IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (CIVIL JURISDICTION)

CIVIL CASE NO. 52 OF 2007

BETWEEN	**CHRISTOPHE EMELEE** First Claimant
AND	**JOHN SIMBOLO** Second Claimant
AND	**PUBLIC PROSECUTOR** First Defendant
AND	**REPUBLIC OF VANUATU** Second Defendant

Coram: *Justice J. Macdonald*

Counsels: *Mr Napuati for the Claimants*
Mr Jenshel for the Defendants
Mr Sugden (Former counsel for Claimants)

Date of Hearing: *1 October 2010*

Date of Judgment: *22 October 2010*

JUDGMENT

1. The defendants apply for costs against the claimants, following the claimants filing of a notice of discontinuance on 12 March 2010. This was in respect of their claim for malicious prosecution that had been filed back on 17 April 2007.

Background

2. The original claim, in which damages of VT 147 million were sought, followed the unsuccessful prosecution of the claimants by the Public Prosecutor on charges of conspiring to defeat the course of justice. By all accounts the prosecution was quite inept, with the charges ultimately being

dismissed at the end of the prosecution case, following a submission that there was no case to answer. The trial had lasted for approximately two and a half months. The claimants were successful in the first instance in obtaining costs against the prosecution, but those orders were subsequently quashed by the Court of Appeal on 25 July 2008.

3. In the present claim a defence was filed on 15 May 2007. The defendants applied on 18 May 2007 for further and better particulars (the defence sought particulars of malice). The claimants applied for disclosure on 19 October 2009. Apart from that not too much has happened. The claimants failed to comply with Court orders of 10 June 2009 and 14 September 2009 to file and serve sworn statements. Those orders were effectively in lieu of providing further and better particulars.

4. However, this must be put in context. Part of the reason for the lack of activity can be linked to the management of the file by the Court. There is a letter on file from the Attorney General dated 30 January 2008, in which he complains that over eight months had elapsed since the filing of the defence, and the first conference had yet to be held. It appears from the Court file that the first conference was set down before Bulu J. on 27 June 2008, but it did not take place until 19 October 2008.

5. Nonetheless, the claimants have hardly pursued their claim with any vigour at all, and it was only in January this year, when the defendants applied for the claimants to show cause why judgment should not be entered against them with costs, that matters finally came to a head.

6. In respect of the notice of discontinuance the first claimant says that the matter had already cost so much in legal costs that he could not afford to continue. There was, however, no concession that the claim lacked merit or that it was an acknowledgment of likely defeat. Indeed, in keeping with that stance the claimants have refused to withdraw the accusation that the prosecution was malicious.

Issues

7. It is accepted that the defendants are entitled to costs but three issues arise:

   a) Should they be standard costs or indemnity costs or a combination of the two?

   b) From what date should they be awarded?

   c) Should costs be awarded against the claimants or against their counsel, Mr Sugden?

8. The application has been keenly contested during a two hour hearing. I sense that there are strong feelings on all sides. I have considered the application, the sworn statements, and the written and oral submissions. I have also had regard to the Court file and the chronology of events it discloses.

Discussion

9. On the first issue (standard versus indemnity costs) rule 15.5(5) of the Civil Procedure Rules provides:

   (5) 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 to settle made and rejected) if the court thinks it appropriate.

10. Mr Jenshel submits that the claim was clearly vexatious and an abuse of process. It was always a hopeless case with no chance of success. And, that should have been obvious to the claimants after the Court of Appeal judgment of 25 July 2008. Such submission is based on the premise that

the claimants could not meet the test required to sustain an order for costs, they were hardly likely to be able to meet the much higher threshold of establishing that the prosecution was malicious.

11. Mr Jenshel also points to the failure of the claimants to comply with the defendants' request for further or better particulars of malice, as being a reflection of the weakness of the claimants' case. He further submits that the claimants were extremely dilatory in the prosecution of their claim, with extraordinarily little being achieved since April 2007. The defendants warned the claimants by letter of 27 April 2007 that penalty costs would be sought if the claim was unsuccessful.

