

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Civil Appellate Jurisdiction)

**Civil Appeal
Case No.17/2722CoA/CIVA**

**BETWEEN: EILON MASS trading as RAW FOR
BEAUTY**

Applicant

AND: WESTERN PACIFIC CATTLE COMPANY

Respondent

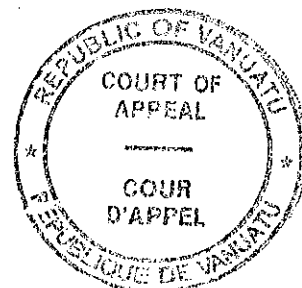
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak*

Counsel: *Mr. Eilon Mass in person
Respondent – no appearance*

Date of Hearing: *6th Nov. 2017*
Date of Judgment: *17th Nov. 2017*

JUDGMENT

1. This matter was listed as an application for leave to appeal against an interlocutory order made in the Supreme Court on 9th February 2017 which refused leave to add 11 new parties to the proceedings and to amend the claim to plead their involvement. However when the matter was called the applicant identified 3 applications which he had filed and which he invited this Court to consider. The applications were:
 - (1) Application for leave to appeal out of time;
 - (2) An application seeking leave to file new evidence. This application was filed 2nd November 2017;
 - (3) An application entitled "*Urgent Application for the Leave of the Court of Appeal out of time and to add to the leave to appeal three more related*

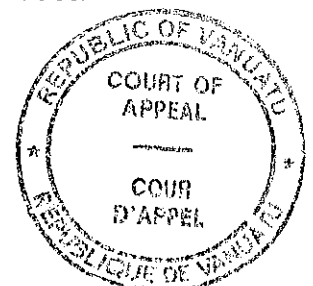


applications which were not scheduled to be heard by the Supreme Court." This application was filed on 26th September 2017.

We deal with each of these applications in turn.

Leave to appeal out of time.

2. The applicant obtained leave on 21st March 2017 to appeal against the interlocutory order made on 9th February 2017 but no appeal was filed within time thereafter. The applicant lodged the application now before the Court on 26th September 2017, more than 6 months after the 30 day period within which an appeal from the order from 9th February 2017 should have been filed.
3. The factors to be considered on an application to extent time to appeal are well established: Laho v. QBE Insurance [2003] VUCA 26. In the context of this case, the Court must consider not only the length of the delay, but the reasons for it, and the prospect of the appeal succeeding if leave is granted.
4. In a sworn statement filed on 14th June 2017 the applicant explained that he attempted to file an application to appeal out of time on 19th April 2017 but the application was refused by the court registry as he was unable to pay the filing fee of VT25,000. However he goes on to say in the statement that by 14th June 2017 he had the filing fee and would be inviting the Court of Appeal to evaluate whether time should be extended. The impecuniosity of an intending appellant which delays the filing of appeal papers is a matter to be considered. However that had ceased to be a factor in this case by 14th June 2017. No explanation for the delay from that time until 26th September 2017 when the papers were filed has been offered. On the prospect of success, we consider for the reasons that follow that an appeal would in any event fail. For that reason and for the reason of delay the application to extend time must be refused.
5. The claim was commenced on 21st May 2014. The pleadings alleged that the applicant was the owner of the business "*Raw for Beauty*". In 2012/2013 he met "*the defendant*" (in reality he met Mr. Ronan Harvey, the principal shareholder and director of Western Pacific Cattle Company Limited). The defendant invited him to the defendant's property in Velit Bay Santo. Once there the applicant and the defendant company entered into a joint venture that would, amongst other things, run a factory to produce coconut oil for use in the Raw For Beauty business. To this end machinery was imported from China for coconut oil production. The applicant pleads that the machinery became and



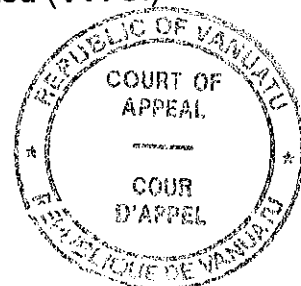
remained his property. On 14th December 2013 the defendant ordered the applicant to vacate the Velit Bay Property and not to take anything (machinery included) apart from his personal belongings. The applicant claims that the defendant thereby wrongfully destroyed his business causing losses of VT29,352,143.

6. The respondent's defence filed soon after the claim was served denied that there was any commercial relationship, denied that there was any joint venture agreement as alleged, and asserted that the machinery was and remained the property of Mr. Harvey.
7. Whilst there have been many conferences and pre-trial applications by the parties the claim between the applicant and the respondent is still very far from being listed for trial. In the meantime the respondent's property has been sold. The proceeds of sale have been distributed to the shareholders (principally Mr. Harvey). Mr. Harvey has moved offshore as have the proceeds of sale distributed to him. The respondent company has been removed from the register of companies pursuant to s.143(2) of the Companies Act No. 25 of 2017 after the company gave public notice on 24th October 2016 that "*Western Pacific Cattle Company Limited has ceased to carry on business, has discharged in full its liabilities to all known creditors, and has distributed its surplus assets in accordance with its rules and under this Act, and intends for the company to be removed from the register*".

Finally, on 21st March 2017 the lawyer on the record for the respondent ceased to act with the consequence that the respondent has since then been unrepresented and has taken no further part in the proceedings.

