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

Civil Case No. 41 of 2014

BETWEEN: FAMILY FARM DEVELOPMENTS LTD
Claimant

AND: NICHOLLS LTD (a struck off company)
First Defendant

AND: CLAUDE NICHOLLS
Second Defendant

AND: RENE LAURENT
Third Defendant

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU
Fourth Defendant

Hearing: *11 July 2014*

Before: *Justice Stephen Harrop*

Counsel: *Nigel Morrison for the Claimant*

Edmond Toka for the First and Second Defendants

Robert Sugden and Marie Noelle Patterson for the Third Defendant

No appearance for the Fourth Defendant

Judgment: *29 July 2014*

JUDGMENT OF JUSTICE SM HARROP
AS TO APPLICATIONS TO STRIKE OUT CLAIM

Introduction

1. The first three defendants (" the company", "CN" and "RL"), apply to strike out this claim primarily based on the inherent jurisdiction of the Court to prevent an abuse of its process. Subject to an important point about particularisation, this is not a case where it is suggested

the claim is inherently untenable or incapable of success but rather that, it being assumed to be valid, the claimant ("FFD") should nevertheless be prevented from pursuing it because of two earlier claims which it mounted relating to the same events. The first claim was dismissed, the second was discontinued . The applications are opposed.

The facts in more detail

2. The underlying issue between FFD and RL is which of them should be entitled to lease title 12/0631/001 ("the lease"). A transfer of the lease was registered in favour of RL on 1 December 2009; it had been signed on behalf of the company by its director CN.

3. The problem arose because two contracts for the sale and purchase of the lease had been executed at about the same time. On 12 November 2009 a contract was signed between the company as vendor and FFL as purchaser for Vt 27 million. On 22 November 2009 a contract was signed between CN representing La Societe Civile Familiale Nicholls ("SCFN") as vendor and RL as purchaser for Vt 30 million. The company had changed its name in 2002 from SCFN to Nicholls Ltd.

4. On becoming aware of the other agreement and of the registration of transfer to RL, FFD lodged a caution over the lease in the Lands Records Office but this was ultimately withdrawn, on 8 March 2010.

5. On 8 February 2010 the board of the company ratified the agreement with RL.

6. On 1 October 2010 the company was struck off the register of companies. It has not been restored.

7. Despite being aware of the registration of RL's transfer and of the refusal of the Director of Lands to grant its request to rectify the register in its favour, FFL completed the purchase from the company on 6 May 2010. On receiving a duly executed transfer of the lease it paid the company Vt 27 million. However, because of the registered transfer to RL, FFL was unable to register its transfer.

8. In CC 102/10, FFD sought cancellation of the registration in favour of RL under section 100 (1) of the Land Leases Act. It alleged that RL had *"fraudulently procured"* the transfer of the lease to him. It was said that he knew that SCFN was not a legal entity and was not the registered proprietor so any transfer from it was of no legal effect. It was further alleged that RL knew that there was a mortgage over the lease that prevented the registration of the transfer without the consent of the mortgagee, which was not obtained. Despite these things he proceeded to seek and obtain the registration of the transfer in his favour. It was also alleged that the transfer had not been executed by CN with the approval of the company and that it was *"a forgery"*.

9. The primary judge found in favour of FFD on the basis that the transfer to RL had been executed by CN *"under the influence of improper pressure knowingly exerted by the first defendant, his agents and advisors and was therefore registered 'by fraud' "*. Cancellation of the transfer to RL was ordered under s100(1).

10. RL successfully appealed to the Court of Appeal which held that while a contract or transfer procured by coercion of threats of coercion may cover overt acts of improper pressure or coercion such as unlawful threat, the primary judge had erred in finding for FFD on that basis. That was because there was no allegation of fraud by coercion in the pleadings. There were particulars of fraud but they did not include that kind of fraud. In any event, FFD did not present any cogent and admissible evidence to make out a case of fraud by coercion.

