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

Civil Appeal Case No.03 of 1998

BETWEEN: HUDSON & Co.

Plaintiff

AND: GREATER PACIFIC COMPUTERS LIMITED

Defendant

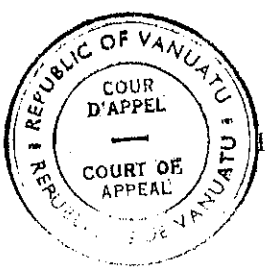
Coram : Acting Chief Justice Vincent Lunabek
Justice J. Bruce Robertson
Justice John von Doussa
Justice Reggett Marum

Counsel : Mr Robert Sugden for the Appellant
Mr John Malcolm for the Respondent

JUDGMENT

This is an appeal from Orders made by Saksak J. following the taxation of four bills of costs. The bills of costs were lodged for taxation pursuing to directions of the Court of Appeal made on 8 October 1997 in Civil Appeal Case No.7 of 1997.

Two issues only are raised by the Notice of Appeal. The first is that the primary Judge erred in disallowing three items in one of the bills of costs. The second is that the primary Judge erred in making no order as to costs following the taxation of the four bills. The Appellant contends that it should have been awarded costs in respect of the taxation on the ground that the aggregate amount allowed on taxation was not substantially below the amount claimed in the bills.



The Appellant is a firm of solicitors, which carries on business in Port-Vila. On 13th February 1997 the Appellant issued a Writ specially endorsed with a claim for legal fees of VT2,107,121, although the particulars in the pleadings specified that the amount outstanding was VT2,104,548. The amount claimed was disputed by the Respondent, which alleged that excessive time had been charged. There was also disagreement as to the rate at which the fees were to be computed. The primary Judge ordered that the Appellant itemize the bills that had been rendered to the Respondent. Those bills claimed gross sums. The primary Judge further ordered that the itemised bills then be taxed. Against those orders, the Appellant sought leave to appeal. The Court of Appeal on 8 October 1997 refused leave and set a timetable pursuant to which the Appellant was required to file an itemised bill of costs in respect of all sums claimed in the proceedings.

Four bills of costs were lodged by the Appellant. Many items in the bills were challenged. There was a long taxation. The amount sought in the bills as lodged in aggregate totalled VT2,635,251. These bills included work covered by payments of VT459,675 which the Respondent had paid before the commencement of proceedings as the orders required the Appellant to file an itemised bill for all the work performed. The primary Judge taxed the bills at VT2,332,630.

The three items taxed off which are the subject of the first issue raised by the Appeal were items No.10, 12 and 13 in the "Advanced Export NZ Ltd" matter. The primary Judge noted in his written judgment that dates given for many items of work were wrong. The dates shown for items 10, 12 and 13 were "4.10.97", "15.10.97", and "16.10.97". The items were disallowed as the Respondents file did not show any work done after February 1997.

The Appellant contends that it was plain both from the chronological order in which the items appeared in the bill, and from the Appellant's file that the dates were wrong, and should have stated corresponding days in October 1996.

The Respondent does not dispute that there was a typing error. On that basis the items, which total VT100,334, should have been allowed on taxation.

The second issue concerns the refusal of the primary Judge to award the Appellant the costs of the taxation. Arguments on this issue have revealed errors in the taxation process not only in the Advanced Export NZ Ltd

matter but also in the matter of "Express Custom Services". In that matter the bill as drawn for taxation was VT1,167,747, and the amount allowed on taxation was VT976,681. The process by which the amount allowed on taxation was reached is complicated, and reflects misunderstandings of the papers placed before the Court by the Appellant. We are bound to say that we found the papers most confusing, and it is understandable that the primary Judge misconstrued the information before him.

The primary Judge referred to the last of four gross sum bills rendered by the Appellant to the Respondent on 12 December 1996. That bill sought a net sum of VT 720,876 after giving credit for certain monies paid in advance. His Lordship said that the professional costs to be allowed on taxation should not exceed this sum. In respect of professional costs claimed in the bill lodged for taxation, the primary Judge said: "For this part of the claim it is my opinion that in the light of my findings as earlier stated, only the sum of VT720,876 will be allowed." His Lordship treated this sum as the starting point, then went on to allow certain items of costs in the bill which he treated as agreed additional items, along with disbursements. His Lordship disallowed a number of items which had been claimed at a rate which exceeded the agreed rate as between solicitor and client. These amounts were entirely disallowed, although it appears to us that the amount should merely have been reduced to the agreed rated. Then His Lordship listed 19 items totalling 931,998VT in respect of which he said: "The following costs are considered to have been unreasonably incurred and will be disallowed. Further that they have been claimed without the Plaintiff establishing the basis for them". It therefore appears from the reasons of the primary Judge that VT720,876 was erroneously included in the amount allowed on taxation on the Express Custom Service matter. This error explains why the amount allowed was not far below the amount claimed even though there were substantial deductions for work overcharged and costs unreasonably incurred.