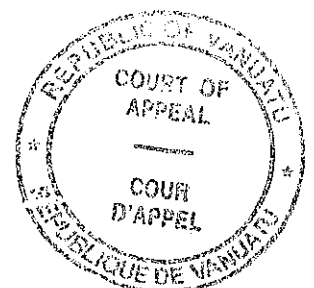
8. The 11 parties which the applicant now seeks to join are:

- Mr Ronan Harvey
- Mr Sean Griffin
- The Government of the Republic of Vanuatu
- The Commissioner of Police
- The Principal Immigration Officer
- Vanuatu Investment Promotion Authority (VIPA)
- Mr Nigel Morrison of Ridgway Blake Lawyers
- Mr Garry Blake of Ridgway Blake Lawyers
- Ms Kayleen Tavoia, former counsel for the respondent
- Vanuatu Waikie Group International Industrial Company Limited (VWGI)



- First National Real Estate

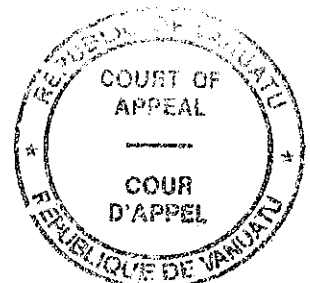
9. In short the applicant alleges that each of these identities has played some role in one or more of several alleged schemes, or "*conspiracies*" that have, since the issue of the applicant's original claim in 2014 had the effect of delaying trial of the claim so that in the meantime the respondent has been stripped of its assets, which are now beyond reach, so that the applicant is completely denied the potential fruits of his claim. The intended purpose of the joinder of the new identities is to claim damages from them for putting the potential fruits of the applicant's claim against the respondent beyond reach.
10. The role of Ronan Harvey in events since the issue of the original claim is as the effective controller and shareholder of the respondent. Mr. Griffin is alleged, since the commencement of the claim, to have become a minority shareholder in the respondent and to have acted as manager and managing director of it during the period when the Velit Bay property was sold.
11. The applicant seeks to join the Government of the Republic of Vanuatu on the basis that it is responsible for the Department of Police, VIPA and Immigration, each of which has been corruptly involved in the alleged conspiracies.
12. Mr. Morrison and Mr. Blake are lawyers. Mr. Morrison acted for the respondent for a time after the original claim was filed. He was involved in various transactions relating to the sale of Velit Bay and various proceedings taken against the applicant by the Police and Immigration and in relation to the applicant's attempt to take possession of the coconut oil machinery. Mr. Blake represented VWGI in the purchase of the Velit Bay property. Ms. Tavoia acted for Mr. Harvey since the original claim was filed, and more recently was the lawyer on the record for the respondent. VWGI was the purchaser of the Velit Bay property and the applicant for an investor's licence sought from VIPA to enable the purchase to take place. First National Real Estate is an estate agent that had a part in the sale of the Velit Bay property.
13. The various allegations made about the identities sought to be joined are vague generalisations, and as the primary judge correctly observed based on opinion and are not presented in a way that could be admissible in evidence.
14. More importantly there are two other features that justify the refusal by the trial judge to allow the addition of new parties and consequential amendments to the pleadings.



15. First, a reason why the new parties and amendments were said to be necessary is recorded in the application for leave as follows:

"To better identify the issues between the parties – After that the statement of the case was filed on 30/5/14, the Defendant have orchestrated Conspiracies which have brought this case into a new reality in which the Defendant and the new parties have created new damages to the Claimant relating to his case. Those issues have to be amended in the statement of this case so that this Honourable Court could better identify the issues between the parties".

16. That statement correctly identifies the allegations that the new parties have caused new damages which occurred after the original claim was filed, and concern events that have happened since that time. Whilst the applicant says the new damages relate to the case, that is not a basis which justifies the proposed joinder. It is the causes of action, not damages which must be related. The new causes of action must relate to those pleaded in the original claim to overcome the general rule of pleading that amendment is not allowed to add a cause of action that has accrued since the proceedings were commenced. Here the cause of action against the new identities have all arisen after the commencement of the claim, and are not related in terms of the rules of court to those pleaded. The issues between the parties pleaded in the claim relate to the legal rights and wrongs of the relationship between the parties before and leading up to 14th December 2013 when the order was given that the applicant vacate the Velit Bay property. The alleged new causes of action arise out of quite different facts and in a legal sense are unrelated to the cause of action pleaded in the claim. On this ground alone the appeal against the decision under challenge has no prospect of success.
17. The second feature of the application for leave to amend the Supreme Court claim that justified refusal is that the application was not accompanied with a draft of the proposed amended claim in a form that met the requirements of Rule 4.2 of the Civil Procedure Rules. The application merely outlined in very broad terms the roles of the proposed new parties and the consequences of events and transactions in which they were involved but does not identify the particular conduct of each new identity that is said to create a legal liability, and why.
18. For these reasons the application to join new parties and amend the claim was rightly refused.



Application seeking leave to file new evidence

19. This application must be refused as the alleged new evidence relates to the proposed new parties and new causes of action, and is not relevant to the original claim. Even if the new evidence related to the causes of action pleaded in the original claim, that evidence should be filed in due course in the Supreme Court, and not in the Court of Appeal.

Urgent application to add 3 more related applications which were not scheduled to be heard by the Supreme Court

20. These applications were:

- (a) Application that Mr. Harvey and Mr. Griffin disclose agreements and assets relating to the transfer of lease of the Velit Bay property;
- (b) Application to dismiss the respondent's counterclaim;
- (c) Application for wasted costs.

21. Matter (a) relates to the new causes of action and has no relevance to the original subject matter of the claim. Matters (b) and (c) are matters that must be dealt with by the Supreme Court. If the applicant wishes to continue with these applications he must arrange to have them listed before the conference judge. This application for leave must also be refused.

22. The formal order of the Court is that the application for leave to appeal out of time against the order of the Supreme Court made on 9th February 2017, and the other applications brought before the Court, are all dismissed. There will be no orders as to costs.

DATED at Port Vila, this 17th day of November, 2017

BY THE COURT


Hon. Chief Justice Vincent Lunabek

