IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No 18/2690

BETWEEN	Chen Jinqui Appellant
AND	Ly Nu Loung First Respondent
AND	Millie Ogden Second Respondent
AND	Thomas Ogden Third Respondent
AND	Luong Fong Fourth Respondent
AND	BRED (Vanuatu) Limited Fifth Respondent
AND	The Republic of Vanuatu Sixth Respondent

CORAM:	Hon Chief Justice V Lunabek Hon Justice J von Doussa Hon Justice J Hansen Hon Justice O Saksak Hon Justice G Andree Wiltens Hon Justice S Felix
COUNSEL:	R E Sugden — Counsel for Appellant N Morrison — Counsel for First Respondent J Malcolm — Counsel for Fifth Respondent T Loughman — Counsel for Sixth Respondent
DATE OF HEARING:	13th and 18th February 2019.
DATE OF DECISION:	22nd February 2019.

JUDGMENT OF THE COURT

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[1] This is an appeal against the decision of Aru J striking out civil claim 453/2017.

[2] The sixth respondent abides the decision of the Court. As noted above, there were appearances for the appellant, the first fifth and sixth respondents. Submissions were filed by those parties. An appeal book had been prepared by the second respondent, and this was printed and distributed by Mr Morrison. We are grateful to Mr Morrison for this assistance.

[3] There is a somewhat tortuous background of proceedings in the Supreme Court that led to the strike out decision. The following is gleaned from the pleadings and the plethora of documents filed in the various proceedings. It is not necessarily a comprehensive overview but it is sufficient for the purposes of this appeal.

Background

[4] Luong Fong and Ly Nu Loung are husband and wife. Millie Ogden is their daughter, and she is married to the third respondent in these proceedings. The wife, Mr and Mrs Ogden and two other siblings live in the USA. On the material before the Court the husband and wife have long been estranged. It is also apparent that, sadly, the wife suffers from progressive Parkinson's disease. It appears to us that the role of her daughter, Millie Ogden, and her husband, has been no more than attempting to assist their mother and mother-in-law. It has to be said that this has been done in quite an aggressive manner, but that is not surprising in all the circumstances.

[5] The dispute has its genesis as far back as 1982 when the husband and wife, using marital funds, purchased leasehold title 03/0183/038 in Luganville, Santo. In 1987 the wife gave a general Power of Attorney to the husband. This was said to be to facilitate administration of the couple's business interests in Luganville during the wife's frequent absences overseas.

[6] In 1998, using the Power of Attorney, the husband transferred the lease into his sole name. Subsequently, this lease was surrendered and two new leases were issued, 070 and 071. The first proceedings filed in relation to these matters was Civil Claim 142 of 2015. It was filed on 7 July 2015. In those proceedings the wife was the first claimant and the three children the second claimants. The husband was the first defendant, and the second defendant the

Director of Lands. It is sufficient to say for the purpose of this appeal that allegations of fraud were made by the wife and children against the husband in relation to the transfer of the lease into the sole name of the husband. There are also allegations in relation to the dealings by the husband with one Gum So Leung purporting to sell the 071 lease. Various allegations were made against the husband and the Director of Lands, and the claim sought rectification of title and damages.

[7] The original claim in Civil Claim 1335/2016 was filed on 21 April 2016. The wife was the claimant, the appellant the first defendant, and the sixth respondent the second defendant. It recites the matters between the husband and wife mentioned above. (Additional parties were added in at various stages as the pleadings were amended and a counter claim filed by the appellant.) It goes on to plead that when the wife realised the misuse of the Power of Attorney, she confronted the husband and an agreement was reached in 2001 with the husband which should have led to the transfer of both leases to the names of the claimant and the children. It is alleged that such a settlement was given effect to by the execution of the necessary documents that were presented to the Lands Department. It is also alleged the Minister of Lands consented to the transfer. The husband undertook he would stamp and register the transfer documents.

[8] It is then alleged that the husband breached this agreement, and the wife became aware of this around 2010. As a consequence she registered cautions over both leases 070 and 071 to protect her unregistered interest. In the course of 2013 and 2014 the husband and wife entered into voluntary and professionally directed mediation, the outcome being that the husband agreed to reinstate and comply with the settlement set out above.