11. After allowing the appeal and setting aside the orders of the trial judge, the Court of Appeal said at paragraph 53, in terms which have become contentious on this application: *"We do not propose to remit the matter for rehearing. The pleaded case failed. The appeal succeeds as the trial judge found in favour of FFD on a non-pleaded case and on a basis which we have found was flawed. It is a matter for FFD whether it may bring a separate claim alleging fraud by coercion, duly particularised, recognising that such a claim should not be made without firm evidence in support of it and that there are other real obstacles to it being able to do so."*

12. The Court of Appeal formally dismissed the claim made by FFD in the Supreme Court in CC 102/10.

13. The Court of Appeal judgment was issued on 25 October 2012. On 7 December 2012 FFD launched a second claim, CC 228/12, but perhaps surprisingly this was not against RL but solely against CN. Nor was it a fraud claim ; it was a straightforward claim against CN (as alleged assignee of the rights and liabilities of the company) for specific performance of the agreement for sale and purchase between FFD and the company dated 12 November 2009, or alternatively for damages against him. There was no pleading of fraud against CN, and no mention of RL except as to the registration of the transfer to him being the impediment to registration of FFD's transfer. His registration was not therefore challenged by FFD in this proceeding.

14. CN then issued a third party notice against RL alleging that when RL requested the signing of a sale and purchase agreement by him, he was not authorized by the company to sign and had no capacity knowingly to enter a contract because he was suffering of bipolar disorder. He then pleaded that *"the defendant wrongfully and under pressure from the third party executed a further agreement with the third party."* No particulars of the wrongfulness and pressure were pleaded.

15. Paragraph six says: *"The third party backdated such agreement wrongfully and registered the same as a transfer."* This appears to omit any allegation that a transfer was signed as a separate document, let alone is there an allegation that it was signed in circumstances giving rise to a cause of action by CN against RL.

16. CN however then withdrew the third party notice and Justice Aru recorded among orders made on 4 December 2013 that the third party notice was now struck out. He gave leave to FFD to file and serve an amended claim by 6 January 2014 and allocated a further conference date of 10 February 2014.

17. Faced with this situation , described by Mr Morrison as a "backflip" by CN, FFD did not file an amended claim against CN nor did it seek to include other defendants such as RL. Rather it decided that a fresh claim, the one now sought to be struck out, ought to be launched. Promptly after having filed this claim it discontinued the claim in CC228/12.

The Current claim - CC 41/14

18. The present claim refers to the agreements for sale and purchase dated 12 and 22 November 2009. FFD then pleads in paragraph 9: "*the Laurent agreement was procured fraudulently by the third defendant as result of his coercion of and with the first defendant and second defendant.*"

19. Particulars of that allegation are provided: "*the third defendant coerced the second defendant into execution of the Laurent agreement when the second and third defendants knew of the Nicholls agreement and the Laurent agreement was executed with the intention of overcoming and/or supersiding* (sic) *the Nicholls agreement.*"

20. Paragraph 11 says:

> "*Prior to [obtaining the lessor's consent] and after the date of the Nicholls Agreement the third defendant fraudulently procured a transfer of lease dated on or about 25 November 2009 (the "Laurent Transfer") from and executed by the second defendant as the purported representative of Societe Familiale Nicholls as transferor and in respect to the lease.*
>
> *Particulars:* *(a) The third defendant coerced the second defendant into execution of the Laurent Transfer when the Second and Third defendants knew of the Nicholls Agreement and the Laurent Transfer was executed with the intention of overcoming and/or supersiding* (sic) *the Nicholls Agreement.*
>
> *(b) The Laurent Transfer was executed by the Second Defendant under the influence of improper pressure knowingly exerted by the third defendant.*
>
> *(c) The Second Defendant and Third Defendant further knew that there was a mortgage over the lease registered in favour of the National Bank of Vanuatu which prevented registration of the Laurent Transfer without discharge of the said mortgage.*"

21. In paragraph 12 FFD alleges that CN executed the Laurent transfer without the knowledge or approval of the company's board and *"consequent upon the fraudulent coercion pleaded hereinbefore."*

22. The claim goes on to allege that for these reasons the Laurent transfer was registered fraudulently and that the fourth defendant has failed or refused to rectify the register as requested. FFD also pleads that the purchase was completed on or about 6 May 2010 by the exchange of a duly executed transfer and the Vt 27 million and (paragraph 19) that on or about 6 May 2010 it was *"fraudulently induced"* to pay the Vt 27 million to the company *"by and for the benefit of the Second Defendant"*.

23. FFD then pleads (paragraph 22) that its inability to register its transfer *"is resultant from the fraud and coercion of the second and third defendants previously pleaded herein"*.