12. In reply, Mr Sugden submits that the claimants had a very strong case and he went into quite some detail explaining why that was. As far back as 3 November 2005 he wrote to the Attorney General advising that if his clients were successful in defending the criminal charges they faced, then he had instructions to sue for malicious prosecution.

13. As to the request for further particulars of malice, Mr Sugden submits that they were already adequately set out in the claim. He also submits that the claimants were not obliged to supply such further particulars, as the details sought were matters of evidence, which would emerge in the sworn statements filed prior to trial. In any event, he submits that if the particulars in the claim were inadequate it was always open to the defendants to apply to strike out the claim on the basis that no reasonable cause of action was disclosed, but they did not do so.

14. Having considered the respective submissions I am inclined to think that Mr Jenshel's assessment of the strength of the claimants' case is the more accurate one, but I am not prepared to go so far as to conclude that the claimants had a hopeless case. In my view that could only be determined at trial. And, the fact remains, as I said before, that the prosecution by all accounts was quite inept, and at least at first instance costs were awarded. That was on 14 March 2008, only to be quashed on 25 July 2008.

15. My concern, however, is over what happened from that point onwards, or at least from the first conference on 19 October 2008. Mr Sugden ceased to act in December 2007 but resumed acting for the claimants in April 2009. The discontinuance was filed just under a year later. Even allowing for the period when the file might not have been properly managed there is still substantial delay overall, which is not explained. There was also the non-compliance with the Court orders of 10 June and 14 September 2009.

16. While the Court had a responsibility to manage the case the primary obligation to pursue the claim lies with the claimants. It was their claim. There was roughly a further 12 months that elapsed after the first conference before the claimants took any active steps and that was in the form of filing a request for discovery in October 2009. As far as I can tell there was no good cause for such delay and it has merely prolonged the proceedings. In my view that brings rule 15.5(5)(a) into play.

17. In the circumstances I allow standard costs up until 19 October 2008 (being what I understood to be the date of the first conference), but indemnity costs after that date.

18. The final issue is whether such costs should be awarded against Mr Sugden personally. That is governed by rule 15.26(1):

> (1) The Court may order that the costs of the whole or a part of a proceeding be paid by a party's lawyer personally if the party brings a proceeding that:
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> (a) has no prospect of success, is vexatious or mischievous or is otherwise lacking in legal merit; and
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> (b) a reasonably competent lawyer would have advised the party not to bring the proceeding.

19. As with the claimants, the defendants warned Mr Sugden by letter of 27 April 2007 that personal costs would be sought if the claim was unsuccessful.

20. The first claimant, Mr Emelee has filed a sworn statement, in which he blames Mr Sugden fairly and squarely for pursing the claim. He says that they relied on his legal advice. He also says that the only reason he did not pursue the matter to trial was because of the level of legal costs already incurred.

21. Reaching any conclusions about what took place between Mr Sugden and his clients is difficult. However, Mr Sugden did produce correspondence in the course of the hearing, which on the face of it provided the answer to the first claimant's complaints. I gave Mr Emelee, through his counsel Mr Napuati, the opportunity to provide a further response but nothing has been received.

22. An undated letter from the claimants to Mr Sugden, which he received on 5 April 2007, showed that it was the claimants who were the driving force behind the proceedings, not Mr Sugden. They were pressing for proceedings to be issued. And, from that I infer that any decisions in relation to the pursuit of the claim were not solely Mr Sugden's. Of course, I have already indicated that I am not prepared to accept the proposition that the claimants had a hopeless case.

23. Accordingly I am not satisfied that there is a sufficient basis for me to award costs against Mr Sugden.

Result

24. Costs are awarded against the claimants on the standard basis up until 19 October 2008, and on an indemnity basis after that.

Dated at Dunedin this 21st day of October 2010

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J Macdonald
Judge

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX