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

CIVIL APPEAL CASE No 12 of 1999

BETWEEN **MARK JAMES HURLEY**

Appellant

A N D **THE LAW COUNCIL OF THE REPUBLIC OF VANUATU**

Respondent

Coram: **Mr Justice J Bruce Robertson**
Mr Justice D Fatiaki
Mr Justice R Coventry

Counsel: **Mark J Hurley in person**
Rowan Downing and George Boar for the Law Council

Hearing Date: **10 May 2000**

JUDGMENT

This is an appeal against a gross sum award of costs of VT 750,000 against the respondent Council following a successful application by the appellant for an order of certiorari to quash the decision of the Council refusing him unconditional registration as a legal practitioner under Legal Practitioners Act (CAP 119).

Briefly, the grounds successfully advanced by the appellant in his application before the Supreme Court were that the decision of the Council refusing him unconditional registration was invalid, in that :-

Irrelevant considerations (namely ultra vires conditions attached to the appellant's original unconditional registration) had been taken into account; and, that in arriving at its decision the Council had denied the appellant natural justice through its failure to disclose to him materially damaging evidence and in not providing him with an opportunity to respond to it before making its decision.

It is sufficiently plain from reading the judgment of the Supreme Court that the appellant was entirely successful in his application for judicial review. In such circumstances the appellant would normally be entitled to an order for costs assessed on a party and party (but not a solicitor and client) basis.

The learned trial Judge in dealing with the question of costs, at the specific request of counsel for the appellant assessed an all inclusive gross sum figure of 750,000 VT. It appears to us that was the sensible approach to be taken. His Lordship in that process disallowed the claim submitted by the appellant for overseas counsel's fees and disbursements related thereto and adopted as the appropriate party and party hourly rate, a figure of 10,000 VT which was less than half the rate charged in the Bill of Costs which was for 20,000 VT plus VAT,.

The appellant appeals on three (3) grounds:

1. His Lordship misdirected himself in applying as party and party costs a rate of Vatu 10,000 per hour and should have allowed the rate of Vatu 20,000 per hour previously adopted in a number of Supreme Court taxations presided over by Mr Justice Saksak.

2. The quantum of costs allowed at a gross figure of Vatu 750,000 inclusive of disbursements was manifestly unjust and grossly inadequate to constitute a reasonable contribution to costs.

3. The disallowance of foreign counsel's costs and his accommodation and airfares in respect of Mr Finnigan was manifestly harsh and unjust and in all the circumstances it was inappropriate and unjust to treat Mr Finnigan as a local practitioner.

This appeal raises the following important questions for determination:

1. What is the appropriate hourly rate in Vanuatu in any assessment of party and party costs?

2. What are the circumstances in which it will be appropriate to recover the costs of the services of overseas counsel generally and particularly in the circumstances of the present case?

3. Did the exercise of the trial Judge's discretion miscarry?

In this latter regard we respectfully adopt as an accurate summation of an appellate Court's approach to a review of the exercise of a Judge's discretion in ordering costs, the dictum of Griffiths LJ in *Alltrans Express Ltd v C.V.A. Holdings Ltd* (1984) 1 WLR 394 when he said at 403 :

> This Court must not be tempted to interfere with the Judge's order merely because we would have exercised the discretion differently from the way in which the Judge did. Before a Court can interfere it must be shown that the Judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should or should not, have considered or that his decision is wholly wrong, because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale.

We are advised by counsel that this is the first case in which the proper approach to the issue of costs has come before this Court for consideration and it is appropriate that we should accept counsels' invitation to proffer some general guidance to the Courts and practitioners on the topic.

As a preliminary point counsel for the respondent raised the question of whether this was an appeal which required leave of the Court. Having heard argument on the matter we were satisfied that leave ought to be granted ex abundanta cautela. We were not persuaded that the authorities relied on by Mr Boar were apposite. There was a final decision of the Supreme Court in respect of which a right of appeal exists as to the whole or part. If the English authorities could be thought to be

applicable, this appeal unquestionably raises important questions of both principle and practice. The appeal proceeded accordingly to be heard on its merits.

Mr Hurley appeared and ably argued the appeal in person. We are grateful for the comprehensive written assistance he provided to the Court.