24. It is on this basis that FFD seeks an order under section 100 (1) of the Land Leases Act rectifying a register by cancellation of the registration of the Laurent transfer and a further order directing registration of its transfer. Alternatively damages are sought against the first, second and third defendants in the sum of Vt 27 million.

25. It is obvious, and Mr Morrison accepts, that the allegations of coercion, improper pressure and fraudulent inducement made in paragraphs 9, 11 and 19 of the claim contain no particulars of how, when and in what circumstances the second and third defendants acted in the alleged ways. Such particulars are not merely sparse or inadequate, they are non-existent. Mr Morrison accepts that as it presently stands the claim is liable to be struck out on that ground alone. However he submits, and I accept this as a general proposition, that where the sole ground for striking out being justified is a lack of particularisation in a claim which otherwise is tenable the usual order is striking out but with leave being given to the claimant to replead its statement of case: see for example Kalomtak Wiwi Family v. Minister of Lands [2004] VUSC 47 and Marshall Futures Ltd v. Marshall [1992] 1 NZLR 316.

26. However in this case the defendants, despite (rightly, in my view) being strongly critical of the lack of particularisation, apply to srtike out on other grounds.

The striking out applications and submissions

27. It is convenient to refer first to the application by RL as advanced by Mr Sugden. His first ground is that the remedies of cancellation and damages are both sought on the basis of fraud on RL's part and the claim is an abuse of process because in CC 102/10 the same remedies were also sought against RL, again on the basis of fraud, albeit a different kind of fraud. The essential allegation of a fraudulently-obtained registration is the same. Because the Court of Appeal dismissed FFD's claim in CC 102/10, FFD's right to pursue RL on this basis has, Mr Sugden contends, merged in the judgment of the Court of Appeal. The matter is , he says, res judicata.

28. In the alternative, RL relies on what has been called the extended version of res judicata established by the rule in Henderson v. Henderson (1843) 67 E.R 319 which is also known in Australia as Anshun's estoppel as result of the High Court of Australia applying it in Port of Melbourne Authority v. Anshun Pty Ltd [1981] 55 ALJR 621. In simple terms this is the principle that if a litigant fails to raise a matter in a proceeding that he could have raised in that proceeding then he will be estopped in the absence of special circumstances from raising that matter in a later proceeding between the same parties. Mr Sugden submits that FFD clearly could have (indeed it endeavoured to) raised this issue in CC 102/10 but it failed to plead it through negligence not amounting to special circumstances which might justify permitting it to pursue the current claim. In this way it is an abuse of the Court's process and should be struck out in the exercise of its inherent jurisdiction.

29. For the first and second defendants, Mr Toka makes similar submissions. So far as the claim against CN is concerned, he first argues that CC 228/12 through the discontinuance has effectively been determined by the Court so that claim for breach of contract against CN is res judicata. Mr Toka also contends the current claim against CN could have been raised in CC 228/12 but was not so that it falls foul of the Henderson v. Henderson rule as well. In addition, he points out that FFD was given the opportunity in CC 228/12 to amend its claim against CN but elected not to do so. In that sense it waived its right subsequently to raise and argue coercion. Finally in relation to CN, Mr Toka submits that the discontinuance filed prevents the matter being resurrected. In this he relies on rule 9.9 (4) (a) of the Civil

Procedure Rules which provides: *"If the claimant discontinues: (a) the claimant may not revive the claim….."*.

30. In relation to the claim against the company Mr Toka submits it is untenable since the company has been struck off the company register and it has not been restored. The claim currently is therefore against an entity which does not exist in law; as Mr Toka put it, a *"ghost"*.

31. FFD opposes the striking out applications. Mr Morrison says that following the Court of Appeal decision, FFD considered its options and the attitude adopted by CN who it regards as the effective seller of the lease, was to play a major part in the chosen option. He submits that the initial choice of a claim against CN in CC 228/12 ended up being of *"no utility"* to FFD due to CN's *complete backflip.*". FFD, he says, decided that it would be cumbersome to amend the claim in CC 228/12 and the better course would be to file a fresh claim and to discontinue CC 228/12. Leave to do so was granted and that duly occurred.

32. As to the grounds advanced by the defendants, Mr Morrison submits that the principal claim for relief is not res judicata as the very reason the Court of Appeal found for RL was that FFD had succeeded on a claim that had not been pleaded. It follows , he says, that FFD's claim for *"fraud by coercion"* ,whether inelegantly pleaded or otherwise, is not a claim that has been before the Court previously and cannot therefore be res judicata.

