

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

Civil
Case No. 19/2678 SC/CIVL

BETWEEN: Nikon Limited
Claimant

AND: Light Ship Limited
Defendant

Date: 26 June 2020
Before: Justice V.M. Trief
Counsel: Claimant – Mrs C. Hamer
Defendant – Mrs M.N. Ferrieux Patterson

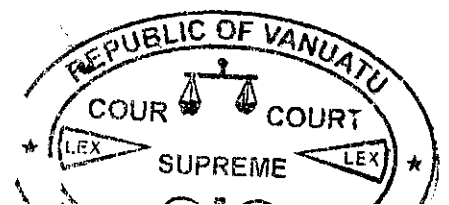
JUDGMENT AS TO APPLICATION TO AMEND CLAIM

A. Introduction

1. This is an Application for leave to amend the Claim to add a party, better identify the issues and provide better facts about each issue. The Defendant opposed the Application with Mrs Ferrieux Patterson strongly requesting that the Defendant be given the opportunity to file a written response to the Application. I granted that request. I now determine the Application on the papers.

B. Background

2. The Claimant operates a shipyard in Luganville, Santo.
3. The Defendant owns a yacht S.V. Lightship (the 'Vessel').
4. The Claim seeks payment of the balance of outstanding invoices for slipping, materials and attendant services for the Vessel. These services were requested by a shareholder of the Defendant. All invoices for the services were directed to that shareholder.



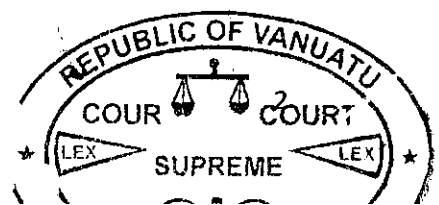
5. A Defence has been filed. The Claimant considers from the denials made that it should amend the claim to add the Defendant's shareholders as a party, to better identify the issues and provide better facts about each issue.

C. Preliminary Matter

6. On 4 June 2020, the Defendant filed its response to the Application. On 8 June 2020, the Claimant filed submissions in reply.
7. On 9 June 2020, the Defendant filed a 5-page "Further Response" to the Application. This was filed without the leave of the Court. Accordingly, I declare that this document is ineffectual for the proceeding pursuant to r. 18.10(2)(c) of the *Civil Procedure Rules* ('CPR') and I do not consider it in determining the Application.
8. I note only that this document repeats the abuse of process submission made in the response filed on 4 June 2020. This is presumptuous considering that that document was itself filed without the leave of the Court.

D. Submissions

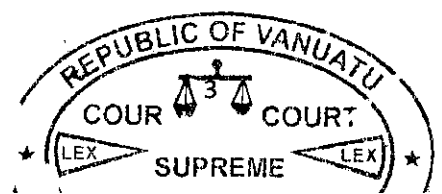
9. The stated purpose of the amendments is to add the beneficial owners of the Defendant as the Second Defendants to ensure that all necessary parties are before the Court and consequential pleadings to better identify the issues between the parties (all of the amendments), provide better facts about each issue (all of the amendments) and correct a mistake or defect (para. 10 of the proposed amended claim).
10. The Claimant relies on the Sworn statement of Nigel Giltrap filed on 21 November 2019. Mr Giltrap deposes that the services were supplied to the Defendant at the request of Stephen Quinto. Mr Quinto is a shareholder of the Defendant. Mr Giltrap also deposes that all of the Claimant's invoices were rendered to Mr Quinto. These are the subject of the proposed amendments.
11. Mr Hurley submits that although the Defendant is the owner of the vessel, the Defence includes denials. Therefore it is open to the Defendant based on those pleadings to contend at trial that the Defendant was not the contracting party.
12. Mr Hurley submits that in order that the Claimant avoids the risk that the Defendant contends and/or the Court finds that the initial contractual arrangements were between the Claimant and the shareholders (in particular, Mr Quinto) it is appropriate for the Court to grant the relief sought in the Application.
13. Mr Hurley submits that the amendments are necessary for the purpose of determining the real questions in controversy and cites several authorities including of the Court of Appeal.
14. Finally, Mr Hurley submits that the Defendant is not prejudiced in a way that cannot be remedied by awarding costs.



