

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

Civil  
Case No. 19/2678 SC/CIVL

**BETWEEN:** **Nicon Limited**  
Claimant

**AND:** **Light Ship Limited**  
First Defendant

**AND:** **Stephen Quinto and Nicola Quinto**  
Second Defendants

*Date:* 28 February 2023  
*Before:* Justice V.M. Trief  
*Counsel:* Claimant – Mr M. Hurley  
Defendants – Ms L. Raikatalau and Ms V. Muluane, for Mrs M.N. Ferrieux Patterson

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**DECISION AS TO COSTS**

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A. Introduction

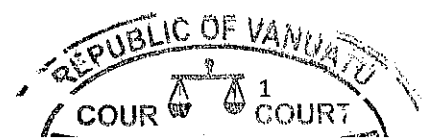
1. The Claimant Nicon Limited ('Nicon') sought judgment on an unpaid invoice for VT886,042 and with compounding interest of 3% per month, for VT4,580,744. Alternatively, Nicon sought judgment on a *quantum meruit* basis. By judgment dated 1 December 2022, I entered judgment for Nicon on its *quantum meruit* claim, for VT886,042 plus interest of 5% per annum from 10 February 2015 until the judgment sum is paid in full.
2. Both parties then filed submissions as to costs. This is the decision.

B. Submissions

3. Rule 15.1 of the provides as follows:

- 15.1 (1) *The court has a discretion in deciding whether and how to award costs.*
- (2) *As a general rule, the costs of a proceeding are payable by the party who is not successful in the proceeding.*
- (3) *However, nothing in this Part prevents the parties to a proceeding from agreeing to pay their own costs.*
- (4) *The court may order that each party is to pay his or her own costs.*

4. The general rule as set out in rule 15.1(2) of the CPR is that the costs of a proceeding are payable by the party who is not successful in the proceeding.



5. Nikon, as the successful party, seeks costs on an indemnity basis, relying on its "without prejudice except as to costs" letter dated 22 February 2022 and the principles in *Calderbank v Calderbank* [1975] 3 All R 333 and rules 15.5(5)(d) and 15.11 of the *Civil Procedure Rules* (the 'CPR') which provide as follows:

15.5 ...

(5) *The court may also order a party's costs be paid on an indemnity basis if:*

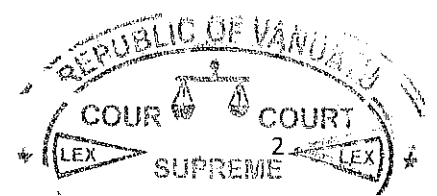
...

(a) *in other circumstances (including an offer to settle made and rejected) if the court thinks it appropriate.*

.....

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

6. By the letter dated 22 February 2022 from its lawyers, Nikon offered to settle the matter on a full and final basis with the Defendants Light Ship Limited ('Light Ship') and Mr and Mrs Quinto paying Nikon VT800,000 and each party paying their own costs of the proceeding, said to be "a genuine compromise on [Nicon's] part". The Defendants were given 3 days to respond to the offer.
7. Mr Hurley submitted that the general rule should apply and the Defendants should be ordered to pay costs on a joint and several basis as follows as they had rejected Nikon's offer, that one of the reasons the litigation proceeded to trial was the Defendants' repeated contention that they had paid a cheque (which was rejected by the Court) and Nikon's repeated rejection of that contention, and Mr Quinto's insistence of his version of events (rejected by the Court in several key respects):
- on the standard basis until 22 February 2022; and
  - on an indemnity basis from 23 February 2022, being the date of rejection of the terms of Nikon's letter dated 22 February 2022.
8. The Defendants on the other hand also sought costs. Ms Raikatalau submitted that Nikon's conduct could give way to a possible costs order in favour of the Defendants, citing *Triwood Industries Ltd v Stevens* [2012] VUSC 199. That conduct was said to include maintaining unnecessary and hopeless parts of the Claim (for compounding interest); that that was only maintained so as to allow Nikon to dictate a high-end Calderbank offer; that as a result there was extensive cross-examination of witnesses as to what had been agreed; that the Defendants' unchanged position from the outset was that there had never been prior agreement as to terms of trade; and Nikon's choice to prosecute the Defendants for the full extent of the Claim defeated any real prospects to settle at VT800,000.
9. Ms Raikatalau submitted that as Nikon maintained its entire Claim and only withdrew the claim for compounding interest in its final submissions after trial, it should bear its own costs of that part of the Claim between October 2019 up to the filing of those submissions on 24 March 2022.



