

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

Civil Case No.168 of 2010

**BETWEEN: HUDSON & CO.**

Claimant

**AND: ASCENSION LIMITED**

First Defendant

**AND: WELLINGTON LODGE HOLDINGS PTY LTD.**

Second Defendant

**AND: THE DIRECTOR OF LANDS, LAND  
RECORDS AND SURVEYS**

Third Defendant

**AND: VANUATU FINANCIAL SERVICES  
COMMISSION**

Fourth Defendant

**Coram: Justice D. V. Fatiaki**

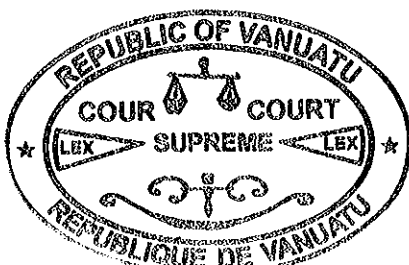
**Counsels:** Mr. R. E. Sugden for the Claimant  
No appearance for the First Defendant  
No appearance for the Second Defendant  
Mr. T. Loughman for the Third Defendant  
Mr. F. S. Loughman for the Fourth Defendant

**Date of Decision: 4 October 2012**

**DECISION**

**Chronology**

- 25 January 2010 – **Gazette Notice** under **section 335** of the **Companies Act** that the First Defendant (Ascension Limited):  
  
“... will be struck off the Register of Companies at Port Vila Vanuatu and the company dissolved at the expiration of three months from the date of this notice.”;
- 12 April 2010 – **Gazette Notice** that Ascension Limited has pursuant to Section 335 of the Companies Act “... been struck off the Register of Companies at Vila, Vanuatu” [see: **Hack v. Fordham** (2009) VUCA 6 at para 9];



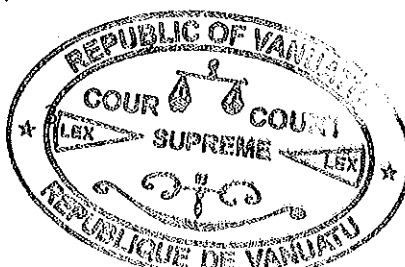
- 28 June 2010 – Registrar of Companies **Notice** that the strike off notice dated 20 April 2010 against the First Defendant (Ascension Limited) “... *is hereby cancelled and withdrawn.*”;
- 4 November 2010 – Supreme Court claim filed. The claimant was **Hudson & Co.** and the defendants were **Ascension Limited** and **Wellington Lodge Holdings Pty Ltd.** respectively. The claim seeks payment of outstanding legal fees due from the defendants;
- 8 February 2011 – Request for Default Judgment (Damages) against the First Defendant;
  - Sworn statement of **Chief Willie Alick Pakoa** deposing service on **Madam Christiane Brunet**, a Director of Ascension Limited;
  - Sworn statement of **Leiwia Leikarie Dick** annexing last annual return of Ascension Limited;
- 17 March 2011 – Claimant’s application to serve Second Defendant “*out of jurisdiction*” granted;
- 18 March 2011 – Request for Default Judgment (Fixed Amount) filed against Ascension Limited seeking VT19,341,804 with interest at 5% per annum;
- 21 July 2011 – Application for extension of time to serve on Second Defendant filed;
- 4 October 2011 – Claimant’s application for Orders to Protect Property pursuant to **Rule 7.8** of the Civil Procedure Rules (CPR);
- 6 October 2011 – **Civil Claim 168 of 2010** renewed for a further 3 months pursuant to **Rule 4.15** of the CPR;
  - The Court recorded at a conference:
 

*“After discussions (with Mr. Sugden) about Rule 5.8 (1) and 5.8 (2) and the short-comings in the claimant’s affidavit of service counsel orally seeks an order under Rule 4.15 to renew the claim to allow for its service on the registered office of (Ascension Limited).”*
- 19 October 2011 – Sworn statement of service on Registered Office of Ascension Limited deposed by **Lucy Karie**;
- 20 October 2011 – Claim amended adding the Director of Lands, Land Records and Land Surveys as the Third Defendant;
  - Court ordered on claimant’s urgent application:
    1. *“Mr. Sugden is given leave to file the claimant’s undertaking in damages by 9 November 2011;*