We think the probable explanation for the primary Judge refusing to make an order for costs in favor of the Appellant is that he taxed off 931,998VT for work unreasonably performed, and deducted other items that were overcharged as well. However, those deductions were not fully reflected in the ultimate Orders that were entered because of the mistaken inclusion of VT720,876.

In our opinion the taxation process, including the exercise of the primary Judge's discretion on the question of the costs of taxation, miscarried because of the mistaken inclusion of VT720,876. It is not appropriate for the Court of Appeal to undertake a fresh the taxation of all or even one of the bills of costs. It would be necessary for that process to be performed again to correct the errors that have become apparent before there would be a proper factual basis for the exercise of the discretion as to costs. Apart from the further matter to which we now turn, it would have been necessary for the Court to set aside the Orders under Appeal, and return the matter for a fresh taxation.

In a course of argument, the Court was informed that the Respondent had paid the amount ordered to be paid following the taxation, and had done so in circumstances which the Respondent contends gave rise to a settlement between the parties regarding the disputed costs the subject of the action.

The following facts were brought to the attention of the Court. They are either established by the Court records, or agreed between the parties: The Respondent was required by the Order under appeal made on 10th February 1998 to pay the balance ofVT2,232,630 then outstanding. On 18th February 1998 the Appellant wrote to the Chief Registrar seeking a review of the taxation, and served copy of that correspondence on the Respondent's solicitor. The letter was promptly brought to the attention of the Respondent. The grounds of review were first that items 10, 12 and 13 had been excluded wrongly in the Advanced Export NZ Ltd bill, and secondly that the primary Judge erred in not awarding the Appellant costs. On or about 6th April 1998, the Court informed the Appellant that it would necessary to appeal to the Court of Appeal against the taxation as it had been carried out by a Judge rather than a taxing officer. The Appellant then initiated the steps to bring the matter to the Court of Appeal.

In the meantime, on 18th February 1998, the Appellant had also served a Notice of Demand on the Respondent followed up at the expiration of 21 days by a Petition to wind up the Respondent. The Petition was filed on 11 March 1998. The amount claimed in the Notice of Demand, and in the Petition, was the balance due under the Order of the Court made on 10th February 1998. On 16th March 1998 the Respondent, by fax, informed the Appellant and the Chief Registrar of the Court that a cheque for the Appellant was ready for collection, and could be collected the next day at

4.00pm on delivery of the Respondent's files. The fax said: "If we do not have the files the cheque will not be able to be collected".

The Respondent proposed to deliver a cheque drawn personally by one of its directors. The Appellant advised that he would not accept that director's cheque. However, the Appellant's said he would accept the personal cheque of another officer of the Company. On 18th March 1998 that cheque was received, and the Appellant's files relating to the Respondent's matters were handed over. At the same time a document was signed on behalf of the Appellant which commenced with the following statement: "Received cheque for the sum of VT1,322,955 in full and final settlement of the claim by Hudson & Co. against the Greater Pacific Computers Limited, in respect of Company Case No.2 of 1998".

Company Case No.2 of 1998 was the Petition to wind up the Respondent. The genesis of the amount sought in the Petition was the Order for taxed costs made on 10th February 1998.

The Respondent contends that in the circumstances just outlined, there has been a settlement in respect of the Appellant's disputed claim for costs, and that the Appellant is now barred from claiming any additional amount. The Respondent's position is that it stands by the settlement, and does not seek to have the amount allowed on taxation reduced for the erroneous inclusion of VT 720,876, or for any other reasons.

Counsel for the Appellant contends that the receipt signed on the Appellant's behalf should not be construed as an accord and satisfaction of a disputed claim because the Respondent should have known the Appellant intended to dispute the disallowance of items 10, 12 and 13 from one bill, and the primary Judge's refusal to award costs. It is submitted that the receipt should be construed as nothing more than evidence of a payment in discharge of the liability arising under the Order of 10th February 1998.