10. On 8 July 2021, this Court issued judgment in *Nicon v Short* [2021] VUSC 160. That matter also involved a dispute over payment of Nicon invoices. One of the issues was whether the parties agreed the terms of trade (including for compounding interest) recorded on the invoices prior to the issuance of the invoices. Mr Short's case was that terms of trade were never agreed prior to the invoices being issued. The Court held in Mr Short's favour. Accordingly, that aspect of the Claim failed.
11. Ms Raikatalau also submitted that Nicon should not benefit from the timing of its offer as the judgment in *Nicon v Short*, delivered 8 months previously, bound Nicon but for which it made no allowances until its closing submissions.
12. She submitted that accordingly, for that part of the proceedings up to the end of trial which consisted of trying matters relating to prior agreement of rates and terms of trade, and assessed by the Court at [51]-[61] of its judgment, the circumstances are appropriate for a costs order to be made against Nicon, to pay the Defendants' costs on an indemnity basis.

C. Discussion

13. Nicon maintained all aspects of its Claim up to and during trial. It was only in its closing submissions, at para. 50, that Mr Hurley stated as follows:

50. *In so far as the claim for compound interest of 3% per month is included on Nicon's invoices rendered to Mr Quinto, Nicon is bound by [62] of Short's judgment.*

14. Paragraph 62 of the *Nicon v Short* judgment stated as follows:

62. *It follows that the parties did not agree to the terms of trade recorded on the invoices prior to the issuance of the invoices. This aspect of the Claim fails.*

15. Even though Nicon was stated to be bound by the *Nicon v Short* judgment, that would apply only if the Court found that Nicon had given the Defendants its price list prior to the commencement of works on Light Ship's vessel (the 'Vessel'). Having considered the evidence, I held that it was more likely than not that the price list was not given to Mr Quinto prior to the February 2015 works with the result that Nicon's claim for payment on its invoices failed.
16. Although Ms Raikatalau now characterises the maintenance of the claim for compounding interest as unnecessary and hopeless, it was part and parcel of the strongly contested issue of whether Nicon had given its price list to Mr Quinto – on behalf of the Defendants – prior to the works commencing on 3 February 2015.
17. Accordingly, I do not agree that the maintenance of the claim for compounding interest was unnecessary and hopeless.
18. On the contrary, given that all aspects of the Claim were contested up to and throughout the trial (including through the extensive cross-examination of witnesses as to what had been agreed), the maintenance of Nicon's claim for payment on its invoices (including compound interest) was not unnecessary and hopeless.
19. In the circumstances, Nicon's offer to settle at VT800,000 with each party bearing its own costs was a very reasonable offer. Nicon was offering to settle at that amount whereas its

Claim sought judgment in the total sum of VT4,580,744. Put another way, the Defendants' rejection of the offer in the circumstances was unreasonable.

20. Ms Raikatalau submitted that the offer was a high-end Calderbank offer. With respect, I would not characterise an offer to settle at VT800,000 in the face of a Claim seeking judgment of VT4,580,744 as a "high-end" offer.
21. Ms Raikatalau also submitted that Nicon's choice to prosecute the Defendants for the full extent of the Claim defeated any real prospects to settle at VT800,000. I find that submission unpersuasive when Nicon offered to settle at less than 25% of its Claim. Those were very reasonable terms being offered for settlement. It seems to me that rather than Nicon's prosecution of its whole Claim defeating any real prospects to settle at VT80,000, it was more the parties and particularly the Defendants' entrenched positions which defeated any real prospects of settling at VT800,000 including Mr and Mrs Quinto's repeated contention that they had paid a cheque (which was denied from the outset) and Mr Quinto's insistence of his version of events.
22. By way of illustration, the contention that Mr and Mrs Quinto had paid a cheque was even referred to in the counter-offer made to Nicon after its offer was rejected, which proposed that the Defendants would "put a stop payment on the cheque issued; issue a new cheque for VT221,000;" and that Nicon pay the Defendants' costs of the proceeding.
23. If the Defendants had accepted the terms of Nicon's letter dated 22 February 2022 the costs from 23 February 2022, including in respect of the trial, would have been avoided.
24. For the reasons given, I consider that the general rule should apply and the Defendants should be ordered to pay Nicon's costs on a joint and several basis on the standard basis until 22 February 2022; and on an indemnity basis from 23 February 2022, being the date of rejection of the terms of Nicon's offer set out in its 22 February 2022.

D. Result and Decision

25. For the reasons given, costs shall follow the event.
26. The Defendants are to pay the Claimant's costs of the proceedings on a joint and several basis as follows:
  - a. on the standard basis until 22 February 2022; and
  - b. on an indemnity basis from 23 February 2022, being the date of rejection of the terms of Nicon's offer set out in its 22 February 2022,

such costs to be paid as agreed, failing which they are to be assessed by the Master. Once settled, the costs are to be paid within 28 days.

**DATED at Port Vila this 28<sup>th</sup> day of February 2023**

**BY THE COURT**

  
Justice Viran Molisa Trief

