

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

**Civil**  
**Case No. 15/183 SC/CIVL**

**BETWEEN:** **Abdul Shamim**  
**Claimant**

**AND:** **QBE Insurance (Vanuatu) Limited**  
**Defendant**

***Date of Judgment:*** ***Monday, June 5th, 2017***

***Before:*** ***Justice JP Geoghegan***

***Distribution:*** ***James Tari for the Claimant***

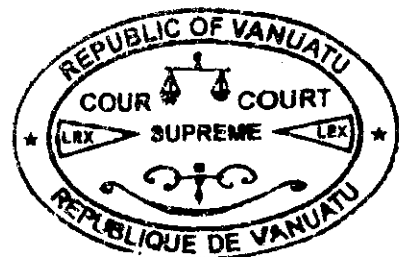
***Mark Hurley for the Defendant***

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**JUDGMENT**

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1. This judgment is to determine whether or not the Court should award indemnity costs in favour of the defendant against the claimant arising from the defendant's successful defence of the claimant's claim in these proceedings on February 3<sup>rd</sup> 2017.
2. The facts in respect of the matter are set out in my Judgment of February 3<sup>rd</sup>, however, briefly, the proceedings arose out of an insurance claim made by Mr Shamim in respect of alleged damage to a printing machine owned by Mr Shamim



and operated in his printing business. QBE had declined the claim on the basis that Mr Shamim had not been truthful in respect of the value of the machine. At paragraph 47 of my judgment I stated that:

*"For these reasons I find that QBE has clearly established that Mr Shamim's claim was a fraudulent, false or fraudulently exaggerated claim and declaration of loss and that such a claim was made with the intention that the defendant would accept that claim".*

3. QBE now seeks costs on an indemnity basis.

4. Rule 15.5 (5) of the Code of Civil Procedure provides:

*"The Court may also order a party's costs be paid on an indemnity basis if:-*

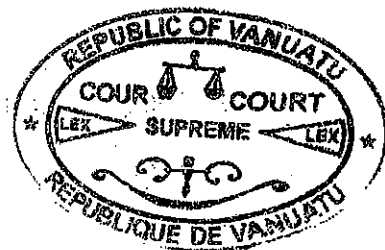
- (a) The other party deliberately or without good cause prolonged the proceeding; or*
- (b) The other party brought the proceeding in circumstances or at a time that amounted to a misuse of the litigation process; or*
- (c) The other party otherwise deliberately or without good cause engaged in conduct that resulted in increased costs; or*
- (d) In other circumstances (including an offer as a settle made and rejected) if the Court thinks it appropriate".*

5. While timetabling directions were made by me in respect of an application for costs, requiring any submissions on behalf of Mr Shamim to be filed no later than Friday, April 14<sup>th</sup> no submissions have been received.

6. In his submissions in support of an award of indemnity costs, Mr Hurley referred to the judgment of Sheppard J in the Australian Federal Court Decision in Colgate - Palmolive Company and Colgate - Palmolive PTY Ltd v. Cussons PTY Ltd<sup>1</sup> which

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<sup>1</sup>[1993] FCA 536.



was applied by Spear J in Triwood Industries Ltd v. Stevens<sup>2</sup> where his Lordship stated at paragraphs 9 to 11:

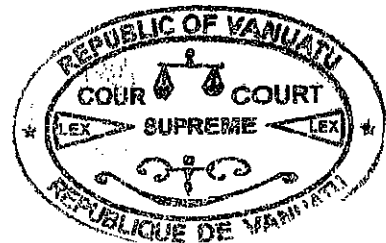
- “9. In the Colgate – Palmolive case, Sheppard J referred with approval to the following extract from J – Corp Pty Ltd v. Australia Builders’ Labourers’ Federation Union of Workers - Western Australian Branch (Federal Court of Australia, 19 February 1993, unreported) French J:  
“It is sufficient, in my opinion to enliven the discretion to award such (indemnity) costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case”.
10. Indemnity costs should only be imposed in exceptional cases. However, where a case is seen as hopeless or obviously lacking any realistic prospect of success, to maintain the claim invites serious consideration of awarding costs on an indemnity basis.
11. Having regard to the evidence that was presented to me, I cannot see how the case for Mr Ward ever had any real prospect of success. This was raised fairly and squarely by Mrs Steven’s counsel after the settlement conference and well before the trial date. It was also, reportedly; the assessment expressed by the Judge presiding over the settlement conference. I can understand and agree with that assessment”.

