatu Financial Services Commission. This business name was at all material times registered in the name of the First, Second and Third Defendants jointly*".

7. In brief, the claim seeks to recover a sum of VT3,140,375 from "*the Defendants*" (jointly) being an advance for the purchase and supply of cocoa, which the defendants failed to fully supply or refund in breach of the agreement. Specifically against Louis Kalnpel, the claim sought payment of VT90,000 being the balance owing on a car loan granted to him personally.

8. Although the claim was served on both Louis Kalnpel and Johnson Kari, default judgment was only requested and entered on 10 October 2013 against Louis Kalnpel alone, for the total sum claimed VT3,230,375 plus



interest at 5% per annum; legal costs of VT184,050 and VT27,500 filing fees.

9. On 14 April 2014 Louis Kalnpel filed an application to stay enforcement and to set aside the default judgment. In his sworn statement in support of the application, besides asserting that the named claimant company was an "*international company*" prohibited from carrying on business in Vanuatu, Louis Kalnpel deposed inter alia:

> *"1. I am the first defendant in this case. The other two defendants Johnson Kari and Scott Tavi are friends;*
>
> *2. I used to be involved in the business of exporting cocoa through a business name called NPS Export Services;*
>
> *3. NPS Export Services begun exporting cocoa sometime in 2009 and 2010. At this time we were exporting cocoa to the claimant. The man behind the claimant is Mr. Andreas Bruno Rolf Lombardozzi who I understand resides in Australia."*

and later in the sworn statement:

> *"14. The arrangement was that the claimant would advance some money to NPS Export Services. NPS Export Services would use the money to acquire cocoa beans from the cocoa farmers on Santo or Malekula and then export same to the claimant through Mr. Lombardozzi. The claimant through Mr. Lombardozzi would then sell the cocoa beans to European buyers for a good profit;*
>
> *15. This arrangement was in place for quite a while until the last time when the claimant advanced VT3,852,625 to the defendant. This amount was used to acquire cocoa from the Malekula cocoa farmers".*

10. By an application dated 24 April 2014 claimant's counsel applied to change the name of the claimant company to: "*African Pacific (Singapore) Pte Ltd.*" on the basis of a "*typing mistake*". The application was opposed by defence counsel in a response filed on 27 April 2014 on the basis that: "*once (default) judgment had been entered it was no longer possible to change the claimant's name*".

11. The response prompted an additional reply from claimant's counsel on behalf of "*African Pacific (Singapore) Pty Ltd.*" (which entity had not yet been recognized by an order of the Court) seeking an order for indemnity costs against Louis Kalnpel in the sum of VT333,106 "*incurred by the claimant and caused by* (defendant)".

12. The additional reply drew a counter-application from defence counsel for an order for "*security for costs*" on the basis that the claimant company was a foreign company with no assets in Vanuatu.

13. On <u>11 June 2014</u> default judgment was set aside and the claimant's application to rectify the claimant company's name was granted and counsel was ordered to re-file and serve an amended claim with the claimant's name rectified.

14. On <u>24 June 2014</u> an amended Supreme Court claim was filed naming "*African Pacific (Singapore) Pty Limited*" (as the sole claimant) <u>and</u> "*Louis Kalnpel*" (as the sole defendant). In particular, the claim averred at **para. 2** that:

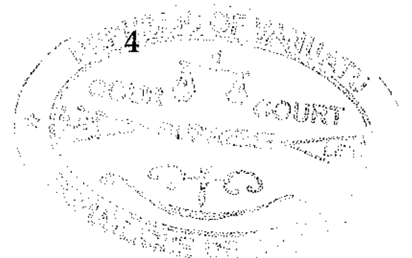
> "*the defendant is a Ni-Vanuatu citizen who operated at all material times an export business of cocoa under the business name: NPS EXPORT SERVICES hereafter called Louis*".

15. Notable by their absence are, the original claimant: "*African Pacific Pty Ltd.*" and the second and third defendants namely, "*Johnson Kari*" and "*Scott Tavi*" or any mention of their involvement with: "*NPS EXPORT SERVICES*".