[9] It is then pleaded that this was a false submission to the mediator, as at that time the husband was finalising the details of a sale and purchase contract for the 071 lease with the appellant. In or about 2013 he entered into an agreement with the appellant which it is alleged provided for the purchase of the 071 lease for VT45 million. It is pleaded that the appellant and the husband fraudulently colluded to deprive the wife and children of the properties. The following terms of the contract are pleaded:

- Upon execution the appellant agreed to deposit VT2 million with the husband

- The balance of VT45 million would be paid over a period of time.

- Title would only be given "when the rest of the payment is finished".

[10] It is further pleaded that in 2015, by which time the wife was residing in the United States, the husband and the appellant were planning on transferring the 071 lease. In March of that year the wife travelled to Luganville to protect her interest. It is alleged she met with the appellant and advised him that his agreement with the husband involved property that the husband had no right to deal with. She also made it plain that her interest was protected by a caution. She also pointed out that by the end of March 2015 the appellant had still to pay off the full contract price, and was, therefore, not entitled to any transfer, even in the terms of the agreement. She pleaded extensive allegations of fraud against the appellant and the Minister of Lands, and sought rectification of title and damages.

[11] On 1 June 2016 the two cases 15/142 and 1335/2016 were consolidated. Given they relied on the same underlying facts and transactions, that was inevitable. The wife was granted the right to amend to include the Director of Lands as a party, and timetabling was made for the filing of Amended Claims and Defences.

[12] On 21 June 2016 the Amended Claim was filed, adding the Director of Lands in both his official and personal capacities. Allegations of fraud and bribery against him were pleaded. Rectification was again sought as the major remedy. On 4 August 2016 the appellant, represented by Mr Hurley, filed a Defence to the Amended Claim and a Counterclaim. It can be seen, therefore, that there has been a Counterclaim on foot since August 2016. The husband was added as a second Counterclaim defendant.

[13] The Counterclaim alleges that the full purchase price had been paid to the husband and the appellant became the registered proprietor of the lease on 15 April 2015. The Counterclaim seeks that if the claimant is successful in that Counterclaim then he will have suffered loss. It is also said that if the defence is unsuccessful, the first defendant would seek an order against the first and second counterclaim defendants, jointly and severally.

[14] The files had been assigned to Fatiaki J, who case-managed them throughout. There were a number of conferences. It is clear Mr Hurley acted for the appellant for 20 months, until

December 2017. In that month the appellant consulted Mr Sugden and ultimately decided to change lawyers. Mr Sugden accepted those instructions. That was the appellant's personal choice. By that stage Mr Sugden would have been well aware that the matter had been given a 7 March 2017 trial date. For the sake of completeness we note that this is a case of some factual complexity but the legal issues appear relatively straight forward. The case had been properly case-managed to trial.

[15] Early in 2017 four separate applications were filed, on the 1, 8 and 17 February. The first three were by the appellant the fourth by the second respondent. The first sought an adjournment of the trial date; the second was to amend the counterclaim pleadings; and the third and fourth sought security for costs. They were supported by sworn statements. These were opposed and heard by Fatiaki J. On 17 February he granted the application to amend the pleadings and ordered that they be filed and served by 28 February 2017. He also ordered that any additional sworn statements in support of the Defence to the Amended Counterclaim were to be filed and served by 6 March 2017. The security for costs applications are irrelevant for present purposes.

[16] In relation to the application for adjournment, the Judge pointed to the fact that on 11 October 2016, in the presence of Mr Hurley, the matter was adjourned to 12 December to fix trial dates for early 2017. On that date, again in the presence and with the concurrence of Mr Hurley, trial dates were fixed from 7–10 March 2017. At that conference the Court gave pre-trial orders, as well as directions concerning a tape recording that was attached to a sworn statement filed by Millie Ogden.

[17] Mr Hurley filed a formal Notice of Ceasing to Act on 19 December 2016, and on 3 January 2017 Mr Sugden filed a Notice of Beginning to Act. It appears to be common ground that Mr Sugden was overseas and did not return until 26 January 2017.

[18] The grounds for the adjournment were said to be that instructions were given following the 12 December 2016 conference, with files and materials being obtained by 21 December 2016. There was reference to the unidentified factual material in the tape recording, the unverified transcript of the tape recording and an insufficiency of time to prepare for a trial that had been fixed six weeks earlier and was not to take place for five weeks. There was an English

transcript of the tape recording and the appellant has not pointed to any specific prejudice from not having this transcript verified.

[19] Perhaps not unsurprisingly, given the history of this matter, the appellant's application for adjournment was opposed by other parties. Apart from general concerns of delay and cost other grounds were advanced. The wife and accompanying children had already bought tickets to travel to Vanuatu. There was the deterioration of the wife's health due to Parkinson's disease, and in the course of the hearing of the application the appellant's counsel was unable to give a firm commitment that the appellant agreed to meet any additional costs that might be incurred by the wife and her accompanying children having to alter travel dates.

[20] The Judge rehearsed these matters and noted that the appellant's claim repeated the circumstances surrounding the first defendant's acquisition of the disputed leasehold land. He also noted that counsel received instructions in December 2016 and despite being aware of trial dates, and after obtaining the files, he decided nonetheless to undertake an annual holiday. The application to adjourn was refused. There was no appeal against that decision.

Events after the refusal of the adjournment

[21] What followed can only be described as a concerted and deliberate course of action by Mr Sugden, utilising the rules of civil procedure, to avoid the consequence of the Judge's decision refusing the adjournment. Indeed, Mr Sugden admitted as much in papers he filed with this Court, and submitted that the overall justice to his client required such a course of action be taken.

[22] As noted earlier, the trial date had been set for 7 March. On 2 March 2017 Mr Sugden filed a new Civil Claim under number 453/2017. The claimant was the appellant and the first to sixth defendants were the wife, the daughter Millie Ogden, her husband Thomas, the husband, BRED bank and the Republic of Vanuatu. It can be seen that these are all the parties in the consolidated cases, except for Mr Ogden. The claim against the Director of Lands dropped out. We note here that, contrary to Mr Sugden's submission, Millie Ogden was a party to the earlier proceedings because she was named as such in one of the consolidated cases, 15/142.

[23] We note, with some considerable concern, that neither the other parties nor the Judge were advised of these new proceedings. Service did not occur at that time.

[24] The next day, 3 March, the appellant filed a Notice of Discontinuance of the Counterclaim against the wife, the husband, BRED, and the Government of the Republic of Vanuatu. The trial Judge was of course aware of this, and other counsel were advised before the trial commenced.

[25] Once service of the new claim finally occurred BRED filed an application to strike out 453/2017 as it applied to them. The application states that the claim against BRED was an allegation of negligence in lending money to the claimant while a caution existed. It also alleges that the counterclaim issued against BRED by the appellant relied on the same, or similar, grounds. It is said that the claimant is prohibited by Rule 9.9(4) of reviving the claim. It is also said that the issuing of a new claim for the same thing is reviving the claim. Alternatively, it is said that the claim is estopped by the principal of *Anshun Estoppel* i.e. that the claimant had the opportunity of having the issue before the Court determined in 1335/2016 and is estopped from filing any revived claim in respect of the same facts and issues.[1]

[26] The second defendant filed a similar striking out application, however, while addressing a number of legal matters the second defendant in 453/2017 did not specifically rely on Rule 9.9.

[27] Those applications came before Aru J and, in a ruling dated 11 September 2018, both applications to strike out were granted and the claim in 453/2017 was struck out in relation to all defendants. At that hearing the appellant, the wife, and BRED were all represented. Ms Ogden appeared in person.

[28] In his ruling the Judge rehearsed the factual dispute at the heart of this matter, and the legal submissions. He cited Rule 9.9 and noted he was unsure why grounds for discontinuance were included in the discontinuance application, as they are not required under the rules. He stated at [17]:

> *I am firmly of the view that the effect of rule 9.9 (3) and (4) is that if the claim is discontinued against a party, it may not be revived. That is what the claimant has done*

1 *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45.

in relation to BRED (Vanuatu) Limited therefore the claim cannot now be revived as it has been discontinued.