33. As to Anshun's estoppel, Mr Morrison submits this rule is not binding on Vanuatu Courts and is discretionary. The present case involves CN who was not previously a defendant in CC 102/10 and who is a key to the final just and proper determination of the issues, as the Court of Appeal recognised.

34. Mr Morrison notes that the Vanuatu Courts have their own distinct rules of Civil Procedure and submits that the Anshun rule is "unsympathetic" towards these. He submits that the Courts here regularly review pleadings and make directions for amendments and correction at conferences to avoid any necessity for the application of the rule and so as to ensure all matters are before the Court for determination.

35. Mr Morrison refers to the Court of Appeal having taken the same approach in Roqara v. Takau [2001] VUCA 15. He says that in identical circumstances to those arising here the Court said towards the end of its judgment: "*It is a fundamental principle of the law that, in any case, a person against whom allegations are made should know what the allegations are with precision so that they can decide how to respond to them. We have been persuaded that the line here was breached. If the dispute is considered solely in terms of the strict letter of the pleadings, the judgment appears to have strayed into areas which do not come within them and that serious factual issues which were not raised by the pleadings and upon which evidence was led at the trial over counsel's objections, had a material influence on the Judge. Accordingly the appeal must succeed. There will need to be a further opportunity for the respondents to prove the allegations which would justify the relief they sought.*"

36. Accordingly Mr Morrison submits that this is not a case of abuse of process and the Court should follow the Roqara approach and provide a further opportunity for FFD to prove its allegations.

37. Mr Morrison summed up FFD's position as follows:

> "*The claimant discharged a mortgage of circa Vt 27 million on the basis it would receive the transfer of the lease. It did not. Laurent did receive that transfer. The principle of our procedure rules is that justice should be done. Justice should not be procedurally denied. Costs can be adequate remedy and Laurent's costs in the original proceeding and his successful Court of Appeal hearing have been and are being addressed by the Court.*"

38. Effectively then Mr Morrison also submits that even if the Anshun rule is to be applied there are special circumstances which mean it ought not to prevent FFD's claim proceeding.

Discussion and Decision

39. It is convenient first to address the submission based on the rule in Henderson v. Henderson. Sir James Wigram V-C expressed the principle in these terms:

> "*.....where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to*

bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belong to the subject of the litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time."

40. In the Anshun case, the High Court of Australia was faced with a claim based on an indemnity contained in a contract between two defendants to a personal injuries claim which had been heard and determined. In the earlier case an apportionment of responsibility between them had been made. In this second claim one defendant, the Port Authority, sought indemnification under the contract from the other, Anshun. The indemnity had not been an issue considered in the earlier case so the High Court held that it was not a case of orthodox res judicata. The indemnity could have been included as an issue in the earlier case and, had it been, it would have caused the decision reached in that case to have been different. Accordingly if the claim were allowed to continue the result would be two conflicting judgments on the subject of indemnity. The High Court noted that the appellant had not adduced evidence to show why it had failed to raise the issue of indemnity in the earlier proceedings and the Court held that to preserve the orderly administration of justice the earlier judgment should be treated as conclusive on the question of indemnity. As it was put in the judgment of Gibbs, CJ, Mason and Aickin JJ:

"The matter now sought to be raised by the Authority was a defence to Anshun's claim in the first action. It was so closely connected with the subject-matter of that action that it was to be expected that it would be relied upon as defence to that claim and as a basis for recovery by the Authority from Anshun. The third party procedures were introduced to enable this to be done. If successful the indemnity case would have obviated an enquiry into contribution. If reserved for assertion in the later action, it would increase costs and give rise to a conflicting judgment. "

41. As Murphy J put it: *"The issue now sought to be raised was plainly open to be agitated in the previous litigation. The judgment in that case is inconsistent with the judgment now sought by the plaintiff."*

42. I have no hesitation in concluding that the Henderson v. Henderson rule forms part of the law of Vanuatu. This must be so based on Article 95 (2) of the Constitution which provides:

> *"Until otherwise provided by Parliament, the British and French Laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom."*

43. The Henderson v. Henderson rule was obviously one of the British laws in force, whether or not applied, immediately before Independence being part of the English common law. It had been applied in England many times since 1843. For example in Brisbane City Council v. Attorney-General for Queensland [1979] AC 411 Lord Wilberforce speaking for the Privy Council approved what had been said by Somervell LJ in Greenhalgh v. Mallard [1947] 2 All ER 255 at 257: *"Res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but... it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."*

44. There have been other helpful statements of the principle in England since Independence. In Barrow v. Bankside Agency Ltd [1996] 1 WLR 257 at 260 the Court said:

> *"It requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not*

drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

45. In Johnson v. Gore Wood & Co. [2001] 1 All ER 481 at 498-499 Lord Bingham said:

"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.... It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been so as to render the raising of it in latter 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 of 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....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."