16. On <u>28 July 2014</u> the defendant filed a defence to the amended claim stating inter alia:

> "*1. The defendant does not know and cannot admit paragraph 1 of the amended claim (hereinafter the claim) regarding the claimant's being a Singapore registered company. In addition the defendant denies paragraph 1 of the claim and say that the defendant, together with Johnson Kari and Scott Tavi trading as 'NPS Export Services' conducted cocoa business with an Australian company namely 'African Pacific Pty Limited (hereinafter the company) through the company's sole director Mr. Andreas Bruno Rolf Lombardozzi.*
>
> *2. As to paragraph 2 of the claim, save that the defendant admit being a Vanuatu citizen, the defendant denies same and say that the defendant together with one Johnson Kari and Scott Tavi trading as 'NPS Export Services' were equally involved in the sale of cocoa beans to African Pacific Pty Limited but not the claimant African Pacific (Singapore) Pty Ltd.*"

17. It is clear from the latest amended defence that the defendant Louis Kalnpel maintains that "*NPS EXPORT SERVICES*" is the registered business name of three (3) named individuals including himself and the company they dealt



with was an Australian (not Singapore) company namely: "*African Pacific Pty Limited*".

18. This latter revelation resulted in a further amendment of the claim to reinstate the original claimant "*African Pacific Pty Limited*", as a second claimant in an amended claim filed on 2 September 2014.

19. Incredibly on 16 December 2014 claimant's counsel filed yet another application "*for leave to amend the amended claim of 2 September 2014*". On 17 December 2014 in the absence of defence counsel leave was granted and the further amended claim was filed on 7 January 2015 and served on defence counsel on 20 January 2015.

20. Although the parties remained the same with two claimants and one defendant, the claim was now being advanced on the footing that the first claimant Singapore company was solely involved in the cocoa contracts and the Australian company (the second claimant) had merely lent the defendant VT300,000 of which an amount of VT90,000 was still outstanding on its loan.

21. On 25 February 2015 the defendant filed a defence to the amended claim denying any knowledge of the claimant companies or personally entering into any agreements to supply cocoa to them and asserting that:

    > "*any such agreement was between the claimant and NPS Export Services*" (**para. 3**)

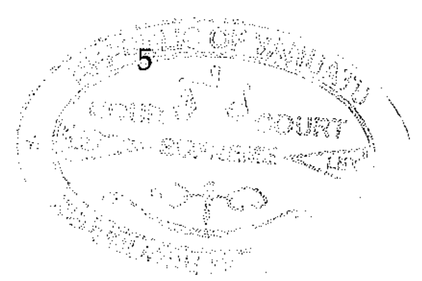
    Furthermore:

    > "*All the invoices issued by the claimant was addressed to NPS Export Services as the original supplier and not the defendant*" (**para. 5**)

    And, in conclusion:

    > "*The defendant says the amended claim should be dismissed because the proper defendant is not named as a party*".

22. Plainly throughout the several transformations and amendments of the claim, the defendant has consistently denied any personal dealings with the claimant(s) and maintaining throughout, that all dealings were with "*NPS Export Services*" a business name that he, Johnson Kari, and Scott Tavi operated or traded under at the relevant time.



23. On 27 February 2015 claimant's counsel agreed to deposit a sum of VT300,000 with the Chief Registrar as "*security for costs*".

24. On 7 April 2015 the claimants filed an application for summary judgment supported by a sworn statement of Andreas Lombardozzi an authorized representative of the claimant companies.

25. For completeness mention should be made of the defendant's Third Party Notice issued on 17 June 2015 to: "*Scott Tari*" and "*John Kapi*" the defendant's former named co-defendants in the original claim who are registered users of the business name: "*NPS Export Services*". On 18 June 2015 the claimant's filed a reply to the Third Party Notice consenting to it and asserting that it "*does not affect the claimant*".

