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

Civil Case No. 191 of 2007

BETWEEN: PORT HAVANAH BAY ENTERPRISE LTD
Claimant/Judgment Creditor

AND: WILLIAM KALOTITI, TIVATE KALOTITI, SAEL KALOTITI and MATHEW KALOTITI
Defendants/Judgment Debtors

Hearing: ***20 February 2015 at 9.00am***

Before: ***Justice Stephen Harrop***

Judgment Date: ***27 February 2015***

In attendance: ***Jack Kilu for the Claimant/Judgment Creditor***
Saling Stephens for the Defendants/Judgment Debtors

RESERVED JUDGMENT AS TO APPLICATION TO SET ASIDE DEFAULT JUDGMENT

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1. On 9 July 2008 Justice Tuohy entered default judgment in favour of the claimant against the defendants being satisfied that the defendants had been served with the amended claim filed on 27 November 2007 and that they had failed to file defences. The judgment against the defendants jointly was in the sum in Vatu currency equivalent to AUS$455,540. In addition the defendant Sael Kalotiti was ordered to pay VT347,160. Interest and costs were awarded.

2. After enforcement action was eventually taken, the defendants applied on 26 August 2014 to set aside the default judgment. The primary ground (it is not necessary to refer to the others) is that there is no such company as Port Havanah Bay Enterprise Limited, and there never has been. Accordingly it is not a legal entity and could neither sue nor obtain a judgment as it has.

3. The application is opposed by the claimant which says that the correct name of the claimant company, registered on the 20 February 2003, is Havannah Bay Enterprises

Limited and that inadvertently during the course of this proceeding the name of the claimant was changed to Port Havanah Bay Enterprise Limited.

4. The original claim in this proceeding was filed on 15 November 2007 and it pleaded that the named claimant, Havanah Bay Enterprise Limited was a duly registered Vanuatu company which could sue and be sued in its own name. It alleged that it had executed an agreement to lease with the defendants and that they were in breach of it. Damages of Vt 355,015 (AUS$363,436) were sought jointly against the defendants.

5. I note though that even this claim was not strictly correct because the sworn statement in support of the claim which was filed by Dominique Dinh on 4 December 2007 annexes the contract sued on which describes the company as "Havannah Bay Enterprises Limited". Further, Mr Dinh's recent sworn statement dated 26 November 2014 annexes a copy of the relevant certificate of incorporation which says the company name is Havannah Bay Enterprises Limited (emphasis added). Accordingly even the initial claim cited the name of the claimant incorrectly in two respects.

6. That said, shortly after the original claim was filed, on 27 November 2007 an amended claim was filed with the name of the claimant as "Port Havanah Bay Enterprise Limited". It was pleaded that this company was a duly registered Ni-Vanuatu company which could sue and be sued in its own name. The claim was substantially increased to (the Vatu equivalent of) AUS$455,540.

7. Once that document was filed, it became the operative basis for the claim and it was the undefended claim contained within it on which the default judgment was entered by Justice Tuohy on 9 July 2008. The name of the claimant in whose favour default judgment was entered was therefore correctly stated as Port Havanah Enterprise Limited. There is no error in the judgment itself; it correctly used the name of the claimant in the undefended amended claim.

8. Although the Court no doubt has the inherent power, although this is not apparently expressly conferred in the Civil Procedure Rules, to amend the name of a party where there has been an error in documentation filed, in my view that power exists only until judgment is entered.

9. Further, companies exist only through their formal incorporation and through their consequent entitlement to use the registered name under which they are authorized to operate. That means scrupulous attention is required to the accurate use of the company name on any documents, but particularly in important Supreme Court documents. This case exemplifies anything but that.

10. The problem for Havannah Bay Enterprises Limited here is that the company which filed the amended and therefore operative claim, or at least purported to do so, and which obtained judgment, simply does not exist legally. That is fatal to the validity of the judgment.

