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

Civil
Case No. 19/2530 SC/Civil

BETWEEN: **FR8 Logistics Limited**
Claimant

AND: **Republic of Vanuatu**
Defendant

Date: 28 November 2019
By: Justice G.A. Andrée Wiltens
Counsel: Mr C. Kemot representing the Claimant
Ms A. Bani for the Defendant
Decision: 3 December 2019

JUDGMENT

A. Introduction

1. This is a simple debt recovery matter. The Claimant has filed for Summary Judgment, on the basis that the defence filed has no realistic prospects of success. The Defendant has filed an application to strike out the Claim as well as an Opposition to Summary Judgment.

B. Background

2. The Claimant provides a number of services in Vanuatu, which included freight storage and warehousing.

3. There was an agreement entered into between the Prime Minister's Office, for which the Defendant is vicariously responsible, and the Claimant on 18 October 2017 whereby certain goods imported into Vanuatu for the South Pacific Mini Games were to be customs cleared.

4. All goods, save for a new Minibus and some spare parts, were duly uplifted by the Prime Minister's Office once customs cleared by the Claimant. However the Claimant was left to store those goods left behind.

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5. There was a delay in payment for the storage provided, despite numerous reminders being issued by the Claimant. Ultimately the dispute went to the Supreme Court, and by judgment issued in Civil Case no. 18/1879 by Justice Fatiaki on 22 August 2019, the storage costs as from 18 October 2017 until 11 May 2018 was ordered to be paid by the Defendant to the Claimant, together with interest for each unpaid invoice at 4% per month, and standard costs.

6. Justice Fatiaki further awarded 14% per annum interest on the global sum awarded, as from 9 July 2018 until the amount awarded in the judgment has been paid in full. Further, the judgment indicated that the Claimant was entitled to claim a lien on the goods so as to retain possession until payment in full.

C. The Claim

7. Subsequently, there was further accumulation of storage costs while the case wound its way through the Court process. Hence a second, new Claim was filed as case no. 19/2530 in September 2019. This Claim seeks to recover storage costs for the minibus and the spare parts, as well as interest on each late invoice of 4% p.m., plus costs.

8. There is a sworn statement by Mr Kernot in support, setting out the background, appending copies of the various demands for payment as well as Fatiaki J's judgment.

9. The outstanding amount now claimed is VT 5,338,410. The 4% interest p.m. on the outstanding invoices is calculated to be a further VT 1,822,379. Once again Mr Kernot seeks 14% interest on the same basis as that awarded by Justice Fatiaki, namely on all outstanding amounts until fully paid, including costs.

D. The Defence

10. In October 2019 a defence was filed, together with a sworn statement in support. The defence contends that Justice Fatiaki's decision to award interest of 14% p.a. as from the date of the original Claim means that further storage or interest charges are not payable over and above that award.

11. Alternatively, the defence pleads that the current Claim is *res judicata*.

E. Discussion

12. It is difficult to see what duplication there is between this present case and the previous Claim. While based on the same legal obligations, namely the cost of storage, the time period follows on from the previous determination. Also, the previous litigation was of necessity limited by the pleadings.

13. The submission now is that the Claimant could have amended the previous Claim by adding this further storage cost onto the original Claim. That is not a viable argument when a point in time needs to be chosen for the commencement of a Claim, and yet the further monthly obligations continue to accrue.

14. Mr Kernot, not unreasonably, questions the need to amend his pleadings every month to keep it current; and further, submits that he was entitled to consider that once the Court had ruled,

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thereafter the parties know what their obligations are and would comply with them. It is quite unreasonable to submit that an unrepresented litigant should be so constrained as submitted by counsel for the Defendant. This is not a case of *res judicata*.

15. Justice Fatiaki's decision to award both a monthly interest rate of 4% and an annual interest rate of 14% is difficult to comprehend. It seems to be a double counting in favour of the Claimant, and when looked at in the round equates to the Claimant being able to claim 62% per annum for outstanding storage charges. This of course is well beyond what might be said to be "commercial rates".

16. However, for reasons best known to it, the State Law Office has not appealed the decision. Accordingly, that judgment stands.