26. So much then for the pleadings which if I may say so, are indicative of a hastily issued claim being progressively amended as a defence was filed and as more information came to light, without the necessary analysis and discipline being brought to bear on it at an early stage before proceedings were issued.

27. Be that as it may, in the response opposing the application for summary judgment the defendant reiterates:

> "*... the correct and proper defendant should have been Louis Kalnpel, Scott Tavi and Johnson Kapi trading as NPS Export Services*".

And later

> "*Since the commencement of this proceeding the claimant has failed to properly name the parties. Initially the claimant named all three registered users (of the business name) as separate defendants and subsequently amended the claim by removing John Kapi and Scott Tavi leaving Louis Kalnpel as the sole defendant*".

And finally:

> "*Unless and until the parties to a proceeding are properly named the Court must not give judgment*".

28. The claimant's reply to the above response is equally forthright and is couched in the following terms:

> "*1. It makes no difference whether one or two or three people are named as defendants;*

2. *In this case there might be three people registered under the business name NPS Export Services. The three person are partners under the Partnership Act [CAP. 92];*

3. *The liability of the users of the business names is several and joint. Because of that there can be no apportionment between the partners because the Partnership makes each of them responsible for the debt of the partnership.*

4. *The claimant is entitled to have his debt satisfied by any of them, any one, any two or any three;*

5. *No one can force the claimant to pursue 1/3 of the debt from each of the partner if the claimant has chosen to sue one of the partners;*

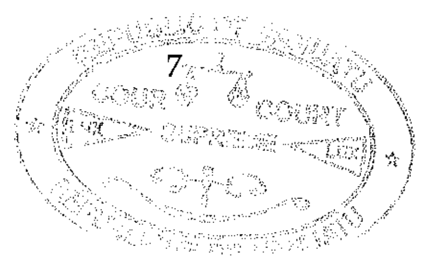
6. *The claimants have the right to sue one of the partners if they wish to."*

29. During the hearing of the applications claimants' counsel identified **Sections 9** and **12** of the **Partnership Act** as being the strongest law in support of the claimants' attitude in suing Louis Kalnpel alone.

The Law

30. The **Business Names Act [CAP. 211]** provides "*... for the registration and use of business names and matters connected therewith*". The Act makes it an offence punishable with a daily fine, for a person to carry on business in Vanuatu under a business name "*... unless the business name is registered ... and that person is registered as the user thereof*" (***see:*** Section 2). A "*firm*" is also defined inter alia as: "*... an unincoporated body of two or more individuals ... who have entered into partnership with one another with a view to carrying on business for profit*".

31. It is undisputed that: "*NPS Export Services*" is a registered business name and the registered users of the name are 3 named individuals: "*Louis Kalnpel*", "*Johnson Kapi*" and "*Scott Tavi*". It is also undisputed that "*NPS Export Services*" is a "*firm*" within the definition of the term in Section 4 of the Partnership Act and is comprised of three registered individuals operating collectively as a partnership entered into with a view to exporting cocoa for a profit. Furthermore all Pro-Forma Invoices were raised in the name of "*NPS Export Services*" and all were signed by the defendant in his capacity as "*Director NPS*".



32. The relevant provisions of the **Partnership Act** are:

> ***"9. Liability of partners***
>
> *Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts."*

33. The meaning and effect of the section is clear in declaring in the first limb that every partner in a firm is "*liable jointly with the other partners*' for all "*debts and obligations*" (**ie**. contractual liabilities) incurred while he is a partner. The second limb beginning after the semi-colon (;) is also declaratory of the law in recognizing that the estate of a deceased partner is "*severally liable*" for the firm's pre-existing unsatisfied debts and obligations.