We do not accept the Appellant's construction of the document. By its terms it does not purport to evidence a payment which is merely a discharge of a legal liability. The words "in full and final settlement" imply a compromise of a continuing, live claim. The dispute about the amount of the costs was still a live one at that time because of the Appellant's application to review the Order of 10th February 1998. A similar inference arises from additional terms of the document, which is not necessary to set out, which relate to an

agreement by the Appellant to hand over its files relating to the Respondent's matters in exchange for the cheque. The delivery of the Appellant's files to the Respondent is in our view strongly indicative of there being an agreement which brought to an end the question of costs on the files that had been subject of taxation.

We think the receipt document should be construed as evidencing a final settlement of the continuing dispute over the costs. However, if there were doubt about the true construction of the document, it is a document signed only by the Appellant, and its terms were settled by the Appellant before it was signed. The Appellant is firm of solicitors. It was at the relevant time dealing with its unrepresented client. To the extent that the terms of the receipt may be ambiguous, they should be interpreted against the interests of the Appellant.

For these reasons we do not considered that it is now open to the Appellant to seek to reopen the Orders of 10th February 1998, and the Appeal should be dismissed with costs.

It is appropriate that we make general comment on two issues. First, the confusion and the mistakes which occurred in the taxation process stem from an elementary failure on the Appellant's behalf to produce a clear statement which identified first, the gross bills that had been delivered, secondly, their relationship to the bills in taxable form, and thirdly the credits for payment which had been received from the Respondent. The taxation of bills of costs in long matters as between solicitor and client is likely to be complex, and it is incumbent on the solicitors concerned to put forward the information necessary to support their claim in a simple straight forward way which is easy to follow by the judicial officer required to conduct the taxation, and by the client who is disputing the claim. In this case the Appellant has been largely the author of the errors and confusion which have occurred.

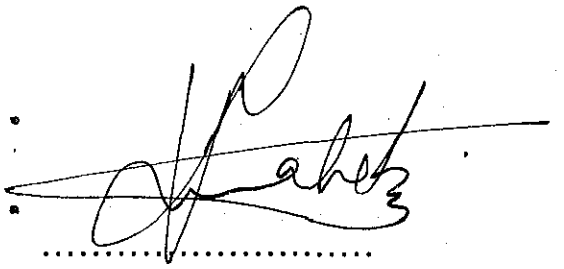
The other comment we make is in respect of an observation made by the primary Judge in the course of his reasons. His Lordship wisely urged that parties to taxations should make every effort to reach agreement, at least on as many items as possible, to reduce the time and expense of taxation. We strongly endorse that view. However, in the course of his remarks, His Lordship said that both in respect of party and party costs and solicitor and client costs, the parties through counsel should be at liberty to examine each other's files carefully with a view to discussing their differences and seeking

solutions. It should be remembered however that on party and party taxations where one side is seeking to tax the costs of the other, it is probable that there will be confidential communications and documents within the file of the solicitors whose costs are to be taxed, and these cannot be made available to the other side. Subject to that reservation, we agree generally with the view that the solicitor's file should be available for examination by counsel for the opposing side.

The formal order of the Court is that the Appeal be dismissed and that the Appellant pay the Respondent's costs of and incidental to the Appeal.

DATED AT PORT-VILA, this 22nd DAY of OCTOBER 1998

BY THE COURT



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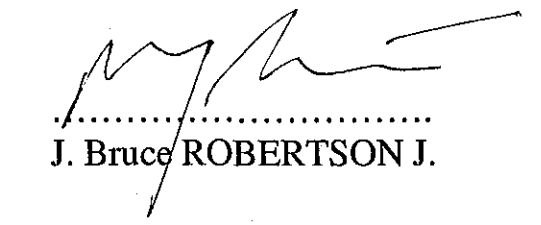

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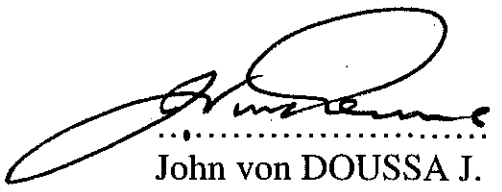
J. Bruce ROBERTSON J.



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John von DOUSSA J.

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Reggett MARUM J. MBE