

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

Civil Case No. 167 of 2011

BETWEEN: CLAIRE DORNIC
Claimant

AND: FELIX LAUMAE
Defendant

Hearing: *Thursday September 1st 2016 at 8 am*

Judgment: *Thursday, September 29th, 2016.*

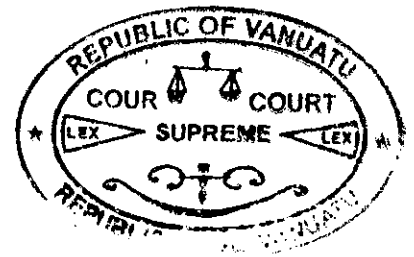
Before: *Justice JP Geoghegan*

Appearances: *Robert Sugden for the Claimant*
Avock Godden for the Defendant

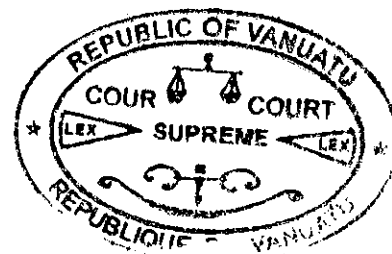
JUDGMENT

1. These proceedings consist of a claim by Mrs Dornic for the sum of Vt 12, 860,759 together with interest, for amounts advanced by her to Mr Laumae at various times between 2007 and 2010.
2. The proceedings were filed in 2011 and have followed an unsatisfactory path since that time which has consisted of persistent and serious breaches by Mr Laumae and/or his counsel in complying with timetabling orders designed to progress the proceeding. That led to Harrop J making orders on February 11th 2016, striking out Mr Laumae's defence and counter claim and ordering that Mr Laumae was debarred from defending the claim. In issuing his judgment, Harrop J stated:-

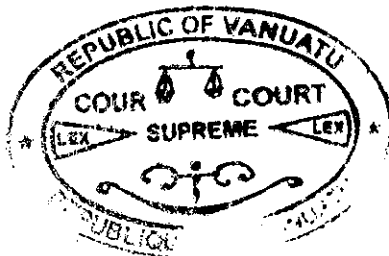
"There is no reason not to do so. There has been no request by the defendant for more time to pay or any application to vary the terms of those orders, coming as they did against an appalling, indeed contemptuous, history of non-compliance by the defendant with Court orders over a very lengthy period".



3. Mr Laumae appealed that decision.
4. On 15 April 2016 the Court of Appeal refused Mr Laumae leave to appeal as it found no merit in the proposed appeal. See: Laumae v. Dornic (CAC 16/726, 15 April 2016).
5. On April 29th 2016, the matter came before me and given that there was no appearance by Mr Laumae or counsel on his behalf I granted judgment in favour of Mrs Dornic. Mr Laumae appealed that decision and on July 22nd 2016 that appeal was granted in the Court of Appeal. The file was returned to me for management and disposition and on August 10th I issued a Minute allocating a formal proof hearing to take place on Monday August 29th at 3 pm. I directed that given that Mr Laumae had indicated that he wished to attend that hearing that Mrs Dornic should attend the hearing although some consideration would need to be given to the extent to which Mr Laumae could participate in the proceedings given the orders which had already been made in the proceedings striking out his defence and debaring him from defending the proceedings.
6. On Friday August 26th Mr Laumae filed an application for leave to revive his defence and counter claim together with submissions in support of that application and a notice of intention to cross examine Mrs Dornic.
7. On August 29th, the Court received what purported to be a medical certificate dated August 29th and issued by a Doctor Tarianga. The medical certificate simply recorded in respect of Mr Laumae, "*three days no work*". The medical certificate was unaccompanied by any letter or formal application for an adjournment.
8. In a Minute issued on August 29th I made various observations regarding the medical certificate and adjourned the hearing to 8 am Thursday, September 1st. That adjournment was principally for two reasons, the first being that Mrs Dornic had travelled from Santo to attend the Court and the second, that I would be in a circuit on Santo and away from Vila for the following two weeks.