2. *The Claimant is granted leave to amend its pleadings to include the Director of Land as an additional defendant to the claim;*
3. *The claimant is granted leave to amend, file and serve an amended claim directed at the Director of Lands by 16 November 2011;*
4. *Until further order the Director of Land Records is restrained from registering any dealing that concerns, touches or affects the land comprised within leasehold title No. **11/OC22/009** except to remove the cancellation registered on 6 September 2011 from the Register;*
5. *That a copy of this order be served on the Director of Lands and the State Law Office by 4.00 p.m. tomorrow 21 October 2011;*
6. *Liberty to all parties to apply generally on 3 days notice.*

- 25 October 2011 – **Ridgway Blake Lawyers** letter advising the Court:  
  
*“... we have no contact from anyone associated with (Ascension Limited) although from our files it is apparent we have previously forwarded documentation received at the Registered officer to Mr. Sugden as he was the lawyer acting for Ascension Limited ...”*
- 27 October 2011 – Second Request for Default Judgment (Damages) against Ascension Limited;
- 21 November 2011 – The Third Defendant (Director of Lands) files a Defence denying liability and relying on **Sections 9 & 24** of the **Land Leases Act**;
- 15 December 2011 – Notice of Beginning to Act filed by **Sugden Lawyers** acting on behalf of the Claimant;
- 16 December 2011 – Claimant’s application to add **Vanuatu Financial Services Commissions (VFSC)** as the Fourth Defendant;  
  
– Claimant files a further amended claim adding **VFSC** as the Fourth Defendant;
- 16 December 2011 – Application for Change of Name of Wellington Lodge Pty Ltd. to ‘James Shady as liquidator of **Wellington Lodge Pty Ltd.**’;  
  
– Application for substituted service on **James Shady** by registered post;

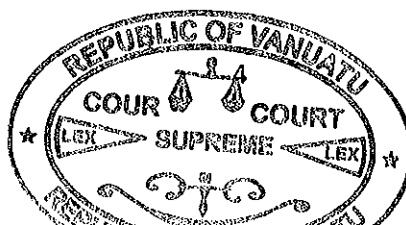


- 16 January 2012 – **VFSC** files a “*Holding Defence*” to amended claim with a sworn statement in support;
- 8 May 2012 – Claimant applies for **Robert Edgar Sugden** to be substituted as the claimant pursuant to a Deed of Assignment dated 19 April 2012;
- 5 June 2012 – The Court orders on the claimant’s applications:
  1. *Order in terms of application dated 10 May 2012; claimant to file and serve amended claim within 14 days on or before 18 June 2012;*
  2. *Application dated 14 March 2012 is granted in the following terms:*

*Substituted service on the Third Defendant company (in liquidation) by its liquidator James Shady through registered post to:*

*Piper Alderman  
Level 24, 385 Boule St  
Melbourne Vic 3000  
Attention: Mr. Michael Lhuede*
  3. *In so far as there is an application to join James Shady in his personal capacity there will need to be a separate application to add him a defendant;*
  4. *By consent the First Defendant company Ascension Limited is ordered restored to the register of companies;*
  5. *Claimant to amend the claim to delete the Vanuatu Financial Services Commission as defendant within 14 days by 18 June 2012;*
- 14 June 2012 – **Ridgway Blake**, Lawyers letter to Robert Sugden returning documents and advising that the registered office of Ascension Limited “... was changed in 2007 to ‘Pilioko House’ PO Box 117, Port Vila”;
- July – September 2012 – Various correspondence from Robert Sugden to the Court seeking consent and/or default judgments against the defendants and a conference date to enable the case to be progressed towards a trial. In particular, in a letter dated **5 September 2012** Robert Sugden states:

*“If the simple administrative steps could be taken of entering judgment by consent against (the second defendant) and default judgment against Ascension Limited, the whole case resolves itself to the restoration of the registered leasehold title of Ascension Limited.*”



*That would be the ONLY remaining issue in the whole case if these formal steps were taken.”*

- 5 September 2012 – Undated Memo of Consent Orders between Robert Sugden and James Shady liquidator of Wellington Lodge Pty Ltd. filed in Court;

## **DISCUSSION**

1. With all due regard to Mr. Sugden’s letter, the entry of default judgment is neither “*simple*”, “*administrative*” or “*formal*”. As the Court of Appeal observed in **Gorden v. Cikay Development Ltd.** [2010] VUCA 17 at para 7 (ii):

*“The decision as to whether or not a court should grant a default judgment application is discretionary ... but where a defence has been filed raising serious issues that need to go to trial, a default judgment order should not be made.”*