17. No matter how the reasoned decision is viewed, it is not what is contended for by counsel for the Defendant. The award made deals only with the core obligations incurred up until May 2018. What is owed at that point of time attracts the 14% interest. The interest awarded does not, and never could, replace the agreement entered into by the parties as to applicable storage rates post the date of the judgment.

18. Accordingly, the defence filed has no reasonable prospect of success on either footing put forward. I also note that there is no claim by the Defendant of any payments having been made towards the accruing debt.

F. Strike Out of Claim

19. The submissions in support of the Strike Out application repeat the submission that the new Claim is *res judicata*.

20. That argument has been dealt with. It is dismissed as having no valid application to the facts before me.

21. The application to strike out is dismissed.

G. Summary Judgment

22. There being no viable defence, the Claimant seeks summary judgment. That is opposed for firstly the same reasons set out above, which are rejected; and secondly the suggestion that there is a dispute of fact or law between the parties which needs to be tried.

23. The dispute referred to is non-existent. Justice Fatiaki in his decision established that there was a contract and the terms of that contract. If there were any disputed terms, the proper approach should have been to challenge the decision on appeal. That has not been done.

24. Ergo, the Court is left in the position of a Claimant having made out its case without demur. In that situation there can no longer be any issues of fact or law outstanding between the parties which need to be resolved.

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25. The reality is that the liability for storage costs has continued past the period identified in the previous litigation.

26. In the course of the Conference at which these matters were discussed, Mr Kernot repeatedly complained that the minibus, which is part of the goods being stored, was "illegally removed" from his premises. He was advised that (i) certain remedies are available to him in respect of that, but that (ii) he was not able to claim storage fees for something he was no longer storing. Accordingly he agreed to ascertain when the minibus was removed from his premises and to re-calculate the amounts due.

27. Mr Kernot's new claim accordingly now amounts to VT 3,880,412. That is made up of the storage costs totalling VT 2,703,357 and the 4% per month interest of VT 1,177,055. He also seeks the filing fee of VT 20,000 plus the 14% interest component as previously explained.

28. Mr Kernot was to provide the information previously provided to Justice Fatiaki to justify the 14% p.a. interest component of the award. He has been unable to do this – due to a virus attacking his computer. Instead he has prepared a written submission to the effect that commercially available funding costs 13.50% p.a. interest, which is increased by 5%p.a. for late payments. Mr Kernot compares the situation to his company acting as banker to the defendant.

29. However, there is no evidence before the Court that the Claimant Company has had to borrow funds in order to provide the storage service. If these goods were not in storage, the space would have been filled by other stored goods for which storage could have been charged, or the space would have sat empty. In either situation the Claimant Company would not incur additional costs over and above the usual overheads, which are the normal costs of doing such business. I see no basis on which the 14% interest can properly be claimed.

30. Additionally, Mr Kernot maintains that he is entitled to the late fee of 4% interest per month for each unpaid invoice. There is no evidence before the Court, though Fatiaki J. accepted this to be the case, that the late payment term of the contract was agreed to by the Defendant. Mr Kernot has likely sought to impose this by printing such a condition on each invoice unilaterally, and then claimed it as an agreed term of the contract.

31. For the above reasons the Claimant is not entitled to claim 4% interest on unpaid invoices per month.

32. As well, the 14% interest claimed on the entire Claim is clearly double counting. As already stated, it gives the Claimant a massive 62% per annum if awarded. That is usurious and cannot be approved by the Court.

33. However, Justice Fatiaki's determination that the Claimant Company was entitled to hold onto the goods pending payment in full of the outstanding sum remains in place.

34. The State Law Office must realise that the costs for on-going storage will continue to accrue. To avoid this, the outstanding amounts awarded to the Claimant need to be settled and the goods uplifted. Otherwise there is a continuing and increasing debt accruing.

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H. Result

35. I grant summary judgment to the Claimant in the amount of VT 2,723,357, being the net storage costs plus the VT 20,000 filing fees.

36. Interest is to run on that sum at the usual Supreme Court rate of 5 % p.a.

37. An award of costs is not appropriate, as Mr Kernot was appearing on the company's behalf.

Dated at Port Vila this 3rd day of December 2019
BY THE COURT

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Justice G.A. Andrée Wiltens