As to ground (1) Mr Hurley has conveniently summarised his written submissions as follows :

1. Von Doussa J's inquiries within the Court did not lead to His Lordship being informed of the applicable rate of party/party costs of Vatu 20,000 per hour, as applied by Saksak J in a number of Supreme Court taxations;

2. The appellant's counsel was not invited by von Doussa J to inform the Court of the basis upon which the appellant claimed party/party costs from the respondents of Vatu 20,000 per hour;

3. The appellant has incurred solicitor/client costs at the reasonable rate of Vatu 20,000 per hour applicable to Port-Vila and fundamental justice requires that he be compensated by the respondents at the same level; (save for any unreasonable incurred charges);

4. To reduce, in 1999, the applicable party/party rate to Vatu 10,000 would be to "turn back the clock" to prior to Heerey AJ's ruling in January 1992, in *W Hutton v Amicron* (supra) which allowed a rate of VT 12,000.

As to these various contentions we merely note that as the successful party the appellant was entirely at liberty to address the Court in support of his claim for costs. Suffice it to say that this being an appeal against costs we reiterate the view earlier expressed to counsel that the matter is entirely at large before this Court and we will proceed on that basis.

Mr Hurley in developing his argument on ground 1 drew the Court's attention to an apparent divergence in the Supreme Court as to the applicable hourly rate in

party/party assessments. On the one hand he traced a line of decisions where the rate has progressively increased from 12,000 VT per hour (in 1992) per Heerey AJ in *Wendy Hutton v Amicron South Pacific Limited* (Civil Case No 16 of 1991) to 20,000 VT per hour in a series of decisions delivered by O Saksak J and culminating in his judgment in *Vanuatu Commodities Marketing Board v Edwin Lessengman* (Civil Case No 16 of 1996). On the other hand, Mr Downing for the respondent drew heavily from the ruling of the taxing officer Mr Lunabek (as he then was) in *Hudson & Co v Sunrise Limited* (Civil Case No 59 of 1995) wherein an allowance of 10,000 VT per hour was considered a reasonable rate for taxation o costs on a party/party basis.

In the present case the hourly rate charged in the itemised Bill of Costs were 20,000 VT plus VAT and NZ$200 respectively (being equivalent to 13,354 VT at the relevant exchange rate). There is, in our judgment an air of unreality in accepting the hourly charge rate of 20,000 VT as the proper rate to be adopted in a party/party assessment of costs. What is charged within the profession and accepted or at least acquiesced in by the general community is unquestionably a factor. However we do not accept that it can or should be decisive in determining the contribution to costs to be paid by an unsuccessful litigant.

An order for costs is a matter in the discretion of the trial Court (see: Order 65 of High Court (Civil Procedure) Rules 1964). 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.

Needless to say we remain entirely unpersuaded that "substantial justice" to adopt the words of Article 47(1) of the Constitution, requires that the losing party in a civil action reimburses the solicitor of the winning party the whole of his costs. Such a submission is plainly wrong. It ignores and minimises the equally important constitutional precept of equality before the law and access to the Courts. If that is what was decided on p3 of the Supreme Court decision in *Vanuatu Commodity Marketing Board v Lessengman* (Civil Case 16 of 1996) it was an error.

In this regard we can do no better than repeat the eloquent words of the Taxing Officer in the *Sunrise* case where he said (at p4) :

> It has to be remembered also that one fundamental right or freedom of any individual is the rights of access to Courts of Law. It is a constitutional right in most jurisdictions including Vanuatu. If the cost of litigation is beyond the reach of the ordinary citizen then the constitutional right of access to Court is denied him, and he is the poor litigant. Although the poor litigant has a genuine grievance in Court, he cannot seek the appropriate legal remedy because he lacks the means and facilities to do so. He is thus denied justice ... because of the high litigation cost. That is injustice.
>
> A society where justice is merely apportioned in favour of the rich and against the poor is not built on sound democratic footing. It is a bad system. This should not be encourage in Vanuatu.

It is instructive to note that the approach encapsulated by the taxing master is of course consistent with high authority in other parts of the world. The issues were recently considered in *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779.

In that case there was noted the comments of Steyn LJ in *R v Secretary of State for the Home Department, ex parte Leech* [1993] 4 All ER 539 at 548 :

> It is a principle of our law that every citizen has a right of unimpeded access to a Court. In *Raymond v Honey* [1982] 1 All ER 756 at 760, [1983] 1 AC 1 at 13, Lord Wilberforce described it as a "basic right". Even in our unwritten constitution it must rank as a constitutional right.

Picking up on this theme in the *Witham* case, Laws J said at 788 :

> Mr Richards' elegant and economical argument contains an unspoken premise. It is that the common law affords no special status whatever to the citizen's right of access to justice. He says that the statute's words are unambiguous, are amply wide enough to allow what has been done, and that there is no available *Wednesbury* complaint. That submission would be good in a context which does not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.

We immediately acknowledge that *Witham* was about the level of court fees which it was argued effectively prevented low income people taking their case even if they appeared in person unrepresented, but the philosophy is no different.