2. In accordance with **Rules 9.2 (4)** and **9.3 (4)** of the **Civil Procedure Rules** the grant of a default judgment involves the exercise of a judicial discretion (“*the court may give judgment ...*”) and proof to the court’s satisfaction that the “*conditions precedent*” to the entry of default judgment have been fulfilled, including, personal service of the claim on the defendant and filing of a “*proof of service*”.
3. In this latter regard **Rule 5.1** of the **CPR** states “*the claim and response form must be served on the defendant personally ...*” and **Rule 5.8** explains what “*personal service*” means for the purpose of the **CPR** in the following terms:

### ***“What is personal service***

**5.8 (1)** *A document is served personally on an individual:*

- (a) *by giving a copy of it to the individual; or*
- (b) *if the individual does not accept the document, by putting it down in the person’s presence and telling the person what it is.*

(2) *A document is served personally on a corporation:*

- (a) *by giving a copy of the document to an officer of the corporation; or*
- (b) *by leaving a copy of the document at the registered office of the corporation; or*



(c) *if the corporation does not have a registered office in Vanuatu, by leaving a copy of the document at the principal place of business, or principal office, of the corporation in Vanuatu.*

(3) *A document is served personally on the State of Vanuatu or the Government of Vanuatu by leaving a copy of the document at the State Law Office during the business hours of that Office."*

4. The relevant "*proof of service*" of the original claim on the First Defendant is deposed by **Chief Willie Alick Pakoa** on 8 February 2010 and reads in its relevant parts:

*"4. Service was carried out as follows:*

(i) *"... I met Mme Brunet and showed her the documents and offered them to her but she refused to accept them, and I went back to Hudson & Co.*

(ii) *... I returned to Mme Brunet's residence on 29 December 2011 and there, at 11.15 a.m. by leaving (the documents) at her residence having observed that she was there."*

5. Nowhere in the "*proof of service*" is there any suggestion that **Mme Brunet** was actually given a copy of the documents nor is it deposed that the documents were "*... put down in (Mme Brunet's) presence and telling (Mme Brunet) what the document is.*" Indeed, what is deposed in (ii) above, is equally consistent with Mme Brunet not seeing the process server or being aware of the documents he left at her residence (wherever that might have been). Such inadequate service does not comply with the Rules.

6. The second "*proof of service*" on Ascension Limited is deposed by **Lucy N. Karie** on 19 October 2011 where she states:

*"3. On 12 October 2011 at 16.49hours I did serve the First Defendant with a sealed copy of the Supreme Court claim in this proceeding and with a Response form by leaving it at the reception area of Ridgway Blake lawyers in Port Vila with a woman who was employed there.*

*4. The woman signed a copy of the claim that I had served, to acknowledge service ..."*

7. This second attempt to serve on the First Defendant purports to be based on **Rule 5.8 (2) (b)** above. I say "*purports*" advisedly because of the existence of a **Notice** pursuant to **Section 112** of the **Companies Act** bearing a **VFSC** stamp,




presented by a director/owner of Ascension Limited and evidencing the change of location of the registered office of Ascension Limited from **Ridgway Blake Lawyers** to "*Pilioko House Lini Highway, PO Box 117, Port Vila*" in September 2007.

8. Given the existence of the said **Notice** and the reliance of the deponent/process server on an Annual Return of Ascension Limited dated 20 June 2007 (i.e. 2 months **before** the change of registered office) there is every reason to doubt the thoroughness of the search conducted at the Companies Registry and therefore the adequacy of the second "*proof of service*" for the purposes of **Rule 5.8 (2) (b)**.
9. In the circumstances I am not satisfied that the claimant who was "*responsible for ensuring that (the claim) is served on the defendant personally*" (see: Rules 5.1 & 5.2), had fulfilled a "*condition precedent*" to the grant of a default judgment against Ascension Limited.
10. Accordingly the claimant's request(s) for default judgment against Ascension Limited must be, and is hereby refused.
11. As for the consent judgment against the Second Defendant **Wellington Lodge Holdings Pty Ltd.** on the basis of a Minute of Consent Orders submitted, after having perused its contents which includes references to judgment orders against the First and Third Defendants (Director of Lands), who were not parties to the Minute, I consider that the consent judgment should be restricted and confined to the claimant and the second defendant **Wellington Lodge Holdings Pty Ltd.** only and further, that the best way to giving effect to **Clause 1** of the Minute of Consent Orders is by way of ordering a consent judgment for a fixed sum of VT20,119,403 with statutory interest of 3% per annum calculated from the date of the filing of the claim (i.e 4 November 2010).

**DATED at Port Vila, this 4<sup>th</sup> day of October, 2012.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