46. As confirmation of the recent application of this principle in Vanuatu, Mr Toka referred me to the judgments of Justice Fatiaki in Calo v. Malsungai [2010] VUSC 148 and of Justice Spear in Tranchat v. Republic of Vanuatu [2012] VUSC 113.

47. For these reasons I reject Mr Morrison's submission that the principle is not binding on Vanuatu Courts. It is part of the law of Vanuatu and has twice recently been applied here. I also reject Mr Morrison's submission that the Anshun rule is unsympathetic to the Rules of Civil Procedure. On the contrary it appears to me it is entirely consistent with them. Rule 1.2 (2) says that dealing with cases justly includes, so far as it practicable: ....(b) saving expense ... (d) ensuring that the case is dealt with speedily and fairly and (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

48. In addition, rule 1.4 (2) (i) says that active case management includes the Court *"dealing with as many aspects of the case as it can at the one time"*.

49. Rule 1.5 requires the parties to a proceeding to help the Court to act in accordance with the overriding objective of enabling the Courts to deal with cases justly. That must surely include an obligation on the parties to put their whole case before the Court at the first opportunity. The aspects of Rule 1.2 to which I have referred self-evidently support the principle of putting all matters before the Court at once.

50. I do accept Mr Morrison's point that during conferences pleadings are reviewed and directions made for amendment and correction. This is consistent with the rules just cited. However that occurs in the context of one proceeding, not in the context of whether there should be a second, or a third. The focus of both the Anshun rule and the Rules of Civil Procedure is on ensuring as far as possible that all matters between the parties are dealt within one Supreme Court proceeding.

51. Roqara v. Takau was an example of the Court of Appeal taking a liberal approach to a case which had been determined beyond the pleadings. However as Mr Sugden points out the Court of Appeal in Roqara could see that on the basis of unchallenged and admissible evidence there was a case which if correctly pleaded would likely succeed (as ultimately it did). The Court of Appeal therefore did not, by contrast with the present case, dismiss the claim.

52. Here the Court of Appeal by contrast pointed out there was no admissible evidence that supported a case of fraud by coercion if properly pleaded and that is why it by contrast with the approach in Roqara, dismissed the claim. I accept Mr Sugden's submission that the circumstances in Roqara were materially different.

53. Mr Morrison's point though is that Roqara exemplifies a willingness by the Vanuatu Courts to permit a poorly pleaded case to proceed and therefore not to apply the kind of thinking exemplified in the Henderson v. Henderson principle, or at least not to do so strictly. In short, an approach which ensures so far as practicable determination on the merits, with shortcomings addressed by orders for costs rather than procedural knock outs.

54. Mr Morrison goes on to submit that consistent with this the Court of Appeal clearly left open, in its observations in paragraph 53, the taking of the kind of claim which is now taken by FFD.

55. What then did the Court of Appeal mean when it said: *"It is a matter for FFD whether it may bring a separate claim alleging fraud by coercion, duly particularized, recognizing that such a claim should not be made without firm evidence in support of it and that there are other real obstacles to it being able to do so"?*

56. With respect, the short answer is that it is not entirely clear what the Court of Appeal meant. It was however clearly an *obiter* comment and cannot be seen as a formal granting of leave to FFD to take the current claim nor as a finding made, after submissions on the point, as to whether Anshun estoppel applies. It may indeed be that the Court of Appeal in referring to *"other real obstacles"* had in mind the principle of Henderson v. Henderson. There is limited value in speculating but I note that CN was not a party to the earlier case and the Court may have been referring to the possibility of taking a claim against him rather than RL. Interestingly, it seems that may have been the conclusion of FFD itself because rather than promptly launching a duly particularised claim alleging fraud by coercion *by RL* it instead issued a straightforward breach of contact claim against CN alone. And even when the third party notice was issued it did not seek to join RL as a second defendant. Furthermore, when given an opportunity to amend its claim (which obviously might have included adding RL as

a defendant and directly alleging what it now does against him) it elected to discontinue and to start a fresh proceeding.