This Court in *Attorney-General of the Republic of Vanuatu v The President Frederick Karlomuana Timakata* (1993) 2 VLR 679 cited with approval the statement of the principle of the Privy Council in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670 :

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure all individual citizens the continued enjoyment of fundamental liberties or rights references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like in their Lordships' view refer to a system of law which incorporates those fundamental rules of natural justice that formed part and parcel of the common law of England ... It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law which did not flout those fundamental rules.

This approach is also consistent with obligations in the wider international community.

Vanuatu has been a member of the United Nations since 1981 and it is not to be forgotten that the Universal Declaration of Human Rights provides :

Article 7

> All are equal before the law and are entitled without discrimination to equal protection of the law

Article 8

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Such ideals become pious incantations if as against the particular circumstances of this Republic any litigant is at risk of costs orders which are so crippling that the doors of the Court are effectively shut to them.

In New Zealand the approach was discussed by McGechan J in *Holden v Architectural Finishes Ltd*[1997] 3 NZLR 143 at 145 :

> In both cases, there is no challenge to the well-established principle that party and party costs are to be quantified on the basis of a so-called "reasonable contribution" to the successful party's costs.

At 146 His Honour continues :

> The underlying concept is one of reasonable contribution to costs actually and reasonably incurred. This concept does not envisage a reasonable contribution to actual but excessive costs ... It follows that a party seeking "reasonable contribution" by direct reference to costs actually incurred must first satisfy the Court that the costs actually incurred fall within the "reasonable" range. It is a "range". There is seldom one absolutely correct figure for actual costs. This, essentially, is a market question. It causes less difficulty than might be imagined. Frequently, there is no challenge; quite possibly because the other party's actual costs are comparable. In the absence of some credible challenge, or some obvious excess, the Court is likely to assume actual equates reasonable. However, if a credible challenge is made, or the Court has its own doubts, the party claiming on the basis of costs actually incurred must prove the reasonable range character of the latter.

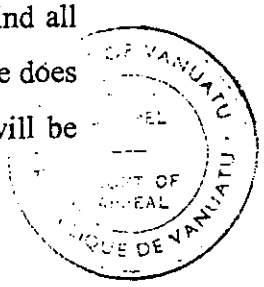
As against this background, just as the Court must determine what hours were reasonable for the preparation and conduct of the case in deciding what is a proper award of costs, the Court must also determine what is a proper rate. This is not a question of interfering with contractual arrangements between a client and their own lawyer nor is it 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. As against prevailing common law and international norms and approaches we are satisfied that to allow full indemnity costs in Vanuatu in the generality of cases (as it appears has been adopted by one Judge), would require Parliamentary intervention and direction. Full indemnity may be appropriate in extreme cases but we reject any possibility of that being considered as the norm.

The question is whether the reasoning and approach in *Sunrise* (which is the only considered and analysed decision in this jurisdiction) should be altered.

It was brought to our attention that the prevailing minimum wage prescribed for an ordinary worker in Vanuatu is still *"...16,000 VT per month calculated on the basis of 22 working days in a month and 8 working hours in a day ..."* (see: Minimum Wage and Minimum Wage Board (Amendment) Order No 5 of 1995).

At the prevailing hourly charge out rate for solicitor/client costs of 20,000 VT, an average minimum wage earner's monthly wage in Vanuatu would effectively purchase 48 minutes of legal consultation. Even allowing for the pooling of resources by the relatives of indigent litigants and the inevitable overheads of maintaining a legal practice in Vanuatu, this singular social and economic indicator cannot be ignored in the Courts overall assessment of what is a fair and reasonable hourly rate in an assessment of party/party costs in litigation before the Courts of Vanuatu. It also illustrates the importance of a strong, active and well-resourced Public Solicitors Office to "provide legal assistance to needy persons" as required by Article 56 of the Constitution.

In so far as it is necessary to have a bench mark, having weighed the competing interest which must be assessed we might have been persuaded that an hourly rate of 8,000 VT was an appropriate and reasonable rate to be applied generally in an assessment of party and party costs. However we are unwilling to differ from the approach and assessment made by the Acting Chief Justice (before he held that office) but consistently applied by him since. In that office and previously as Taxing Officer, he is and was in frequent contact with the taxation of costs. In the absence of new arguments or persuasive relevant evidence we are of the view that VT10,000 (including VAT) 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 the time spent will be reflected.



