

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

Civil Case No. 74 of 2009

**BETWEEN:** REX KALSRAP  
Claimant

**AND:** ROBERT HENIN  
Defendant

**AND:** CHRIS WAGNER  
Third Party

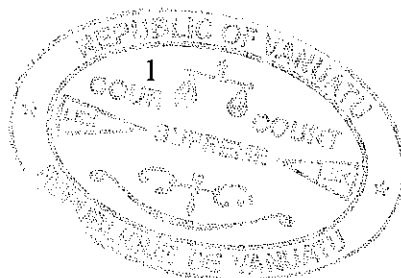
**Coram:** Justice D. V. Fatiaki

**Counsel:** Mr. J. I. Kilu for the Claimant  
Mr. L. Napuati for the Defendant  
No appearance for the Third Party

**Date of Judgment:** 20 June 2014

**RULING**

1. The defendant made an application to strike out these proceedings on the ground of the claimant's continuing failure to comply with the Civil Procedure Rules and with orders of the Court.
2. On 19 September 2009 the claimant commenced these proceedings claiming damages for serious burn injuries he received on 20<sup>th</sup> June 2006 when a fire occurred in a wrecked fishing boat that he was helping to dismantle. The boat had become stranded at Paradise Cove, Pango, as a result of a cyclone.
3. Initially, the claimant sued both the Government of the Republic of Vanuatu and **Robert Henin** ("*Henin*"). The claimant alleged that he was an employee of the Vanuatu Maritime Authority ("*VMA*") for which the Government was responsible, and that Henin was contracted by VMA to dismantle the wrecked boat. Negligence was alleged against both defendants.
4. However proceedings were abandoned against the Government sometime after VMA was abolished by the Vanuatu Maritime Authority (Repeal) Act 2007 as it then appeared to the claimants' legal advisors that, in any event, the VMA had no responsibility for the claimants' injury.



5. During the first half of 2010 conferences were regularly held to address issues that arose in the preparation of the case for trial. In particular, orders were made to assist in clarifying whether the claimant was employed by Henin. Orders were also made requiring the claimant to file a sworn statement in support of his case.
6. In an order made on 29 March 2010 the claimant was warned that if he did not file his sworn statement the action would not proceed. By the time of a conference hearing on 16 April 2010 the claimant had complied with the order, but he was ordered to pay Vt10,000 costs to Henin to compensate him for steps that Henin had been required to take to obtain the claimant's compliance.
7. On 2 June 2010 the claimant was directed to respond by 18 June 2010 to a statement of Henin that denied Henin was the claimant's employer. The Court at that stage had set 30 June 2010 as the date to commence the trial. The claimant did not file any sworn statement in response as he had been ordered to do.
8. On 21 June 2010 Henin made an application to have the claim struck out for non-compliance with the order made on 2<sup>nd</sup> June 2010. The application was duly served and set down for hearing on 30 June 2010, the date previously set aside for the trial. On the same day the lawyer on file for the claimant also filed a notice that he had ceased to act for the claimant.
9. On 30 June 2010 there was no appearance of the claimant or any new lawyer on his behalf. The Court ordered that the strike out application be re-served on the claimant by registered post, and a new date for hearing the strike out application was set for 21 July 2010. Henin complied with the substituted service directions, and as well a copy of the order was personally served on the claimant.
10. On 21 July 2010 the strike out application was not pressed. The claimant had by then engaged a new lawyer and, presumably, Henin's counsel anticipated that the earlier orders would be complied with.
11. On 11 August 2010 Henin applied to join a third party, **Chris Wagner**, to the action and for the next two months Henin's counsel seems to have directed his attention to getting the third party proceedings in place. Leave was given to join the third party on 2 September 2010. The basis of Henin's claim against the third party was that the wrecked boat had been beached on Wagner's leasehold in Paradise Cove, and Wagner had played a relevant part in its dismantling.
12. However long before the Supreme Court proceedings had been commenced, Wagner had returned to his homeland, New Zealand. His whereabouts were unknown in 2010,



and attempts to locate him in New Zealand proved unsuccessful. An order for substituted service on the third party was sought and granted on 1<sup>st</sup> October 2010.