11. Indeed, the company which does exist and which signed the contract of which the defendants are said to be in breach has never issued a claim alleging that breach and loss flowing from it. The company that did issue the original claim is on the face of it a *third* entity called Havanah Bay Enterprise Limited, which also does not exist.

12. On further analysis, the amended claim is itself invalid because it was not the named claimant that executed the agreement to lease on which the claim is based. Port Havanah Bay Enterprise Limited is therefore simply not entitled to do anything, both because it does not exist and because it did not enter the underlying contract sued on.

13. I have no doubt that the name of the company was changed inadvertently through sloppiness on the part of Mr Kilu and his client (who incorrectly swore that he was a director of the claimant) but the problem is that this change was perpetuated through to the entry of judgment.

14. In my view the judgment must be regarded as having been irregularly obtained because it was entered in favour of a non-existent entity.

15. On this basis it is obvious that the defendants are able to satisfy the test in Rule 9.5(3) namely that they have shown reasonable cause for not defending the (amended) claim and they have an arguable, indeed cast-iron defence. While like the correct claimant they may not have been conscious of the error at the time, they strictly had no need to defend the amended claim issued by a non-entity and they have an unanswerable defence because they have been sued by the company which does not exist.

16. Although this was not raised in submissions, I have considered whether I have power to, and if so whether I ought to, recall the judgment in the interests of justice to amend the name of the claimant. However as I have noted in [7], I do not consider the judgment is in itself incorrect; the problem lies with the amended claim. In any event the true claimant is not being deprived of its right to pursue the claim, merely of a judgment by default. If it has a good claim it will obtain judgment in due course.

17. For these reasons I set aside the default judgment entered by Justice Tuohy on 9 July 2008.

18. The applicants are entitled to standard costs on the application which should not in my view have been opposed once the fatal issue of corporate entity was expressly raised by the application.

19. Under Rule 9.4 the Court is required following the setting aside to give directions about the future course of the case.

20. Obviously the amended claim dated 27 November 2007 must be set aside as being untenable and the claimant will need to revert to the original claim dated 15 November 2007. At the very least it will want to seek leave under Rule 4.11 (which would inevitably be granted) to amend that claim in two ways. First, to correct the spelling of its name from Havanah Bay Enterprise Limited to its correct registered name Havannah Bay Enterprises Limited. Secondly, it will no doubt wish to update the amount of its claim as it did previously to reflect the increased amount sought in the amended claim filed on 27 November 2007.

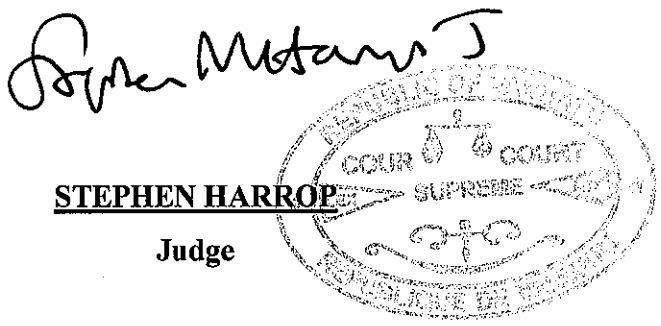
21. To complicate matters further, I understand from counsel that Havannah Bay Enterprises Limited has been struck off the company register. In those circumstances before anything else can happen it will need to be restored. A separate application in that regard must be made and granted before this proceeding may be advanced.

22. I leave it to Mr Kilu therefore to request a further conference in this case if and when his "true client" is back on the register and able to advance its claim.

23. All of the above said, I strongly urge the parties to endeavour to resolve the underlying claim without further reference to the Court (though restoration will still

be necessary). As Mr Kilu notes, there appears to be no suggestion of a defence on the merits of the claim. On that basis the defendants ought to be discussing settlement in a realistic manner with the claimant to avoid further delay and cost to everyone.

BY THE COURT



STEPHEN HARROP

Judge