[29] The Judge continued that Ms Ogden made a similar submission, and then cited from *Henderson v Henderson.*[2] He added the current proceedings were filed before discontinuance, but not served. He said:

> *It was incumbent upon the claimant to inform the parties before Fatiaki J of the related proceeding as the disputes had been ongoing since 2015. Nothing happened until after the counter claim was discontinued. This proceeding re–agitates [sic] more or less the same issues raised in the counterclaim.*

[30] He went on, and considered there were no special circumstances why the claimant should be allowed to re-litigate the issues when he had full opportunity to bring his whole case before Fatiaki J. He granted both applications, and struck out the claim against all defendants.

The appeal

[31] We note the potential dispute as to whether a striking out is an interlocutory or final order. Mr Sugden filed an application for leave which was not opposed by other parties. We granted such application insofar as it was necessary.

[32] Essentially, the appellant argued that the new proceeding 453/2017 was not a revival of his counterclaim in 1335/2016 after discontinuance. Mr Sugden submitted that the Judge was wrong in that he held that for the purposes of Rule 99(4) (a) of the CPR the proceedings did not begin until they were served. He maintains that Rule 2.2 provides the proceeding commences with the filing of the claim. We would take no issue with Mr Sugden's interpretation of 2.2.

[33] He said it was wrong of the Judge in law and fact to hold the appellant had an opportunity to bring forward his whole case in his Counterclaim in the trial before Fatiaki J.

[34] In the notice of appeal it is said that the rule in *Henderson* and *Anshun* had no application as there had been no adjudication in this particular case.

2 *Henderson v Henderson* (1843) 67 ER 313.

[35] Mr Sugden was adamant that the use of the procedure adopted was justified to ensure justice for his client who had expended VT45 million and had a money judgment in his favour against the husband. He submitted the claim in 453/2017 was significantly different from what was claimed in the counterclaim.

[36] Mr Sugden also submitted that there was a manifestly erroneous finding in relation to Ms Ogden as she had not been a party to 1335/2016 and the claims against her in this proceeding were for damages for wrongful interference in contractual relations and negligence which had not been raised in 1335/16. We have already noted that Ms Ogden was a party in the consolidated proceeding.

[37] Mr Sugden argued that the new claim was started before discontinuance and could not be described as a revival. He sought to rely on *FFDL v Nichols Ltd* CAC 28/14 at [22]. Accordingly he submitted Rule 9.9(4) did not apply.

[38] There was a further submission that there would be no re-litigation in relation to the claim against BRED, because that claim only came into existence when the Amended Counterclaim was filed. Mr Sugden further submitted that an appeal in relation to the Counterclaim, if it had proceeded unsuccessfully, was inevitable because the appellant was not ready to try the Counterclaim.

[39] Both BRED and Ms Ogden supported the Judge's decision and his reasoning. BRED further relied on the inherent jurisdiction to strike out pleadings where there had been an abuse of the Court's process.

[40] Ms Ogden filed a long appeal book as a litigant in person, where she set out the considerable history of the dispute, which is of assistance to the Court.

[41] For the Fifth Respondent Mr Malcolm submitted that the new claim was a revival pursuant to Rule 9.9(4) (a) but that further to issue a claim one day before discontinuing was an abuse of process. It was submitted that this is clear from what is stated in the Grounds for the Discontinuance. This was a reference to the refusal of Fatiaki J to adjourn the trial and the allegation the appellant could not get a fair trial from that judge.

[42] Mr Malcolm further submitted the abuse was filing the exact same claim under a new proceeding the day before discontinuance. He said counsel had advised of the intention to discontinue to avoid wasted preparation, but there was no advice of the new claim. It was submitted that this was so late in the piece, all the work had been done, and although under pressure, the counterclaim defendants were ready and able to defend those claims.

[43] Both Mr Malcolm and Mr Morrison submitted that Mr Sugden had a number of options which included advising of the new claim prior to discontinuance; applying to stay: appeal the decision to refuse to adjourn; applying to disqualify Fatiaki J if counsel's beliefs were correct; or apply to consolidate the new proceeding and seek an adjournment.

Discussion

[44] Rule 9.9 CPR provides:

> **9.9 Discontinuing proceeding**
>
> (1) The claimant may discontinue his or her claim at any time and for any reason.
>
> (2) To discontinue, the claimant must:
>
> (a) file a Notice of Discontinuance in Form 18; and
>
> (b) serve the notice on all other parties.
>
> (3) If there are several defendants:
>
> (a) the claimant may discontinue against one or some only; and
>
> (b) the claimant's claim continues in force against the others.
>
> (4) If the claimant discontinues:
>
> (a) the claimant may not revive the claim; and
>
> (b) a defendant's counterclaim continues in force; and
>
> (c) the party against whom the claimant discontinued may apply to the court for costs against the claimant.

[45] The focus in the Supreme Court submissions and decision was on Rule 9.9(4) and the principles in *Henderson* and *Anshun*. The principles in those cases are to like effect as Rule 9.9. That necessarily involved a consideration of whether these proceedings were a revival of

the counterclaim in 1335/2016. Mr Sugden's position was that because he had filed these proceedings before discontinuance, there could not be revival. He was asked for authority for this proposition, and had none. We are bound to say that there is an alternative argument that if new proceedings are filed before discontinuance and are effectively the same as the earlier proceedings, they amount to a revival. However, we do not consider it necessary to determine this in the present appeal. Again, for reasons that follow, we do not need to discuss the reliance on *FFDL* which can readily be distinguished. In that case the court and parties were informed of the new proceedings. As this court noted at 24:

> *It was apparent that FFL, by its notice of proposed discontinuance, did not intend to abandon the claim to recover the VT 27 million...*

In FFDL the discontinuing party made their position clear and told other parties and the judge of the position. That is clearly not the case here as the appellant chose to hide the new proceedings from the parties so it could not be raised with the trial judge when the trial commenced. In the Application for Leave to Appeal at B. 4 the appellant stated:

> *The defendants to the new Claim were deliberately not served until the conclusion of the trial in Civil Case 16/1335 in order to avoid having it consolidated in that trial and so not avoiding the chance to properly prepare the Claim (no defences had been filed to the amended Counterclaim when the trial began.*

However, we do not consider it appropriate to determine this pursuant to Rule 9.9, *Henderson* and *Anshun*. Rather in the context of this case and on the basis of matters conceded by counsel in the Grounds of Discontinuance and in further material filed in the appeal the proper basis is to consider the strike out for abuse of process under the courts inherent jurisdiction. Indeed, although mentioned only briefly below, it is where the focus of submissions and questions from the bench were on the hearing of appeal

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[46] It is unnecessary to cite authority. The court clearly has such discretionary jurisdiction. It is to be exercised cautiously in exceptional cases.

[47] Mr Sugden was candid in his submission and his Application for Leave that one of the reasons for the course of action he undertook was to avoid the consequences of the Judge's refusal to allow any adjournment. At 2(d) of the Leave Application he states:

Because there was no opportunity to prepare for the new issues raised by the amended defence and counterclaim the appellant wished, for this reason, to remove his claim from the adjudication that was shortly to commence.

[48] It also appears to be apparent that Mr Sugden is alleging bias on the part of the trial Judge in 1335/16 such that the appellant could not get a fair trial after the refusal to adjourn the Counterclaim. In the Grounds contained in the Notice of Discontinuance it is stated at 4 :

It is clear to the First Defendant that the Court has already decided against his Counterclaim before trial, at least against the Claimant, and if he brings the Counterclaim to the trial his Counterclaim would, in any event, be dismissed for lack of evidence.

[49] One matter it is appropriate to deal with first. In the course of submissions, the appellant made the submission that the husband, wife and the family had colluded together in an attempt to defraud the appellant of the VT45 million he had paid. Such a submission must assume that the litigation launched by the wife and children against the husband was done deliberately as part of this alleged fraud on the appellant. Given the heat of that litigation and the expenditure on it, we consider such a submission made by Mr Sugden to be preposterous and without any evidential support. We are satisfied there is no possibility of such collusion.

[50] We turn next to the suggestion that these proceedings are completely different from the Counterclaim. We have already noted that Millie Ogden was a party to the consolidated proceedings. An analysis of the Counterclaim and this claim shows there is no real difference between them. Both rely on the same background, factual matrix and would require the same evidence. Even the supposedly new claim of interference with contractual relationships would require a consideration of the background and the actions of the appellant and the husband. We accept there is a difference in the remedies sought, but we see these proceedings as essentially the same as 1335/16. They are no more than an attempt to re-litigate what was discontinued.

[51] We consider next the complaint that there was no time to properly prepare for trial of the Counterclaim. We note this was an important case that had been case managed by the Judge throughout. The trial date was set on 12 December 2016 to commence on 7 March 2017. There was over three months' notice of trial. The appellant takes the view that his new counsel only received the documents immediately prior to Christmas, and on his return from holiday had insufficient time to prepare the amended counterclaim and prepare for the trial of it.

[52] There are a number of points to make. First, the preparation and pleading in 453/17 show that considerable consideration had been given to the material and significant time would have been spent in drafting the new Claim. Without doubt counsel was fully on top of the matter to be able to do that. Especially in the unsuccessful attempt to make it appear that these proceedings were sufficiently different from the Amended Counterclaim as to avoid the suggestion of revival. We are satisfied if this work had been given to preparing the trial of the Counterclaim, there was ample time to be ready by 7 March.

[53] The second point is that in the appellant's submissions dated 10 October 2018 it is stated that:

> *In December 2016 the trial in that proceeding had been set down for 7/3/2017 and the appellant (Chen) a defendant in that proceeding was forced to engage another lawyer.*

[54] That is simply not correct. In the course of submissions, Mr Sugden accepted it was the appellant's free choice to dismiss his previous lawyer and to instruct Mr Sugden. That was the appellant's choice, and the consequences of that decision rest with him and him alone. In the context of this case we also consider that once counsel accepted instructions in a case set down for trial he has a professional obligation to be ready for trial. That is especially so when it could not be said the trial was set down with urgency. Holidays simply do not come into it. That is another matter that is between the appellant and counsel.

[55] In the circumstances applying here the professional responsibilities and obligations of trial counsel dictate a different course of action was required from what was adopted by him after the Ruling of 17 February. First, if the appellant was dissatisfied by the refusal to adjourn, that decision could have been appealed. Mr Sugden complained that the appeal would not have been dealt with quickly enough to avoid injustice and the trial. It was pointed out by counsel for the respondents, and from the bench, that in this jurisdiction, where urgent matters arise a Court of Appeal can be assembled at short notice, either with a local or overseas panel, to hear such urgent appeal. The proper course was to appeal.

[56] Secondly, we are also satisfied that the Judge was correct to say that the trial Judge and the other parties should have been informed of this proceeding. Mr Sugden is right to say that he had three months to serve it. But that is not the point in a case where he had discontinued and was simply reviving essentially the same claim simply to avoid an order of the Court refusing adjournment and to attempt to avoid the same judge. If the matter had been advised

to other counsel and to the Court, consideration could have been given to consolidation and a further application for adjournment could also have been considered. Again, if unsuccessful, an urgent appeal could have been lodged.

[57] Thirdly, as to the suggestion of bias on the part of the trial Judge in relation to the counterclaim, we do not consider that assists the appellant. In any case, where a party thinks there is bias, or apparent bias on the part of the Judge, the obligation of the party and counsel is to immediately raise that with the trial Judge and have him rule on that. In this case it had to be done, at the latest, at the commencement of the trial. Again, if that had been undertaken in this case and was unsuccessful, an urgent appeal could have been lodged.