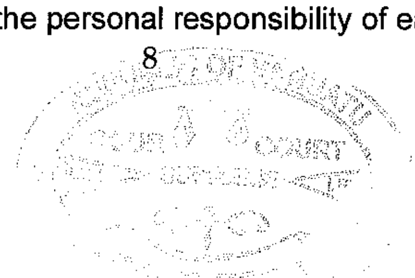
34. The separation of the "*joint*" and the "*several*" liability of the partners of a firm is clear and is reinforced, in my view, by the absence of the words "*and severally*" in the first limb when talking about the partners joint liability for the firm's debts and obligations.

> ***"10. Liability of the firm for wrongs***
>
> *Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."*

35. In my view the section clearly refers to the liability of "*the firm*" (<u>not</u> of the individual partners) for any "*wrongful act or omission*" of a partner acting in the ordinary course of the business of the firm which either causes "*loss or injury*" to an unrelated third party <u>or</u> incurs "*a* (financial) *penalty*". In other words whilst the liability is that "*of the firm*", the actual default is that of a partner acting in the ordinary course of the firm's business. The distinction is not merely semantic nor can the firm's liability be ignored.

36. In seeking to rely on the section claimant's counsel submits that the "*wrongful act or omission*" in this case was the personal failure of the defendant to supply the promised cocoa <u>or</u> to refund the cash advance thereby causing a financial "*loss*" to the claimant companies and for which the defendant (<u>not</u> the firm) is personally liable. I disagree with the submission which blithely ignores the liability of the firm.

37. In the first place where a contract is entered into with a firm under its business name the liability to perform the contract is that of the firm or the partners jointly. It is <u>not</u> the personal responsibility of each individual partner



such that the non-performance of one partner can be equated with that of the firm albeit that the liability is that of the firm.

38. Secondly, the word "*wrongful*" must be given a meaning. The section sheds some light on the meaning by reference to the consequences of the act or omission as either causing "*loss or injury*" or incurring a "*penalty*". In this regard I cannot accept that mere breach of contract without more, is within the contemplation of the section.

39. As was said by Lord Millet in Dubai Aluminium Co. Ltc. V. Salaam [2003] 2AC 366 at **para 103**:

> "... (the section) ... *applies whenever injury is caused to a non-partner, or any penalty is incurred ... The section is concerned only with fault-based liability, but there is nothing in its wording to indicate that the liability must arise at common law*".

and later at **para 106**:

> "*Section 10 assimilated the vicarious liability of partners to that of employers and adopted the same criterion: that the wrongful act or omission must have been performed in the ordinary course of the business of the party sought to be made vicariously liable*".

40. Section 11 of the Partnership Act provides for what might be described as a special instance of liability of the firm dealing with the misapplication of money received:

"11. Misapplication of money or property received for or in custody of the firm

> *In the following cases, namely –*
>
> *(a) where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it;*
>
> *(b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,*
>
> *the firm is liable to make good the loss."*

41. In this case there is no evidence that the funds advanced to the firm and/or received by the defendant, was personally "*misapplied*" by the defendant. The distinction between "*one partner*" and "*the firm*" in the above

paragraphs is significant, as is the liability of the firm "*to make good the loss*" in <u>both</u> instances.

> "***12. Liability for wrongs joint and several***
>
> *Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of sections 10 and 11.*"

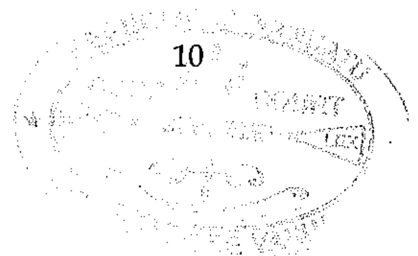
42. I accept that the heading and contents of the section clearly contemplates a "*joint and several*" liability of a partner "*for everything for which the firm while he is a partner therein becomes liable*" but such a liability (of the firm) is expressly limited to the circumstances (or "*wrongs*") set out in **Sections 10** and **11**. Furthermore in my view, before a partner can become severally liable, the liability of the firm must be clearly and separately established. In other words unless and until liability has been established against the firm, <u>no</u> proceeding or enforcement can be issued against the partners of the firm individually as the claimants have done in the present proceedings.