9. My Minute of August 29th was served on Mr Laumae personally and Mr Godden appeared on Mr Laumae's behalf at the hearing on September 1st. It was clear that Mr Godden had minimal instructions regarding the matter and he advised that he was not in a position to argue the application to revive Mr Laumae's counter claim and defence and was not in a position to cross examine the claimant given that he had been briefed only late the day before by Mr Laumae. Mr Godden sought an adjournment of the matter in the first instance. Having heard from both Mr Godden and Mr Sugden, and bearing in mind that Mr Laumae had filed submissions, which I had considered, I determined that I was not prepared to grant the adjournment sought. In addition I dismissed Mr Laumae's application for reinstatement and directed that I would give reasons for that together with a determination of Mrs Dornic's claim at a later date.
10. A significant, but not the sole factor, in determining that there should be no adjournment was the issue of Mr Laumae's application for leave to revive his defence and counter claim. The essential grounds for the application were that Mr Laumae was entitled to recover from Mrs Dornic, the costs of his legal services. That is his counter claim. No issue is taken by Mrs Dornic that legal services were provided to her by Mr Laumae. However her position is that Mr Laumae has not tendered the necessary bills in taxable form despite numerous directions from the Court for him to do so and despite his assurances that he would. Noticeably absent from Mr Laumae's application and affidavit in support were precise details as to the accounts he has tendered to Mrs Dornic and the details of those accounts. Instead, Mr Laumae appears to baldly assert that he owes no money to Mrs Dornic.
11. In Mr Laumae's application he refers to relying on the Court of Appeal judgment in Isabelle Gidley v. Vanuatu Indigenous Development Alliance and Tamata Mele, Civil Appeal Case No. 34 of 2006.
12. While Mr Laumae filed submissions accompanying his application for leave to revive his defence and counter claim those submissions do not refer to the decision in Gidley. Nonetheless I have read that decision. Frankly I consider it to be of no assistance to Mr Laumae. That decision dealt with orders made by a Judge in the Supreme Court striking out a defence and counter claim of the appellants. The Court of Appeal ruled that he should not have done so and that the exercise of discretion under rule 6.8 Civil Procedure Rules which

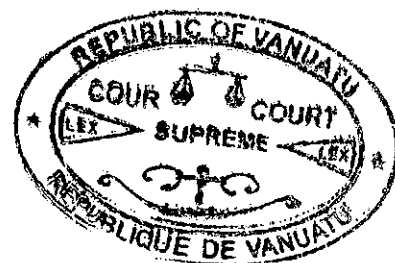


governs the issue of non-compliance with orders made at a conference should be done very sparingly and exercised only when it is clear that a non-appearing party does not intend to participate in the action. That is not the case here. Mr Laumae's defence and counter claim were struck out at an earlier date due to his "*appalling, indeed contemptuous, history of non-compliance with Court orders over a very lengthy period*". Mr Laumae appealed that decision unsuccessfully and in the circumstances the decision in Gidley is of no application.

13. Accordingly apart from the broad assertion that Mr Laumae owes no money to Mrs Dornic, Mr Laumae's application offered nothing new. Mr Laumae's application does not refer to any rule in the Code of Civil Procedure which specifically refers to the "*revival*" of a statement of defence and/or counter claim. I accept however that the Court would have jurisdiction to entertain such an application particularly in view of rule 1.2 of the Code of Civil Procedure Rules which provides that:-

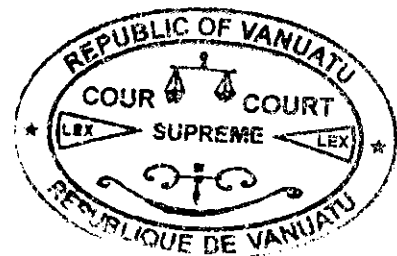
"The overriding objectives of these rules is to enable the Courts to deal with cases justly".

