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

Civil Case No. 104 of 2011

BETWEEN: MARIANNE TRANCHAT
Claimant

AND: THE REPUBLIC OF VANUATU
First Defendant

AND: GENSANNE MARC
Second Defendant

Hearing : ***22 May 2012***
Before: ***Justice RLB Spear***
Counsel: ***Mari Grace Nari for the Claimant***
Christina Lahua for the First Defendant
No appearance / No steps for the Second Defendant

ORAL JUDGMENT

Striking out of the Claim

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1. The Republic of Vanuatu applies to strike the claim on the grounds that it raises the same cause of action or claim as has been raised in previous proceedings by the claimant and which claim has been formally discontinued. The essential submission of the Republic is that the claimant is prohibited by Rule 9.9(4)(a) from attempting to revive a claim that has already been discontinued and that, in any event, it would be an abuse of process to allow that to occur.

Background

2. Mrs Tranchat was the proprietor of two lease hold titles 11/0C31/027 and 11/0C31/028. In 2003, she agreed to transfer lease /027 to her son Gensanne Marc (the second defendant). The claimant asserts that the Director of Lands mistakenly transferred lease /028 to her son instead of lease /027.

3. The claimant then entered into correspondence with the Director of Lands requesting that he correct the error. However, the end result was that the transfer of lease /027 was eventually registered leaving Gensanne Marc as the registered proprietor of lease /27; all as initially intended. However, the register was not corrected in respect of lease /028 and Gensanne Marc remained the registered proprietor.

4. It appears that Gensanne Marc then sold both properties, pocketed the sale proceeds, and left Vanuatu for France. He has apparently never returned to Vanuatu. Essentially, Mrs Tranchat asserts that her son dishonestly took advantage of this mistake as to registration of lease /028 to her detriment.

5. Mrs Tranchat further asserts that the Director of Lands was at distinct fault allowing the registration of the transfer of lease /028 to Gensanne Marc in the first place and then not correcting his mistake before the property was sold.

6. Mrs Tranchat also states that a caution entered against dealings on lease /028 by a relative on her behalf was removed by the Director of Lands without giving notice to

her. The evidence in reply from the Republic is to the effect that appropriate notice was given and no objection was taken to the removal of the caution. On the basis of the evidence adduced, it is difficult to establish what exactly happened in this respect.

7. That is a very brief summary of the history and, of course, this application can appropriately be considered on the basis that the claimant's assertions in her claim are, indeed, correct.

First Claim C 127/08

8. In 2008, Mrs Tranchat commenced proceedings against Gensanne Marc, the new owners of lease /028, the Director of Lands, the Minister of Lands and the Government of Vanuatu alleging that the transfer of lease /028 to Gensanne Marc was a result of either mistake or fraud and seeking rectification of the register together with damages for lost rental income from the property. An alternative claim was made against the Director of Land Records, the Minister of Land and the Government of Vanuatu for damages in negligence.

9. This proceeding was defended by all except Gensanne Marc who was never served. Indeed, it appears that there was no attempt made to obtain an order for substituted service on him for reason that are not entirely clear. Mrs Tranchat discontinued that proceeding CC 127/08 on 4 April 2009 which attracted a order of cost against her in favour of the Republic of Vanuatu in the sum of Vt 20,000. Incidentally, Ms Lahua indicates that Mrs Tranchat has still not satisfied that costs' award.

Second Claim CC 126/09

10. In December 2009, Mrs Tranchat commenced a second proceeding which is in almost identical terms to the previous claim CC 127/08 that was discontinued the previous year. That claim was brought against the same defendants as the earlier claim

CC 127/08. On 4 October 2010, Mrs Tranchat filed a notice of discontinuance in respect of CC 126/09.

The Discontinuance of CC 127/08 and CC 126/09

11. Mrs Tranchat states that the discontinuance of the first claim was undertaken by her lawyer (not Mrs Nari) while Mrs Tranchat was overseas and without her knowledge. When she returned to Vanuatu, Mrs Tranchat instructed the lawyer to recommence the proceeding which he did with CC 126/09. There is no explanation given for the discontinuance of the second claim but that appears likely to have been taken as a result of the objection by the defendants.

12. This explanation by Mrs Tranchat is rather difficult to accept in its entirety given that there would have been no difficulty pursuing the Republic (in right of the Director of Lands). No explanation is proffered as to why the first claim was not maintained against the Republic irrespective of any difficulties with locating and serving the son.

This Claim CC104/11

13. On 1 June 2011, Mr Tranchat commenced this claim initially just against the Republic of Vanuatu in respect of the actions of the Director of Land Records. The claim asserts that the transfer of lease /028 to her son was without her knowledge and as the result of a mistake. She alleges that all her efforts to have the Director of Lands correct the mistake were unsuccessful and that she has suffered loss as a result. She seeks an indemnity in respect of her loss pursuant to section 101(1) of the Land Leases Act which loss she assesses at Vt 19,375000; essentially for the loss of her interest in that leasehold estate.

14. The claim was eventually expanded to include the son Gensanne Marc as the second defendant and that is reflected in the amended claim.

15. Mrs Nari explains that her son is now understood to be residing somewhere in New Caledonia and, as it happens, she is also now residing in New Caledonia. Furthermore, Mrs Nari understands that Mrs Tranchat has not had contact with her son and that they remain estranged.

The Strike out application

16. The application by the Republic is for this current proceeding to be struck out as being prohibited by Rule 9.9(4)(a) of the Civil Procedure Rules CAP 49 of 2002.

