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

CIVIL APPEAL CASE No.11 OF 2010

BETWEEN: **WHITESANDS RESORT LIMITED**
First Appellant

AND: **DOMINIQUE DINH**
Second Appellant

AND: **BUDI & DWIPA WINARTO, STEVEN KORMAS, MARY WALKEY & ZARIFIS ZARIFOPOLOS, LISANDROS & NIKI KARANICOLOS, MERTHI POEDIJONE**
Respondents

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki

Counsel: *Mr Robert Sugden for the Appellants*
Mr Juris Ozols for the Respondents

Date of hearing: *5th July 2010*
Date of Judgment: *16th July 2010*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

JUDGMENT

1. This appeal arises from the aftermath of this Court's decision on 4th December 2008 between the same parties in CAC No.20 of 2008. The Court of Appeal held that each of the Respondents had rescinded their respective contracts to purchase interests in leases from the First Appellant. This conclusion entitled each of the Respondents to a refund of the deposit paid under their contract. Having reached this conclusion, the Court of Appeal said:

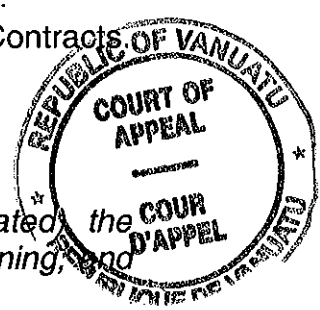
"The matter must be returned to a Judge of the Supreme Court. It seems likely in light of the reasoning of this Court that the Claimants.... will seek summary judgment in their favour on both their claims and the

counterclaim. It would be for the Supreme Court to work out in conjunction with the parties what consequential orders would now conclude the proceedings by the Claimants..."

2. The matter was returned to the Supreme Court and on 21st May 2010 judgment was entered for the refund of the deposits together with interest at the rate of 5% from 31st March 2006, and the Appellants were ordered to pay the Respondent's costs at the standard rate.

3. This appeal concerns only the Order for Costs, but to understand why that Order is contentious it is necessary to give more detail about the events which followed the previous Court of Appeal decision.

4. After the decision the First Appellant offered to refund the deposits but nothing more, notwithstanding that the Respondents were seeking interest. The First Appellant sought to justify the refusal to include any interest component by the terms of clause 13.1.2 of the rescinded Contracts. Clause 13 of those contracts provided:-



*"13. **RESCISSION OF CONTRACT***

*13.1 **Meaning of Rescission***

If this Agreement is rescinded (as opposed to terminated) the rescission will be deemed to be rescission from the beginning, and unless the parties otherwise agree:

13.1.1 the deposit and all other money paid by the Member under this Agreement will be refunded immediately to the Member; and

13.1.2 neither party will be liable to pay the other any sum for damages, costs or expenses."

5. The stand of the First Appellant was unjustified. Even if clause 13.1.2 had the effect of relieving the First Appellant from paying interest up until the time of the rescission, upon the contracts being rescinded the deposits became immediately repayable. From that time onward clause 13.1.2 had no further operation, and could not affect any obligation to pay interest otherwise payable under general law principles.

6. When the Respondents refused to accept the offer the First Appellant made a further offer (the second offer) to pay specific amounts to each Respondent which exceeded the deposit amounts. The additional amounts

were presumably to compromise the claims for interest as costs were offered in addition. How the excess amounts were calculated was not stated in the second offer. The second offer was expressed to be conditional on written acceptance within 16 days.

7. The second offer was not accepted within that timeframe, and did not solicit any response from the Respondents. Sometime later the Respondents' solicitor informed the Appellants' solicitor that the Respondents would not accept the amounts offered.

8. The situation facing the Respondents, after the second offer expired, was that they had no offer at all open to them in respect of their claim. In these circumstances the Respondents understandably applied for summary judgment for the amounts of the deposits plus interest. The rate of interest was not specified in the application for summary judgment, but when the application came to hearing they sought interest at the rate of 10% from 31st March 2006. During the hearing the First Appellant conceded the claim for the refund of the deposits, and offered 5% interest, which, the Respondents immediately accepted. The parties also reached agreement on other incidental matters necessary to resolve outstanding issues between them, save for the costs of the application for summary judgment.

9. Counsel for the First Appellant sought time to prepare an argument on costs, apparently based on the relevance of the amount offered in the second offer. The primary judge however refused to adjourn the matter for this purpose, and in published Reasons of Judgment later given the primary judge said that counsel should have been in a position to argue costs as an award of cost is an issue in every application before the Court. The judgment included an award of cost against the First Appellant on the application for summary judgment at the standard rate.