14. Consideration of the justice of the case as it relates to Mr Laumae's application must however include reference to the history of the proceedings.
15. What is clear in this case is that Mr Laumae has been given any number of opportunities to comply with previous Court Directions and it has only been as a last resort that the Court made the order striking out his defence and counter claim and debarring him from defending the proceedings. In considering whether or not the defence and counter claim should therefore be reinstated I consider that the Court would need to be satisfied, among other things, that there could be a reasonable explanation for Mr Laumae's previous non-compliance with Court orders and that a failure to reinstate would cause Mr Laumae a serious injustice.
16. As to the issue of Mr Laumae's defence I do not consider that Mr Laumae has demonstrated that he has an adequate defence to the proceedings. Secondly, Mr Laumae's application contains no explanation at all for his previous non-compliance with Court orders or provide any assurance to the Court that Court orders will be complied with in the future. This is of particular significance taking into account that Mr Laumae is an experienced Court lawyer who, on the face of it, has clearly breached the duty imposed on all parties under rule 1.5 of the



Civil Procedure Rules to help the Court to act in accordance with the Court's overriding objective to deal with cases justly. Thirdly, Mr Laumae is not prevented from pursuing Mrs Dornic in respect of his outstanding costs. While there may be an inconvenience to Mr Laumae in having to initiate alternative proceedings to pursue payment of his costs that is not the same as an injustice.

17. A further factor which I take into account regarding Mr Laumae's application is the fact that Mr Laumae has had since April 15th 2016, when the Court of Appeal decision was delivered, to file an application to reinstate the statement of defence and counter claim. Indeed he could even have taken those steps immediately after Harrop J's judgment on February 11th 2016. Instead Mr Laumae has chosen to wait until immediately prior to the formal proof hearing to do so. When one takes into account that Mr Laumae is a lawyer, that the last minute filing of this application comes against an appalling history of non-compliance with Court orders and that there is no explanation provided by Mr Laumae as to why he has delayed making the application, such factors weigh heavily against such an application being granted.
18. I can find no grounds at all which would justify the reinstatement of Mr Laumae's statement of defence and counter claim given the history of this matter. Indeed, I would suggest that the reinstatement of the statement of defence and counter claim would merely condone the appalling non-compliance to date and would be an injustice to the claimant, who at all times appears to have been ready willing and able to prosecute her claim. Accordingly, I dismiss Mr Laumae's application to reinstate his statement of defence and counterclaim,
19. The dismissal of that application weighs significantly against the granting of an adjournment of the formal proof hearing. There are other factors however which, in my assessment, support declining Mr Laumae's application for an adjournment.
20. Mr Laumae has required Mrs Dornic to be at Court so that she may be cross examined. She has travelled from her home in Santo to attend Court with the costs associated with that. She is entitled to have her claim dealt with.



21. While Mr Laumae provided a medical certificate which provided no information regarding his medical condition and why he could not attend Court the Court granted Mr Laumae the indulgence of an adjournment for the three day period referred to in that certificate. At this hearing no further medical evidence was provided and there was no further explanation for Mr Laumae's non-appearance. In any event Mr Laumae had instructed counsel to act on his behalf but then had then not provided Mr Godden with adequate instructions to be able to act in any effective manner other than to seek an adjournment. After the hearing had been completed, my Associate brought to my attention the fact that the Court had received a letter from Mr Laumae's office regarding his illness. That letter was received by email at 10:48 am, nearly 3 hours after the scheduled time for the conference. The letter was one from Mr Laumae's office purporting to be signed to behalf of Mr Laumae and which stated the following:-

*"Felix Laumae had been sick and his cases for the last three days have been adjourned.
We have provided his sick leave to the Court.*

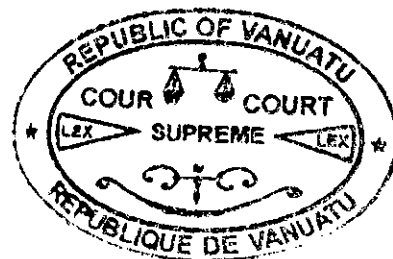
Mr Laumae is still unwell and has to consult his doctors again this morning. His doctor gave him treatment and advises him to take (7) days of (sic) from work. We enclose a medical certificate for Court's file.

We request if all his cases could be further adjourn (sic) to a date after (7) days.

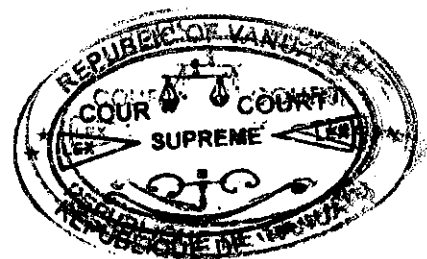
We apologize for any inconvenience."