> ***9.9 Discontinuing proceeding***
> *(1) The claimant may discontinue his or her claim at any time and for any reason.*
>
> *(2)- (3) . . .*
>
> *(4) If the claimant discontinues:*
>
> *(a) the claimant may not revive the claim; and*
>
> *(b) – (c) . . .*

17. The inherent power of a court of record to stay or dismiss proceedings that are an abuse of its process or are frivolous or vexatious is long standing and well established: see *The White Book* [The Supreme Court Practice 1997, 18/19/18], Bullen & Leake & Jacob's *Precedents of Pleadings* 12th ed., p 149 - 150, and Jacobs and Goldrein *Pleadings Principles and Practice*, Sweet-Maxwell, 1990 at pp 227 – 229. However, the exercise of the discretion should be exercised cautiously.

18. In this case, the Republic asks that the discretion be exercised as the new claim is in clear breach of the prohibition in Rule 9.9(4) (a) and/or it is an abuse of process.

Consideration

19. The question that now arises is whether indeed this current claim is an attempt to revive the earlier claims. In this respect, Mrs Nari points to the pleading which seeks indemnity under s. 101 of the Land Leases Act and endeavours to contrast that

with the earlier claims that sought rectification under section 100 and damages. Mrs Nari argues that the earlier proceedings did not specifically seek indemnity under s.101 and, as such, this claim is different to the earlier claims. I do not accept that argument.

20. The second proceeding CC 126/09 was without question almost an exact replica of the earlier claim CC 127/08 and in clear breach of the prohibition by Rule 9.9(4)(a).

21. The current claim is against the same parties and seeks relief again in respect of the Director of Lands' registration of the transfer of lease /028 to Mrs Trenchant's son with the allegation again that this was by way of mistake. That is the basis of the current claim as it was for the earlier claims. The claim has not substantially changed just because the current claim specifies that the relief sought is an indemnity for loss under s. 101.

22. The two earlier sets of proceedings also sought damages against the Republic for loss of rental as adjunctive relief to rectification and quite separate to the alternative/further claim in negligence. It is difficult to see that claim for loss of rental income except as a claim for indemnity pursuant to s.101.

23. Accordingly, I find that the current claim is effectively an attempt to revive the earlier claim or claims. As the earlier claim or claims were formally discontinued, the claimant is now prohibited by Rule 9.9(4) (a) from proceeding with this claim. The reason for the rule appears to be clear – it is for a discontinuance to operate effectively to identify that a conclusion has been reached in the litigation for the parties. It is in the interests of justice for those involved in court proceedings to know when a claim has reached a conclusion, by whatever means, so that the parties affected can order their affairs for the future without the risk of the claim being brought again.

24. Even putting Rule 9.9(4) (a) aside, the Republic claims that it would amount to an abuse of the processes of the court for the claimant to be permitted to commence

what is essentially the same claim, or even a similar claim, as that previously brought and discontinued. It can be an abuse of process for a party to attempt to litigate an issue that has been already addressed in large part by an earlier proceeding involving the same parties and which has been determined in a lawful way. This can arise for consideration as *res judicata*, *issue estoppel*, *action estoppel* or what has been described as the r*ule in Henderson v Henderson* (also known as *Anshun estoppel).*

25. This form of abuse of process was reviewed by the House of Lords in: ***Johnson v. Gore Wood & Co****.[2000] UKHL 65; , (2001) 1 All ER 481 – per Lord Bingham at pp 498-9*

*"It may very well be … that what is now taken to be the rule in Henderson v. Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them****. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.*** *I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding, involves what the court regards as unjust harassment of a party.* ***It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before****. As one cannot comprehensively list all possible forms of abuse so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the*

result may often be the same, ***it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."****(Emphasis Added).*

See also: ***Port of Melbourne Authority v. Anshun Pty Ltd.*** *[1981] HCA 45; (1981), 147 CLR 589, 602-3*

26. So, applying this approach, the focus should be on Mrs Tranchat's conduct; more what steps that she took or did not take rather than just bare regard to the pleadings and procedural steps taken in the various cases..

27. The discontinuance of the earlier claims must, on the basis of the material provided, be attributed to her. It is difficult to understand why a lawyer would discontinue a claim against an available defendant such as the Republic without reference to his client. Certainly, the rather bare and simple complaint that the lawyer discontinued the first claim without reference to her appears somewhat extraordinary and is not, by itself, convincing of "special circumstances..

28. The Republic argues that if the claim is held to be significantly "different" to the earlier claims in that it specifically seeks indemnity under s.101, and thus Rule 9.9(4)(a) does not prohibit this claim, then it would still amount to an abuse of process to allow Mrs Tranchat to pursue the claim given that the claim for indemnity should have been so specifically raised or identified in one of the earlier claims – the rule in Henderson v Henderson / Anshun estoppel.

29. I consider also that the the provision that a claim once discontinued cannot be revived (CPR 9.9(4) (a)) can legitimately be taken into account when considering abuse of process in this context.

30. I am accordingly satisfied that this claim is an attempt to revive an earlier claim that was discontinued. That is prevented by CPR 9.9(4)(a). Additionally, it would be an

abuse of process for Mrs Tranchat to be permitted to raise this claim again in these circumstances and for that reason alone it should not be permitted.

31. I am conscious that this conclusion means that Mrs Tranchat has lost her right to seek indemnity against the Republic. However, finality in litigation also has an important role to play in the administration of justice.

Conclusion

32. The application to strike out the claim must succeed and the claim is accordingly struck out.

33. The Republic seeks costs which I award on a standard basis to be agreed or taxed

BY THE COURT