57. Also, as Mr Sugden points out, the Court of Appeal made no reference to rectification of the register via s100. It may have been referring simply to an ordinary fraud action leading to damages.

58. In the end, I conclude that I am not restricted by what the Court of Appeal said in paragraph 53 from applying the Henderson v. Henderson rule if I otherwise consider it appropriate to do so. Nor do I consider based on the Roqara case that it would be inconsistent with the approach of the Vanuatu Courts to apply the principle. I note that in both Calo v. Malsungai and Tranchat v. Republic of Vanuatu, the Supreme Court has applied the rule in Henderson v. Henderson as an alternative basis for its findings in those cases.

59. The key question then, applying Lord Bingham's approach in Johnson v. Gore Wood & Co., is whether in all the circumstances of the case this claim is an abuse of the Court's process.

60. I have come to the clear view that it is. My primary reason for this conclusion is the starkness of the failure to plead the allegation of fraud by coercion in CC 102/10 coupled with the absence of any explanation for that failure.

61. In CC 102/10 the allegation of fraud by coercion on the part of RL was not merely some possible alternative basis for the claim which was on some level understandably overlooked by FFD. Rather it was central to its presented case but, apparently as a result of negligence, that was not its pleaded case.

62. This is a very different situation from a party overlooking a not very obvious possible basis for its claim in a first proceeding and then, realising its error, seeking to advance it in a later one. That is not to say it would in any event be permitted to do so but the degree of duplication and therefore abuse is greater when a party is fully aware of the case it wants to bring on the first occasion and attempts to bring it but fails to do it properly. Nor is it a case of a Court, after careful analysis, retrospectively determining that this claim could and should have been included in CC102/10. Here it is obvious that it could – and should- have been included, even to FFD, since it not only tried to include it but did so and indeed at first instance succeeded in obtaining judgment on it.

63. There has been no attempt to explain why the allegation of fraud by coercion was not included in FFD's pleadings in CC 102/10. There was no attempt before the trial to amend its pleading and even at trial it could have attempted to do so and sought or not opposed an adjournment so that RL was not prejudiced.

64. In short it is an abuse of the Court's process for FFD to vex RL twice with the same claim (once unpleaded, once pleaded) based on the same events.

65. For these reasons alone I am satisfied the Henderson v. Henderson rule should be applied. However, being conscious of Lord Bingham's enjoinder to undertake a broad merits-based assessment I record that there are a number of aspects of this case which reinforce that conclusion, or to put it another way, deprive FFD of any "special circumstances" escape.

66. First, FFD would be in stronger position in arguing there is no abuse of process if it had now fully particularised the allegations of fraud by coercion and improper pressure. Instead it has still not provided any such particulars despite the clarity of the Court of Appeal's observations about the importance of particularisation of fraud. At paragraph 45 it said: *"In a case where fraud is alleged, it is especially important that the allegation be clearly made and conduct said to constitute the fraud identified."* Again in the previously-cited paragraph 53 The Court said any separate claim alleging fraud by coercion needed to be *"duly particularised"*. It added that *"such a claim should not be made without firm evidence in support of it."*

67. Nearly five years after the key events, there is no indication from the pleadings or the sworn statements filed in support in this or the earlier proceedings that FFD has the requisite evidence. If it did, then it would have been a simple matter to include in the current claim details of exactly how RL coerced CN to sign the agreement in his favour and then on a separate occasion forced him into signing the transfer under improper pressure. The current claim is notable for its complete absence of particularisation. Accordingly, while this is not a striking out application based on the prospects of success of the pleaded claim, the lack of particularisation against the background of the earlier litigation and particularly the Court of Appeal's comments is significant. It supports the conclusion of abuse which I have already reached.

68. I note too that even in his own third party notice in CC 228/12, CN, the allegedly direct victim of coercion and improper pressure, was himself unable to articulate any particulars of how it occurred. If even he cannot do so, how can FFD expect to prove its allegations?