The medical certificate was not enclosed.

22. When I enquired as to Mr Laumae's absence I was advised by Mr Sugden that he had seen Mr Laumae walking to his office the very morning of the hearing. While that is of course, evidence from the Bar, I have serious concerns regarding Mr Laumae's apparent inability to adequately instruct counsel or to attend the Court. As a practicing lawyer and experienced counsel Mr Laumae should know that in these particular circumstances the Court would require clear advice from a medical practitioner as to exactly what was wrong with Mr Laumae and what prevented him from attending Court. No such information was provided.



23. If Mr Laumae were a lay person and not an experienced lawyer and if there had not been the appalling history of non-compliance and delays regarding these proceedings perhaps some leeway could be provided. In all of the circumstances, however, I think that further indulgences given the particular circumstances presented in this case would simply amount to an abuse of process.
24. For these reasons therefore I decline to adjourn the proceedings.
25. As to Mrs Dornic's claim I refer to my judgment of April 29th and in particular to paragraphs 7 to 18 of that judgment. For convenience sake however I refer to the matters set out in those paragraphs which provide the details of Mrs Dornic's claim..
26. It is clear, even looking at the recent documentation filed by Mr Laumae that he does not deny advances being made to him by Mrs Dornic but his claim is that he has performed legal services for Mrs Dornic of an equal amount to the sum claimed by her. With reference to that Mr Sugden submitted that requests have been repeatedly made of Mr Laumae to provide bills in taxable form and that he has consistently failed to do so. Mrs Dornic has no problem meeting appropriately tendered costs by Mr Laumae but he has consistently failed to provide those costs. As Mr Sugden submitted, when the claim was filed in August 2011, Mrs Dornic had been seeking bills of costs from Mr Laumae since at least 2009 and no costs had been delivered since November 2009. There have been repeated directions by the Court for Mr Laumae to provide bills of costs and to account for the money that he had received from Mrs Dornic. Examples of those are as follows:-
- a) On May 7th 2012 Spear J directed that Mr Laumae was to provide a full accounting of all monies received from Mrs Dornic for whatever purpose together with details as to how that money had been applied, no later than May 16th. That direction was not complied with.
 - b) On May 22nd, Mr Laumae's non-compliance with the direction of May 7th was noted and he provided an undertaking to provide all files, and the alleged sole outstanding bill of costs in taxable form together with the details previously directed by the Court no later than May 25th. That direction was not complied with.



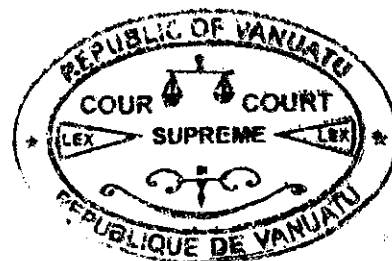
- c) On August 10th 2012, a summary judgment hearing was adjourned by consent and Mr Laumae was given “*one final opportunity*” to file a sworn statement providing a full accounting of the monies that he had received from Mrs Dornic. That was to be provided by August 22nd. That has still not been provided by June 5th 2013 when the proceedings had been set down for trial but were unable to proceed due to Mr Laumae’s counsel, Mr Kapapa, being apparently unwell.

27. In short Mr Laumae has been provided an extraordinary amount of time to provide bills in taxable form which could presumably go some way to resolving this matter but has failed to do so.

28. The sworn evidence of Mrs Dornic is that she had made significant advances to Mr Laumae in respect of a legal work which he was undertaking for her. She had made a number of requests of Mr Laumae to provide her with invoices for the legal work to offset the amounts which had been advanced to him. He duly produced 5 invoices dated from May 25th 2009 to November 27th 2009 for a total of Vt 7, 434,219. Mrs Dornic says that those bills did not equal or exceed the amount which she had paid to Mr Laumae and that Mr Laumae approached her around the end of 2009 for a further advance of funds as he wished to contest the general elections of parliament in the Solomon Islands the following year. The lack of judgment involved in a lawyer seeking a loan from a client is obvious.

