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

Civil Case No. 157 of 2009

BETWEEN: TRIWOOD INDUSTRIES LIMITED
Claimant

AND: LOUISE STEVENS
Defendant

AND: KRAMER AUSENCO (VANUATU) LIMITED
Third Party

Hearing: *23 May 2012*
Before: *Justice Robert Spear*
Attendances: *Claimants –no appearance (Nigel Morrison)*
Defendant: John Malcolm
Third Party: Mark Hurley

INTERIM DECISION AS TO COSTS

31 May 2012

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1. This hearing was called at very short notice simply because time became available and it is important that this issue as to costs is resolved as soon as possible.

2. Mr Morrison was not able to be contacted. Mr Blake (from Mr Morrison's firm) informed the Court that Mr Morrison was at Luganville for another case. Be that as it may, the judgment delivered orally on 30 March 2012 required all memoranda as to interest calculations and costs to be filed within 21 days. Memoranda have been received from Mr Malcolm for Mrs Stevens and Mr Hurley for Kramer Ausenco but there has been no memorandum filed for the claimant.

3. Having regard to the memoranda filed, I have reached the interim or tentative view that costs should be determined as follows:-

    a. The claimant pay the costs of both the defendant and the third party

    b. That costs be calculated on a standard basis up to 8 July 2011 being the date of Mr Malcolm's calderbank letter to the claimant and thereafter on an indemnity basis.

    c. The cost will include all reasonable disbursements including the airfares of the architect from Australia.

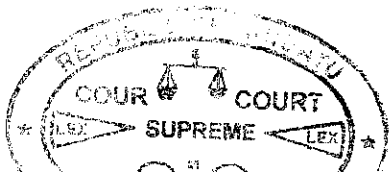
4. As will be apparent from the decision, I found Mr Wood to be a somewhat unimpressive witness. His evidence appeared at times to descend to be more a plea for special consideration on the basis that as he had identified the problem with the siting of the house in relation to the trees, he deserved some special recognition for doing so.

5. The calderbank letter dated 8 July 2011 sent by Mr Malcolm (defendant) to Mr Morrison (claimant) is in rather frank terms and, in particular, states: -

    "I am writing one final term to offer settlement of this matter. The offer is pursuant to rule 15.5.5.d and if rejected the letter will be put to the Court apply for indemnity cost. The offer is that all parties walk away. We withdraw our cross claim and you withdraw your claim".

    It seems to me you have three lawyer all agreeing your client's claim is hopeless and a judge that appears of the same view. Against that you have one opinion from Australia which gave your clients some sort of comfort."

6. I am informed by counsel that the judge referred to as appearing to consider that Mr Wood's case was "hopeless" was the judge who presided over the settlement conference (Justice Weir). I have not, of course, discussed the case with Justice Weir and I am



relying entirely on counsel's advice that this was the view expressed by Justice Weir at the settlement conference.

7. The settlement offer made by Mr Malcolm, in his calderbank letter of 8 July 2012, appears to be an eminently reasonable proposal for settlement as matters were at that time and certainly as matters turned out for Mr Wood. If accepted, it would have resulted in significant savings of cost for all the parties.

8. Given that Mr Wood persisted with a case that was seen as far back as early 2011 as hopeless, it is appropriate that cost are able to be recovered by the defendant from the claimant on an indemnity basis as from the date of the calderbank letter. That, of course, principally involves the preparation for the trial and the trial itself. This is in line with authorities particularly stemming from the decisions of the Federal Court of Australia:

Colgate -.Palmolive Company and Colgate-Palmolive Pty Ltd v. Cussons Pty Ltd *[1993] FCA 536. Sheppard J*

9. In the Colgate – Palmolive case, Sheppard J referred with approval to the following extract from ***J-Corp Pty Ltd v Australian Builders Laborers 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 Wood ever had any real prospect of success. This was raised fairly and squarely by the 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.

12. It is perhaps appropriate that this observation is made. This is a case where Mrs Stevens appears to have taken all proper or reasonable steps to ensure that her building project would be undertaken with the minimal risk to her of disruption. Initially, she engaged architects to prepare the plans and then Kramer Ausenco was engaged not only to prepare the contract documents but also to undertake the project management / supervision of works' responsibilities. Mr Wood was the successful tender for the work. The defendant placed herself apart and dealt with Mr Wood only through the project manager. There was indeed evidence that Mr Wood insisted on Mrs Stevens having only limited access to the building site and thus involvement with him except through the superintendent of works. In short, it is difficult to see what more Mrs Stevens could have done to ensure that this house was built with the minimum of disruption. Certainly, I was unable to find any fault with her conduct incidental to this building project.

13. Mr Wood must have understood that, by bringing this proceeding against Mrs Stevens, it was inevitable that she would need to join Kramer Ausenco. That is because Mrs Stevens could rightly say, and did say, that if she was liable to Mr Wood in the way in which he claimed, that liability could have come about only through her interests not being appropriately protected by Kramer Ausenco.

14. Mr Hurley argues that his calderbank letter to Mr Malcolm of 30 May 2011 gave due notice that indemnity costs would be sought against Mrs Stevens unless the third party notice was discontinued. However, such a discontinuance was never likely to happen unless some agreement was reached by those two parties as to a cooperative basis for a defence to the claim. Absent some such arrangement between Mrs Stevens and Kramer Ausenco which would obviate the need for the third party action to remain on foot, especially given the nature of the claim against Mrs Stevens, it was quite unrealistic to expect her to discontinue her third party action. Mrs Stevens was entitled to have Kramer Ausenco remain in the proceeding particularly to ensure that any criticism of Mrs Steven's conduct *apropos* of her conduct under the contract was responded to by her project manager whom she had engaged to minimise such a risk.

15. Furthermore, Mr Wood must have understood that, by bringing this claim, he was really attempting to visit his complaints about the project management on to Mrs Stevens. In those circumstances, he must also have appreciated that his claim would have the result of drawing Kramer Ausenco in to the proceeding in some way.

16. It is appropriate that Kramer Ausenco's costs are also visited upon Mr Wood and also on an indemnity basis for the same reasons as for Mrs Stevens. That can appropriately be achieved by way of direct order requiring the claimant to pay the third party's costs.

17. Mr Morrison has not filed a memorandum as to costs in accordance with the directions. However, it is still important that he has an opportunity to consider the above interim conclusions and present any submissions that he might have in response within 14 days. If nothing is heard from Mr Morrison within that 14 days period then this interim decision will become the final decision as to costs. If a memorandum is received from Mr Morrison, a final decision as to costs will be made on the papers.

18. Once the issue of costs is finalised, it will be left for the parties to agree but, failing agreement, then to be taxed.

BY THE COURT