[58] What occurred here showed that the appellant blatantly and cynically attempted to utilise the CPR to avoid an order of the trial Judge (we note Mr Sugden's submission about what could have occurred under the old rules is totally irrelevant). Mr Sugden filed new proceedings that, once properly analysed, are essentially the same as the counterclaim. We have noted that Millie Ogden was already a party. The new pleadings added her husband. As we stated earlier we are quite satisfied in this case that Mrs Ogden and her husband were doing no more than their best to assist an elderly mother who suffered from Parkinson's, and who they believed had been defrauded by the husband in the course of the matrimonial dispute.

[59] As we set out above, the appellant, and his counsel, failed to undertake the proper steps following the allowance of the amendment of the counterclaim and the refusal to adjourn the trial.

[60] Mr Sugden made much of the perceived injustice to his client, who had been found to have paid the full purchase price in earlier proceedings. Consideration of justice in the context of a strikeout application, and in the circumstances this Court is confronted with, must necessarily consider the justice of all parties. Indeed, ultimately Mr Sugden conceded that.

[61] To allow this new claim to be revived what had been discontinued would amount to enormous prejudice to the respondents. They would have to prepare for a new trial, canvasing exactly the same facts and witnesses as those that were adduced at the trial in 1335/16. It would also involve enormous expense to the overseas respondents in returning to Vanuatu for another trial.

[62] It is also telling that if this proceeding was allowed to go to trial, the possibility of conflicting findings and decisions from 1335/2016 were considerable.

[63] We accept the use of the Court's inherent jurisdiction to strike out for abuse is discretionary, and used cautiously in exceptional cases. This is an exceptional case not least because Mr Sugden has been quite candid as to what he did. We are satisfied the conceded facts clearly establish abuse. We can do no better than reiterate the submission of Mr Malcolm at page 5.

> The abuse in this case:
>
> 1. was deliberate;
> 2. by an experienced solicitor;
> 3. to obtain a different judge;
> 4. without notice to other counsel;
> 5. it was deceptive in the extreme.

We would add to that list it was an attempt to *judge shop*.

[64] It is hard to think of a more blatant abuse of the Court's process although we acknowledge Mr Sugden's candour. In the circumstances, the Judge was right to strike out the Claim in its entirety. The appeal is dismissed.

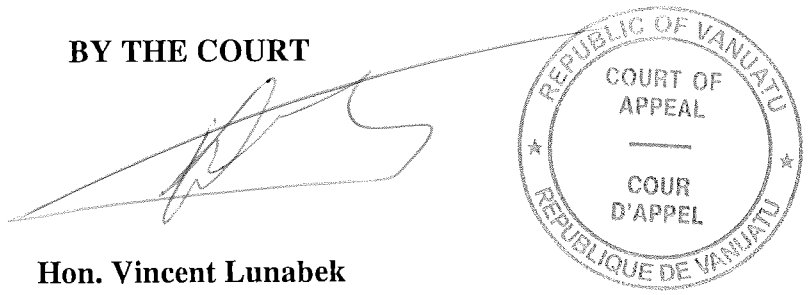
[65] The hearing was reconvened to allow counsel to make submissions as to cost. In the normal course of events the conceded facts could well have warranted consideration of an order that Mr Sugden personally pay the costs. We note, however, that none of the other parties sought such an order. There is nothing to suggest that Mr Sugden acted other than on instructions. We have already commented on Mr Sugden's candour. In those circumstances we will not make an order that Mr Sugden personally pay the costs. However, Mr Sugden is a senior practitioner who is well aware of the Civil Procedure Rules. In breach of his professional obligations he improperly manipulated the Rules. In those circumstances we think it appropriate to refer this judgment to the Law Council.

[66] We award the First Respondent VT50, 000, the Fifth Respondent VT 100,000 and the Sixth Respondent VT 25,000. The Second Respondent is self-represented but is entitle to disbursements. We understood that she flew from Los Angles to Fiji to participate in the

November session of this Court. She did not need to travel further. She is entitled to be reimbursed by the Appellant for her economy class airfare, and accommodation and incidental disbursements in Fiji. She will need to produce receipts to support the disbursements.

Dated at Port Vila, this 22nd day of February, 2019.

BY THE COURT



Hon. Vincent Lunabek

Chief Justice.