29. Mrs Dornic’s evidence is that she was reluctant to do that without having a formal agreement between the parties and accordingly she instructed her lawyer to draw up a deed which was subsequently signed by the parties and is dated April 12th 2010. The operative parts of that deed provide as follows:

- a) That up to March 15th 2010 Mr Laumae had borrowed Vt 4,674,591 in excess of the total sum for the bills which he had delivered to Mrs Dornic and that since 15 March 2010 he had borrowed further sums.
- b) That the parties had agreed that Mr Laumae shall be permitted to make further borrowings by way of successive advances from Mrs Dornic as and when she was able to make them up to a limit of Vt 3 million over and above “*the borrowings*”;



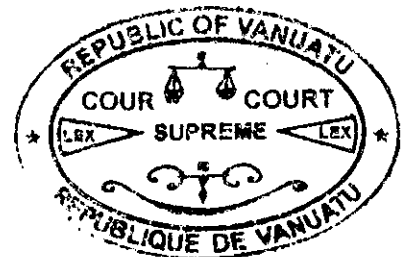
- c) That if Mr Laumae delivered or had delivered further bills since March 15th 2010, the sum of Vt 3 million would be reduced by the total of those bills.
- d) That the parties acknowledged that the total sum which was the subject of their agreement was the sum of Vt 7, 674, 591.
- e) That Mrs Dornic may require the total current balance of borrowings to be repaid within 14 days by delivery of a notice in writing to Mr Laume's office in Port Vila.
- f) That upon expiry of the period of notice any sum remaining unpaid "*shall attract interest at the rate of 15% per annum on the outstanding balance and any payments made by the borrower thereafter shall be taken first in payment of accrued interest and thereafter in reduction of the outstanding sum owed*".
- g) That in the event of recovery action being required Mr Laumae would need Mrs Dornic's costs of recovery on an indemnity basis.
- i) That Mr Laumae agreed to give security for the sum the subject of the agreement together with interests and costs by means of an equitable charge over his registered leasehold title number 12/0631/426 supported by a caution and then a registered mortgage.

30. There is no dispute that on July 18th 2011, Mrs Dornic gave notice to Mr Laumae, in writing, requiring repayment of the sum of Vt 7, 674, 591 within 14 days.

31. It is also alleged by Mrs Dornic that in addition to the advance of Vt 3 million under the deed, Mr Laumae borrowed further sums from her to a total of Vt 5, 195, 168.

32. Accordingly the sums claimed by Mrs Dornic from Mr Laumae are in 2 distinct components, the first component being the sum of Vt 7, 674, 591 captured by the deed between the parties and the second component being additional sums advanced but not captured by the deed in totaling Vt 5, 195, 168. All in all a total sum of indebtedness of Vt 12, 869, 759.

33. When Mr Laumae received the notice of demand he wrote to Mrs Dornic's lawyer advising, among other things, that the claim was premature as the loan agreement recognized that the money advanced would be reduced by bills for work done for by Mr Laumae for Mrs Dornic. While the agreement clearly recognizes that, Mr Laumae's assertion ignored the fact that the



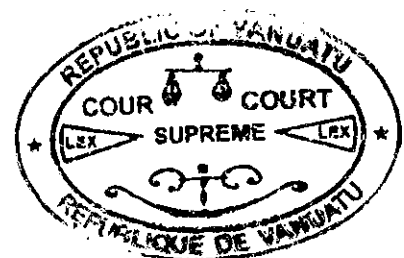
agreement contained a stand- alone clause which entitled the lender to demand repayment in exactly the way she had demanded payment from Mr Laumae. The claim was clearly not premature. It is the evidence of Mrs Dornic that when the notice was issued to Mr Laumae she had received no further bills from Mr Laumae and had also received no repayment of her loans.

34. In her sworn statement dated February 24th 2012, Mrs Dornic provided details of the amounts paid to Mr Laumae. I am satisfied that she has provided sufficient evidence to establish to the requisite standard that she advanced the amount now claimed in these proceedings. I refer also to the sworn statement of Andrea Lumu dated 16 May 2013 which also sets out details relating to the amounts paid to Mr Laumae.