10. On this appeal counsel for the First Appellant argued that he should have been allowed time to prepare an argument on costs, and had he been given the opportunity to do so, he would have contended that the costs should be awarded in favour of the First Appellant against the Respondents

as the amounts in addition to the deposits in the second offer exceeded the award of 5% interest in the judgment. Counsel said he would have relied on the following provisions in the Civil Procedure Rules No.49 of 2002, namely:-

Rule 9.7(10):-

"9.7(10) If:

(a) a party offers to settle under this rule but the other party refuses the offer; and

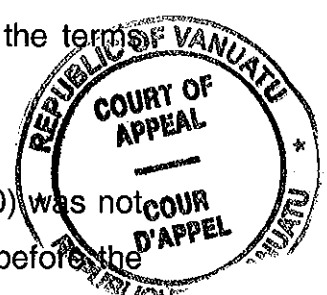
(b) the other party is successful but for less than the amount offered on the offer to settle claim form, or for less advantageous terms than the terms offered on the offer to settle claim form;

the court may award costs against the other party."

11. Rule 15.11:

"When considering the question of costs, the court must take into account any offer to settle that was rejected."

12. The second offer was made on an offer to settle claim form in the terms prescribed under the rules.



13. It was suggested in argument before this Court that Rule 9.7.(10) was not directly applicable as the second offer was made and rejected before the application for summary judgment was filed, and that Rule 15 governs the situation. Rule 15 by its terms will have application even where the relevant offer is made before proceedings are commenced and in this respect has a more general operation than Rule 9.7(10) which applies where there is a proceeding in the Supreme Court.

14. However, in the present case we consider both Rule 9.7(10) and Rule 15.11 are relevant. Although the costs order was made in relation to the application for summary judgment, that application was an interlocutory application made within the principal proceedings. The second offer was made in the course of the proceedings. Although Rule 15.11 also applies, it adds nothing to the discretionary power of the Court arising under Rule 9.7(10).

15. The primary judge in his Reasons for Judgment has not referred to either Rule 9.7(10) or Rule 15.11, and as we understand the judgment he has not

taken into account when making the costs order that the amounts recovered by the Respondents were less than the amounts offered in the second offer. We accept the First Appellant's argument that this relevant consideration appears to have been overlooked and for this reason it is open to this Court to exercise the discretion as to costs afresh.

16. On the one hand, the First Appellant is correct in asserting that the ultimate outcome resulted in a judgment slightly less than the amount contained in the second offer.

17. On the other hand, however, the second offer failed to specify how the excess amount of the deposits was calculated, and the second offer was subject to a time limit. It was well known to the Appellant that the Respondents resided in Australia, and that the Respondents' Vanuatu lawyers would have to obtain instructions through Victorian lawyers who in turn would have to contact individually the six separate Respondents. Moreover, once the offer expired there was no offer at all which they could accept. Each consideration militates against making an order in favour of the First Appellant.

18. It was open to the Respondents before taking the step of issuing the application for summary judgment to approach the First Appellants' lawyer saying that the Respondents were now prepared to accept the second offer, and inquiring whether those offers would be renewed. In light of events which occurred during the hearing it is probable that the offers would have been renewed and the application for summary judgment would have been unnecessary.

19. Had the second offer remained open we consider there is every reason why the discretion as to costs should have been exercised in favour of the First Appellant. However, the time limit for acceptance confused the situation, and we think in the events that then followed both parties bear a measure of responsibility. The Appellants should have enquired before issuing proceedings whether the offer would be renewed, and once the proceedings were commenced, the Appellant could have renewed the offer

but did not. In the circumstances we think there should be no order as to costs on the application for summary judgment.

20. The First Appellant receives this measure of success on this appeal but has failed to establish its primary assertion that costs of the summary judgment application should have been awarded against the Respondents. Appeals to this Court on relatively minor issues like that in the present case are not to be encouraged. We consider there should be no order as to costs on the appeal.

21. The formal orders of the Court are as follows:

(1) The appeal is allowed. The order for costs made in favour of the Respondents on 24 May 2010 is set aside.

(2) Order that there be no order as to costs in the Court below on the application for summary judgment.

(3) There will be no order as to costs on the appeal.

DATED at Port-Vila this 16th day of July 2010

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

Hon. Vincent LUNABEK CJ

Hon. John von Doussa J

Hon. Ronald YOUNG J

Hon. Oliver A. Saksak J

Daniel FATIAKI J