69. At least in relation to the claim for damages there is the curious fact that the payment of the Vt 27 million did not occur until 6 May 2010 by which time FFD was well aware of the "Laurent problem" and surely of the reality that if it paid the money it would not obtain registration of its transfer because the Laurent transfer had been registered some five months earlier. It was well aware of this because it had unsuccessfully tried to arrange for the Director of Lands to rectify the register by removing the Laurent registration. At the very least then if the case proceeded FFD would have difficulty establishing a causative link between any fraud by coercion on the part of RL and its loss of the Vt 27 million.

70. Along with the absence of particulars, this is a matter which highlights the tenuous rather than tenable nature of the FFD claim even if looked at in isolation.

71. I also consider it of some relevance that this claim raises the always serious question of whether the land leases register should be rectified. That is a public register of which the world at large has (and is deemed to have) notice and on which it intended to be able to rely. Any allegation that it contains a fraudulently-obtained registration should be dealt with as soon as possible. It is now nearly five years since the registration of RL's transfer and both publicly, and privately as far as RL is concerned, life should be able to continue in reliance on it. In other words, I consider that the rule in Henderson v. Henderson applies with particular force where the claim involves an attack on the legitimacy of the register, especially one still unresolved nearly five years after the registration sought to be impugned. Except for good reason, a registered leaseholder should not be "twice vexed" with challenges to his registration.

72. Finally, I do not overlook the point that this is the third rather than merely the second claim based on the same events. That can only reinforce my conclusion.

73. In the end, looking at the case in the alternative ways which Lord Bingham mentions, I am satisfied in all the circumstances that the current claim is an abuse and I am unable to identify special circumstances justifying a finding that the rule should not be applied.

74. To put it succinctly, the current claim is one that *both could and should* have been raised in the earlier proceedings and that is alone sufficient to make it an abuse, but a wider perspective on the case reinforces that conclusion.

75. As always in contested litigation, there are two sides to consider. I am acutely conscious that striking FFD's claim out deprives it of its day in Court and of the chance of success it is assumed for present purposes to have. If RL indeed acted in a manner which led to the registration of his transfer being fraudulently obtained, then he will get away with it. This however is always the consequence of a striking out on estoppel or abuse grounds. The existence of the Henderson v. Henderson rule amounts to a longstanding recognition that in certain circumstances the claimant's private interest in having its claim determined on its merits must bow to the wider interests in the finality of litigation and the efficient administration of justice. This is one such case.

76. I have considered Mr Morrison's point that the case ought to be left to be decided on its merits with an award of costs redressing RL's having to be "twice vexed" with the fraud allegations. That option is available as it would be in any similar case. But the point surely is that either the claim is an abuse of the Court's process or it is not. If it is, then it ought to be stopped, rather than the abuse being allowed to continue. Costs are not an appropriate response to an abuse.

77. In conclusion I uphold Mr Sugden's argument on behalf of RL based on the rule in Henderson v. Henderson and the claim against RL must be, and is, struck out.

Alternatively, is FFD's claim against RL an abuse based on res judicata by way of cause of action estoppel?

78. Mr Sugden submits that because the essence of both the claim in CC 102/10 and the current claim is on fraudulently obtaining of the registration of the transfer rather than on the instrument that is registered or the circumstances in which it came to be signed then it can properly be said that the matter has already been determined by the Court of Appeal's dismissal of CC 102/10. The matter is, he says, *res judicata* and cause of action estoppel applies.

79. Just what amounts to *"cause of action estoppel"* is notoriously difficult to assess. As Brennan J said in the Anshun case at page 629: *"There is an imprecision in the meaning of the term cause*

of action which is sometimes used to mean the facts which support a right to judgment, sometimes to mean a right which is being infringed, and sometimes to mean the substance of an action as distinct from its form."

80. An application to the Supreme Court for an order under section 100 (1) of the Land Leases Act is not a typical cause of action. Indeed, as was said by the Court of Appeal in Naflak Teufi Ltd v. Kalsakau [2005] VUCA 15: "The section itself does not speak about Applicants or Claimants: it is purely an empowering section for the Supreme Court". The Court there explained who may make an application for rectification or invoke section 100 and decided that it needed to be someone who had a legitimate interest to seek rectification of the register, rather than a mere *"busy body"*.

81. It is obvious from this that in respect of a particular registration more than one person may be in a position to ask the Court for it to be cancelled because it has been obtained by fraud. Two (or more) applicants may have different but legitimate interests in seeking rectification , different evidence and different kinds of fraud to put before the Court as justifying the exercise of its power to rectify by cancellation.