35. In referring to this I note that Mr Laumae, in a sworn statement dated August 31st 2012, stated that he disputed the deed which Mrs Dornic relied upon. He did not, however provide any details of the reasons why the deed was disputed. In addition, he annexed a statement which he asserted established that, as at the date of the statement, Mrs Dornic owed Mr Laumae the sum of VT 8,530,109 for his legal services. As I have said however, one of the major problems in these proceedings has been Mr Laumae's continuing failure to provide bills in taxable form which would enable Mrs Dornic to assess what, if any, sums are outstanding to Mr Laumae. In circumstances such as that Mr Laumae cannot rely on the fact that he had been on a retainer, to retain funds advanced to him by Mrs Dornic, and as noted at paragraph 26, Mr Laumae has been given every opportunity by the court to produce those accounts. He has failed to do so. He should accordingly be left to pursue his own claim.

36. I am satisfied that the sums which Mrs Dornic claims to have advanced to Mr Laumae have in fact been advanced to him and that they have not been repaid. I am satisfied that appropriate demand has been made for repayment of those sums and that they remain unpaid. I am accordingly satisfied that judgment should be entered in favour of Mrs Dornic.

37. The evidence establishes that Mr Laumae paid the sum of Vt 3 million in reduction of the loan on August 12th 2013. Clause 11 of the Deed provides that any payments by the borrower are to be taken first in payment of accrued interest and thereafter in reduction of the outstanding sum owed. Accordingly, any calculation of the sum outstanding must take that into account.



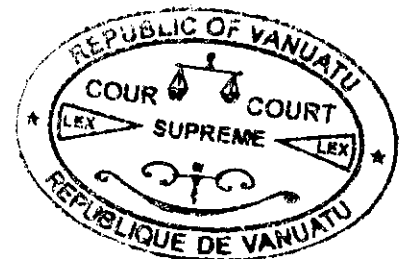
38. In assessing the appropriate sums outstanding and specifically the matter of interest several matters were raised by Mr Sugden as follows:-

- a) The interest figure on the capital sum of Vt 7, 110, 662 at the agreed rate of 15% from August 12th 2013 to September 1st 2016 is the sum of Vt 3, 258, 240. Mr Sugden had provided a calculation through to August 29th on the basis that a formal proof hearing would be on that date and so calculated the correct sum as Vt 3, 249, 475. However I have added interest for the additional days at Vt 2,922 per day.
- b) Mr Sugden submitted that the judgment should stipulate that the interest rate on the capital sum of Vt 7, 110, 662 continues to accrue at the rate of 15% per annum rather than the sum stipulated under the miscellaneous provisions act of 5%. The obvious reason for this is that there is a contract between the parties provided that 15% is to be the interest rate.
- c) That the appropriate sum of interest on the balance of the claim of Vt 5, 195, 168 at 5% from the date of filing of the claim on August 24th 2011 to September 1st 2016 equates to Vt 1, 304, 486.
- d) Mr Sugden seeks costs on an indemnity basis. On that issue, while ordering costs on an indemnity basis is relatively rare, this is a case where an experienced lawyer has entered into a contract with another party with the provisions of that contract as to the payment of interest and costs being very clear. In those circumstances, there is no reason why Mr Laumae should not be held to the terms of the contract which he entered into and I am accordingly satisfied that indemnity costs should be granted.

39. Accordingly judgment is entered in favour of Mrs Dornic against Mr


Laumae for the following sum:-

- a) The balance of the principal sum owing under the deed of Vt 7, 110, 662.
- b) Interest on the capital sum from August 12th 2013 to September 1st 2016 of Vt 3, 258, 240.
- c) The sum of Vt 5, 195, 168.
- d) Interest on the sum of Vt 5, 195, 168 at 5% since the date of filing of the claim on August 24th 2011 to September 1st 2016 being a total of Vt 1, 304, 486.



- e) Costs are awarded in favour of Mrs Dornic in respect of these proceedings on an indemnity basis.
- f) Interest on the sum of Vt 7, 110, 662 is to accrue at the rate of 15% per annum from the date of judgment.
- g) Interest on the sum of Vt 5, 195, 168 is to continue to accrue at the rate of 5% per annum from the date of the judgment.

Dated at Port Vila this 29th day of September, 2016

BY THE COURT

JP GLOGHECAN
Judge