7. Mr Hurley also referred to the Australian Federal Court decision in Fountain Selected Meds (Sales) Pty Ltd v. International Produce Merchants Pty Ltd<sup>3</sup> where Woodward J stated at paragraph 21:

*“I believe that it is appropriate to consider awarding “solicitor and client” or “indemnity” costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be*

<sup>2</sup> [2012] VUSC 1999

<sup>3</sup> [1988] FCA 202



*presumed to have commenced or continued for some ulterior motive, or because of some willful disregard of the known facts for the clearly established law".*

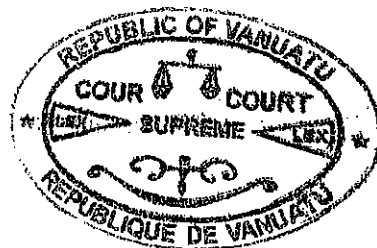
8. Mr Hurley points to the following matters in this case which justify the granting of indemnity costs:-

- a) Mr Shamim commenced and maintained the proceeding based on his *"fraudulent, false or fraudulently exaggerated claim"*;
- b) The fraudulent nature of the claim combined with the bringing and maintaining of the proceedings through to trial demonstrated that Mr Shamim's ulterior motive was that QBE would either meet his fraudulent claim in whole or compromise it;
- c) Properly advised, it must have been obvious to Mr Shamim that he could never overcome the factual findings which were likely to be made against him;
- d) That prior to trial QBE's lawyers had drawn the attention of Mr Shamim's lawyers to the allegations of fraud;
- e) That the evidence presented in the sworn statements filed on behalf of QBE *"was overwhelming"* and there was little by way of cross examination attempted to undermine that evidence;
- f) The submissions on behalf of Mr Shamim were not reasonably arguable on the evidence as it stood and the principles which applied to the circumstances of the case.

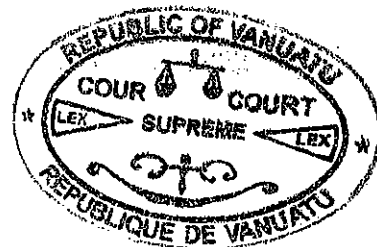
9. Consistent with the position in Australia, the position in New Zealand is that indemnity costs require *"truly exceptional circumstances"*. The New Zealand Court of Appeal in Bradbury v. Westpac Banking Corporation<sup>4</sup> endorsed the following examples where such costs have been ordered:-

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<sup>4</sup>[2009] NZCA 234.



- (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
  - (b) Particular misconduct that causes loss of time to the Court and to other parties;
  - (c) Commencing or continuing proceedings for some ulterior motive;
  - (d) Doing so in willful disregard of known facts or clearly established law;
  - (e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions.
10. I do not think it could be said, in the sense intended by Rule 15.5, that Mr Shamim deliberately or without good cause prolonged the proceedings. Despite the lack of merit in Mr Shamim's claim it was prosecuted in a timely fashion. For the same reason I do not consider that Mr Shamim deliberately or without good cause engaged in conduct that resulted in increased cost.
11. It is clearly arguable however that prosecuting a claim in circumstances where the claimant has been fraudulent, amounts to a misuse of the litigation process. While Mr Shamim was entitled to challenge the assertion by QBE that his claim was fraudulent, a challenge to that assertion creates risks for a claimant in the event that the court upholds it. Such a risk does not present itself in the same way where there are issues over the interpretation of the terms of an insurance policy or issues over quantum arising from an otherwise valid claim.
12. In civil proceedings it is traditionally the maker of an allegation of fraud who carries a significant burden of proof and resulting consequences if the allegation is not made out. There is no reason however, that where a court finds fraud to have been established there should not be an appropriate award of costs which recognizes the fruitlessness of the other parties resistance of such an allegation. In this case, Mr Shamim provided clearly wrong information to QBE in the hope that QBE would accept and rely upon that information resulting in a windfall



13. At paragraph 46 (d) of my judgment I refer to various conflicts of evidence between Mr Shamim and two other witnesses who gave evidence for QBE. I recorded that I was satisfied that Mr Shamim had not simply been mistaken in his evidence but that he had been untruthful. I refer to the fact that Mr Shamim had referred to the "officiated value" of the relevant machine as being Vt 5, 467, 100 which was "clearly false".
14. In circumstances such as these where the Court is satisfied that a claimant has not only made a fraudulent claim but has then followed that by giving untruthful evidence it is appropriate to direct that the successful party be entitled to indemnity costs. It is not only the fact that QBE was put to completely unjustified and needless cost but that parties should also be deterred from pursuing hopeless or fraudulent cases.
15. For these reasons I order that the defendant is entitled to indemnity costs against the claimant.

DATED at Port Vila this 5th day of June, 2017

BY THE COURT