82. Looked at in this light, I consider that logically the same applicant must in principle be able to contend on two separate occasions for the same registration to be cancelled based on two different kinds of fraud. If different people can do it then the same person must be able to do it for different reasons.

83. I therefore do not accept that in dismissing CC 102/10 the Court of Appeal closed off any possibility of a claim by FFD to the registration of RL's transfer having been obtained by fraud. Indeed its paragraph 53 comments would be difficult to understand were that the case.

84. If necessary to my decision then, I would have rejected Mr Sugden's first argument based on *"cause of action estoppel"*.

85. This means that I also regard this case as different from the Anshun case in its application of Henderson v. Henderson. The High Court of Australia seems primarily to have been concerned about the abuse there being manifested by the risk of co-existence of two different decisions on

the question of indemnity. This would not be the result here if the present claim were able to continue and a finding of fraud by coercion was made because the earlier claim was dismissed. I would not regard that as necessarily inconsistent with the Court of Appeal's dismissal of CC 102/10 any more than I would had the Court found that registration of the Laurent transfer was fraudulently obtained if that finding were made on the application of a different person.

The striking out applications by the company and CN

86. The application on behalf of the company must obviously succeed and indeed Mr Morrison made no submission to say otherwise. The claim against a company which is no longer on the company register is inherently untenable and incapable of success and must be struck out. I struck it out accordingly.

87. As to CN, there is no doubt that FFD could have included in its claim in CC 228/12 the claim which is now made against him in paragraph 19 , namely that he fraudulently induced FFD to pay the Vt 27 million on or about 6 May 2010. Again, there is no explanation as to why this was not done. Even if there were some explanation for it not being done initially then it could readily and should have been done once the opportunity to amend the claim arose following the withdrawal of the third party notice. The claim now made against RL could easily have been made in an amended claim under CC 228/12 and at the same time the allegation made in paragraph 19 could and should have been included against CN.

88. The original claim in CC 228/12 did after all focus on the same events and indeed expressly referred to the settlement occurring on 6 May 2010 and sought an accounting of the monies paid. It is an abuse of process for FFD not to have made all the allegations it wanted to make against CN in its first claim in CC 228/12 or at least in an amended claim. I reiterate that no explanation has been provided for its failure to do so. The claim against CN therefore also falls foul of the Henderson v Henderson rule.

89. I do not accept that as far as the claim against CN is concerned it has already been determined by a Court so that it could be seen as *res judicata* in the cause of action or issue estoppel sense. It is unnecessary to discuss this point further because I have already held that the Henderson v. Henderson rule does apply to prevent the current claim against CN continuing.

90. There is however an alternative basis on which the same conclusion is properly reached : the effect of the discontinuance.

91. I have already quoted rule 9.9 (4) (a). In the Tranchat v. Republic of Vanuatu and Marc case, Justice Spear observed:

> *".... I find that the current claim is effectively an attempt to revieve 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."*

92. In this case FFD had a clear choice as to what to do with its claim against CN in CC 228/12 when he withdrew his third party notice. It was fully entitled to proceed against CN and to add other defendants and was expressly given leave on 4 December 2013 by Justice Aru to file and serve an amended claim. I do not accept that it would have been cumbersome to take up the opportunity which Justice Aru provided. In electing to discontinue FFD must be taken to have understood the effect of rule 9.9 (4) (a). CN was entitled to think that FFD had decided no longer to pursue him. After all, despite his central role in the matter it had not included him as a defendant in the original case, CC 102/10.

93. On either basis, the claim made by FFD in this proceeding against CN must be and is struck out as an abuse of process.

Conclusion

94. The claims against the company, CN and RL are each struck out with costs awarded to the applicants against FFD, to be taxed if they cannot be agreed.

95. The claim against the fourth defendant necessarily falls away in light of this conclusion. It was merely included because an order was sought that the Director of Land Records effect the

necessary cancellation and registration which FFD contended should occur. It is therefore dismissed. Accordingly costs must also be awarded to the fourth defendant against FFD, again to be taxed if they cannot be agreed.

96. The remaining issue in this proceeding is the counterclaim by RL. Mr Sugden is to file by 20 August 2014 a memorandum indicating whether RL intends to proceed with it in light of this judgment.

BY THE COURT