The approach is not novel. 125 years ago Mallins VC said in *Smith v Buller* (1875) L.R. 19 EQ 473 at 475 :

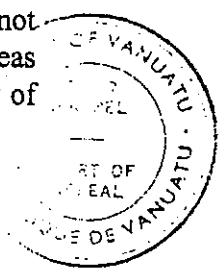
> It is of great importance to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs. ... I adhere to the rule which has already been laid down, that the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them.

The allowance of a foreign counsel's fee is a question which involves the weighing of a number of competing issues. In *Jordan v Edwards* [1979] PNGLR 420 Prentice CJ summarised an approach in a decision for the Supreme Court of Justice :

> "When considering whether an exception should be made in terms of the Court's Rule – the Court, I believe, should take into account as the principal factors – the difficulty of the case (in particular whether it involves complex matters of law); the nature and extent of the rights involved; the expertise reasonably required or the nature of the particular lis; whether the smallness of the profession and of the community might cause embarrassment to the employment of resident counsel; and above all the necessity of keeping costs as low as possible and access to advice as wide and as even as possible."

To like effect Martin CJ in *C Uta'atu v Commodities Board (No 2)* [1990] TLR 48 said :

> "Overseas lawyers have high overheads by comparison with Tonga and cannot be expected to operate on Tongan rates. Their clients will have to pay overseas rates. If that client succeeds in Tonga and then fails to recover at least a substantial part of those costs any damages will be substantially reduced. He will have been denied justice because, he had not been adequately compensated.
>
> Justice means being fair to both parties, including the loser. That can be achieved by allowing overseas rates only where local counsel could not have adequately dealt with a case. If they could, the luxury of overseas counsel must be paid for by the client; if they could not, the necessity of overseas counsel will be paid for by the loser."



The underlying philosophy of those cases from Papua New Guinea and Tonga are appropriate here. In the year 2000 and considering the strength and experience of practitioners permanently within the Republic we are satisfied that the starting point must now be that the additional costs and disbursements of overseas counsel will not be allowed unless or until it is established that such is truly justified and supported by a certificate of the Court. We do not overlook the irony in the present case that the hourly charge rate of the overseas counsel is substantially lower than that charged by the local lawyers although the differential perhaps becomes a little illusory when you add in accommodation, travel, admission and work permit costs.

The primary Judge on this point noted :

> "I do not think it is appropriate to include in the costs awarded in favour of the applicant, the disbursement involved in obtaining the services of overseas counsel. There is a competent legal profession within Vanuatu. If a litigant wishes to obtain the services of a barrister from elsewhere, rather than utilise the services of the Vanuatu profession, that is a matter of choice for the litigant, but the extra expense involved including travelling costs and time, and accommodation, cannot be claimed as a component of party and party costs against an unsuccessful litigant.
>
> I am prepared to assume, however, that the work done by visiting counsel would otherwise have been carried out by local practitioner, and that work should be brought to account, at a rate appropriate to Vanuatu when assessing party and party costs. However care must be taken to exclude 'double counting' where visiting counsel and local counsel both cover the same ground in preparing for trial."

In other words the Judge was not persuaded that overseas counsel was justified but nonetheless while being vigilant to guard against "double counting" he recognised the value of the work actually undertaken by Mr Finnigan. As far as he went we agree with his reasoning and approach but there is one aspect which is not specifically adverted to which we consider requires some elaboration.

While difficulty of the case, the vital importance of the issue to the appellant personally, and the level of expertise necessary, could not have justified an exception from the general approach, we are attracted to the argument that the

nature of the proceedings and the identity of the people comprising the respondent Council was an important factor in this small legal community.

The Law Council comprises the Chief Justice, the Attorney General and one legal practitioner appointed by the Minister (Legal Practitioners Act CAP 119).

There must be a degree of sensitivity about making the underlying challenge that the original conditions imposed by such a group were invalid and, in any event, the endeavour of the respondent to enforce them without a fair and proper hearing on the issues was unlawful.

When it is recalled that the attack at the heart of this litigation is against the decisions of such a body, the potential for perceived adverse long term consequences (however misguided) cannot be ignored. Introducing an independent and objective advocate – free from the ebbs and flows of these issues – was not unreasonable and in our judgment justified. Accordingly, we consider that an allowance towards the disbursements of Mr Finnigan being in Port-Vila was appropriate and we set that at VT150,000.

The appeal is accordingly allowed and the gross sum of costs ordered against the defendant is increased to VT900,000.

The appellant is entitled to costs in respect of the appeal in the sum of VT100,000.

DATED AT PORT-VILA, this 17 DAY of JULY, 2000

J Bruce ROBERTSON J **D FATIAKI J** **R COVENTRY J**

REPUBLIC OF VANUATU COUR D'APPEL COURT OF APPEAL REPUBLIQUE DE VANUATU