15. Mrs Ferrieux Patterson's submissions are noted for not addressing the substance of the Application but the form only. Mrs Ferrieux Patterson submitted that the Application is made under r. 4.11 of the *Civil Procedure Rules* ('CPR') whereas the addition of a party is covered by a different rule of the CPR – r. 3.2(3). She submits that accordingly, the Application is misconceived and an abuse of process.
16. Mrs Ferrieux Patterson's second submission is that an application to add a party must have with it a sworn statement setting out the reasons why the person should be made a party. She submits that this has not been done therefore the necessary information is not before the Court for the Defendant to respond to the substance of the Application or for the Court to decide on it.
17. Finally, Mrs Ferrieux Patterson submits that the Defendant will be fundamentally prejudiced if the Court grants the leave sought because there is no correlation between what the Application seeks, the basis for which it is brought and the grounds provided for it.

E. Discussion

18. I do not understand the last of Mrs Ferrieux Patterson's submissions. I do not see what prejudice to the Defendant arising from granting leave to the Claimant to amend its claim could not be remedied by awarding costs. There is no merit to this submission.
19. Just because the Application does not reference r. 3.2(3) of the CPR is no reason to dismiss the Application. I agree with Mr Hurley that to dismiss the Application for such reason would truly be a "triumph of procedure over substance" and contrary to the overriding objective set out in r. 1.2 of the CPR. The issues are indeed before the Court in the Application and there is no merit in the submission that the Application be dismissed because one or other rule has not been referred to. Further, I am satisfied that the Sworn statement of Mr Giltrap relied on deposes matters which justify the Application seeking to add the Defendant's shareholders as a party. I reject the balance of Mrs Ferrieux Patterson's submissions.
20. At the last conference, Mrs Ferrieux Patterson argued strongly that she should have the opportunity to file a written response to the Application as she needed to address the lifting of the corporate veil if the shareholders were to be added as a party. I note that she made no submissions to this effect in the response filed!
21. Considering the Defence filed, I can understand that Mr Hurley would in the best interests of his client immediately seek to amend the Claim to ensure that all necessary parties are before the Court and to then make consequential pleadings to avoid the risk that the Claimant contend at trial that the Defendant was not the contracting party and the wrong person has been sued.
22. Having considered the Claim, the Defence, Mr Giltrap's sworn statement and the proposed amended claim attached to the Application, I am satisfied that the proposed amendments are required to add a necessary party, to better identify the issues between the parties and to provide better facts about each issue.



23. For the reasons set out above, I hereby grant the leave sought.

F. Costs of the Application

24. There was no legal merit in the submissions made by Mrs Ferrieux Patterson in response to the Application. She has unnecessarily put the Claimant to the cost of prosecuting a written Application when an oral application would have sufficed, made the submissions that she did, and filed a Further Response without the leave of the Court. In the circumstances, I consider that Mrs Ferrieux Patterson has without good cause engaged in conduct that resulted in increased costs – see r. 15.5 of the CPR. I am minded therefore to order that the costs of the Application be paid on an indemnity basis.

25. Further, for the same reasons set out above, I consider that the costs of the Application are an unnecessary expense for the Claimant incurred by Mrs Ferrieux Patterson – see r. 15.26(2)(c) of the CPR. I am minded therefore to order that Mrs Ferrieux Patterson personally pay the Claimant's costs of the Application.

26. Therefore in accordance with r. 15.26(3) of the CPR, I hereby require Mrs Ferrieux Patterson's written response **by 4pm on 10 July 2020** as to why the costs of the Application should not be paid on an indemnity basis, and why those costs should not be personally paid by Mrs Ferrieux Patterson.


G. Result and Decision

27. I declare that the Defendant's Further Response to the Application filed on 9 June 2020 is ineffectual for the proceeding pursuant to r. 18.10(2)(c) of the *Civil Procedure Rules*.

28. The Claimant's Application for Leave to Amend the Claim and the leave sought are granted.

29. In accordance with r. 15.26(3) of the CPR, I require Mrs Ferrieux Patterson's written response **by 4pm on 10 July 2020** as to why the costs of the Application should not be paid on an indemnity basis, and why those costs should not be personally paid by Mrs Ferrieux Patterson.

DATED at Port Vila this 26th day of June 2020
BY THE COURT


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V.M. Trief
Judge