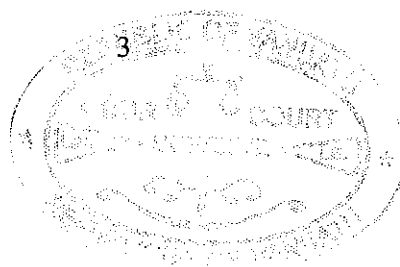
13. After a failed conference in the meantime when the claimant's lawyer did not appear, orders were made on 22 October 2010 and 19 November 2010 for discovery and inspection and for the filing of an agreed chronology and an agreed statement of facts. Henin complied with these orders as far as he could without the participation of the claimant. The claimant however did nothing to comply with the orders. Requests made to the claimant's lawyer to comply with the orders, went unanswered.
14. A further conference was set down on 7 December 2010. Neither the claimant nor his counsel appeared. On this occasion wasted costs of Vt4,000 were awarded against the claimant to be paid by 17 December 2010.
15. On 8 December 2010 Henin filed a second application under Civil Procedure Rules, Rule.9.10 (1) (a) and (b) to have the claim struck out on grounds that included:-

- "1. The Claimant did not take the necessary steps required by the Civil Procedure Rule to ensure the progress of the proceeding;*
- 2. The Claimant did not comply with two consecutive Court Orders;*
- 3. The Claimant and/or his counsel failed to attend conferences as ordered by the Court without good reason."*

16. The strike out application came on for hearing on 20 December 2010. The claimant was represented by his lawyer. On that occasion orders were made as follows:-

- "1. Claimant to file and serve sworn statement in response by 15 January 2011;*
- 2. The defendant to file and serve submissions by 22 January 2011;*
- 3. Claimant to file response submission by 30 January 2011;*
- 4. Matter adjourned for mention on Tuesday 1<sup>st</sup> February 2011 at 9 am;*
- 5. Costs in the cause."*

17. By 1 February 2011 the claimant had not filed any sworn statement. Henin filed his submissions, late on 31<sup>st</sup> January 2011, probably waiting for the claimant to file his




written submission. When the matter came on for mention on 1<sup>st</sup> February 2011 neither the claimant nor his counsel appeared yet again. Counsel for Henin appeared and made brief oral submissions, relying on the written submissions he had earlier filed. Counsel for Henin informed the Court that the claimant had not met the previous cost orders made against him on 16 April 2010 or 7 December 2010 or any part thereof.

18. The Court reserved its decision.
19. The claimant has taken no steps since then to revive the action or in anyway to comply with outstanding orders requiring his attention.
20. Although the striking out of a claim is a draconian measure only to be employed in a clear case, I am satisfied that the continuous unexplained failure of the Claimant and his advisors to comply with Courts orders or to prosecute the claim with any degree of expedition after it was filed, provides a proper basis for the exercise of the Court's powers under **Rule 9.10** of the **Civil Procedure Rules**.
21. In my opinion the three grounds for the strike out application are clearly established by the history of the claim set out above. Since mid-2010 nothing has been done by the claimant to advance his case, and he has not paid the costs ordered against him. In the period from mid-June 2010 to December 2010 Henin diligently took all steps required of him to comply with pre-trial directions to get the matter ready for trial, and in doing so must have incurred substantial legal expenses.
22. I consider the strike out application should be granted to bring this matter to an end. Accordingly the Court orders:
  - (a) **Civil Case No. 74 of 2009** is struck out.
  - (b) The claimant must pay the defendant Robert Henin his costs of the proceedings on the standard basis.

**DATED at Port Vila, this 20<sup>th</sup> day of June, 2014.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