43. Support for the above may be found in two extracts taken from the leading text of <u>Lindley & Banks on Partnership</u> 18th edn at paras. 13-02 and 13-14 as follows:

    13-02 This section is effectively confined to liability arising out of contract, of which Lord Lindley said:

    > *"An agent who contracts for a known principal is not liable to be himself sued on the contract into which he has avowedly entered only as agent. Consequently, a partner who enters into a contract on behalf of his firm is not liable on that contract except as one of the firm: in other words, the contract is not binding on him separately, but only on him and his co-partners jointly. One partner may render himself separately liable by holding himself out as the only member of the firm; or by so framing the contract, as to bind himself separately from his co-partners as well as jointly with them; but unless there are some special circumstances of this sort, a contract which is binding on the firm is binding on all the partners jointly and on none of them severally."*

44. The evidence in this latter regard including the defendant's pleadings is that, far from the defendant "*holding himself out as the only member of the firm*", the defendant has consistently and uniformly maintained that he was only one partner in the firm of "*NPS Export Services*".



13-14 A distinct feature of the law of partnership has always been the unlimited liability accepted by partners for the debts and obligations of the firm, as Lord Lindley explained:

> *"By the common law of this country, every member of an ordinary partnership is liable to the utmost farthing of his property for the debts and engagements of the firm. The law, ignoring the firm as anything distinct from the persons composing it, treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly. Moreover, if judgment is obtained against the firm for a debt owing by it, the judgment creditor is under no obligation to levy execution against the property of the firm before having recourse to the separate property of the partners; nor is he under any obligation to levy execution against all the partners rateably; but he may select any one or more of them and levy execution upon him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves."*

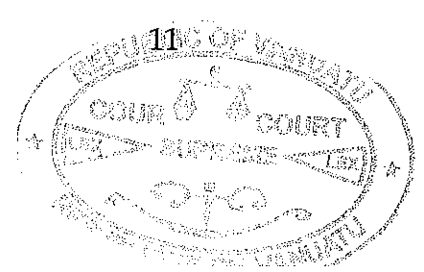
45. In the present case without first obtaining a judgment against the firm, the claimants have elected to sue the defendant alone in order to establish a separate and several liability on his part for the whole of the firm's debts.

46. Finally and more specifically, Lord Millet in the Dubai Aluminium case (ibid) concisely discusses the relationship, meaning and effect of sections 10, 11 and 12 in the following way (at **para 110**):

> *"Section 12 makes every partner jointly and severally liable for loss for which the firm was liable under Sections 10 and 11 while he was a partner in the firm. Where section 10 makes the firm vicariously liable for loss caused by a partners wrongdoing, therefore, section 12 makes the liability the joint and several liability of the individual partners. Section 11 ... is not concerned with wrong doing or with vicarious liability but with the original liability of the firm to account for receipts ... Section 11 deals with money which is properly received by the firm in the ordinary cause of its business and is afterwards misappropriated by one of the partners. The firm is not vicariously liable for the misappropriation, it is liable to account for the money it received and cannot plead the partners wrongdoing as an excuse for its failure to do so".*

> and at **para 111**:

> *"The critical destination between section 10 ... and section 11 ... is not between liability at common law and liability in equity but between vicarious liability for wrongdoing and original liability for receipts. The firm (section 10) and its innocent partners (section 12) are vicariously liable for a partner's conduct provided that three conditions are satisfied:*



(i) His conduct must be wrongful, that is to say it must give rise to fault-based liability and not, for example merely receipt-based liability in unjust enrichement;

(ii) It must cause damage to the claimant; and

(iii) It must be carried out in the ordinary course of the firm's business."

In the present case whilst condition (iii) is satisfied, conditions (i) and (ii) are not.

47. In light of the foregoing, the application for summary judgment is dismissed with costs summarily assessed at VT100,000.

DATED at Port Vila, this 3rd day of July, 2015.

BY THE COURT

<u>D. V. FATIAKI</u>
Judge.