

BETWEEN: Brian and Pam Fisher
Appellants

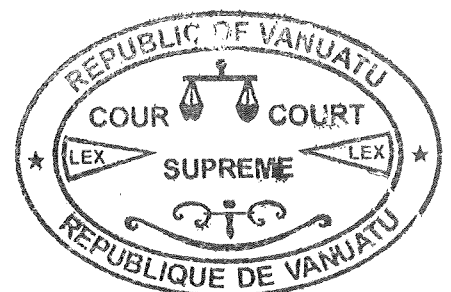
AND: Bob and Cornelia Wyllie
Geoffrey Gee & Partners
Respondents

Date: 8 January 2019
Before: Justice G.A. Andrée Wiltens
Counsel: Mr R. Sugden for Appellant
Mrs C. Wyllie, in person, for the First Respondents
Mr J. Malcolm for the Second Respondent

JUDGMENT

A. Introduction

1. This long-standing civil case, which dates back to events that occurred in 2009 – 2010, was referred to the Master for mediation to be attempted. In the course of the Master's dealing with the file there was an application by Mr and Mrs Fisher ("the Fishers") heard on 26 June 2018 to strike out an Amended Counter-claim filed by Mr and Mrs Wyllie ("the Wyllies") on 27 February 2018.
2. At that same hearing, the Master was asked by the Wyllies to consider an oral application for consolidation with the Amended Counter-claim of a document headed Amended Affirmative Defence, Set-off and Counter-claim which had been filed, without leave being sought, on 26 March 2018.



3. By a decision of 7 September 2018, the Master declined to strike out the amended counter-claim and ordered consolidation of the two sets of pleadings. Both decisions of the Master are appealed.
4. Geoffrey Gee & Partners ("GGP"), although present through counsel, were not really involved in any of these issues. As GGP had little interest in the matters raised, Mr Malcolm only made some general submissions relating to the delay inherent in the proceedings to date, which he wanted to ascribe to the Fishers. As this was not something I had to determine, I need not refer to that any further.

B. The Pleadings (relating only to the Fishers and the Wyllies)

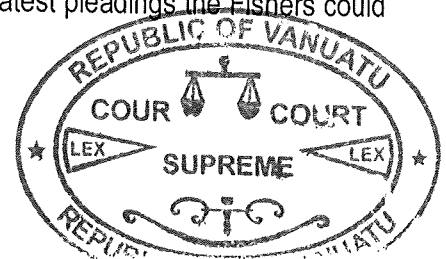
5. The originating Claim was filed by the Fishers on 12 November 2010. The Claim related to alleged breaches of a contract dated 15 September 2009 for the sale of the only 2 issued shares in a business, namely Rainbow Gardens Limited ("RGL"); which contract was repudiated on 29 September 2010. That was responded to by the Wyllies on 10 February 2011 by way of a Defence denying all the allegations and a Counter-claim. The Counter-claim sought payment of the VT 15 million for outstanding vendor finance, plus VT 10.5 million for plant, and finally VT 1.029 million for alleged monthly management fees. An Amended Defence and Counter-claim was filed by the Wyllies on 17 March 2011. The defence remained constant, as a total denial of all allegations; and the amended Counter-claim expanded on the justifications relied on for the amounts sought.
6. An Amended Claim, as required by a Supreme Court order of 5 April 2012, was filed by the Fishers on 31 May 2012 separating out the distinct claims against each of the Wyllies and GGP and better itemising the various heads of alleged losses. A Reply and Defence to the Amended Counter-claim was filed by the Fishers on 11 July 2012. That was responded to by the Wyllies by the filing of a Defence to the Amended Claim on 7 September 2012 – again, simply denying all the allegations. There was no mention in this document of the Counter-claim.
7. A further Amended Claim, as required by a Supreme Court order dated 5 August 2015, was filed by the Fishers on 25 August 2015. This was apparently designed to more particularly articulate the claims against each of the Wyllies and GGP – it also additionally raised the allegation that the Wyllies had fraudulently misrepresented the true value of the business as part of their justification for the purchase price. By way of response, on 16 May 2016, the Wyllies filed an Amended Defence – essentially repeating the previous denials, and for the first time, alleging "a failure to maintain" the value of the business according to a valuation prepared by Mr Jessop. Again there was no mention of the Counter-claim.
8. On 27 February 2018 a Statement of Counter-claim was filed by the Wyllies – the subject of the strike-out application. For the first time, it was alleged that the Fishers had been negligent/incompetent in their operation of the business of RGL in the 11 months prior to the contract being repudiated. On 26 March 2018 the Amended Affirmative Defence, Set-off and Counter-claim was filed by the Wyllies – the subject of the oral application for consolidation. This document repeated the allegation of negligence/incompetence; and, for the first time, raised the issue of the appellants allegedly being in breach of a guarantee.

C. The Appelled Decision

9. The learned Master's decision was that the Wyllies had standing to bring the latest Counter-claim due to the fact that RGL was a closely-held company; and anything affecting the company equally affected the Directors/owners, and vice versa.
10. The learned Master further held that the Wyllies had "...continuously raised the issue of the management of the business" by the Fishers, and that therefore the latest pleadings should be categorised as outlining "...a more detailed account of the said mismanagement".
11. The Master pointed to the 25 August 2015 Amended Claim as first raising the allegation of fraud, thereby invoking the protection of section 14 of the Limitation Act [Cap 212] to the latest pleadings. She reasoned accordingly that the 27 February 2018 Counter-claim and the 26 March 2018 Set-off pleadings were therefore both within the time limitation period.
12. The Master appears not to have seen any need to specifically explain her reasons for consolidation of the two sets of pleadings.

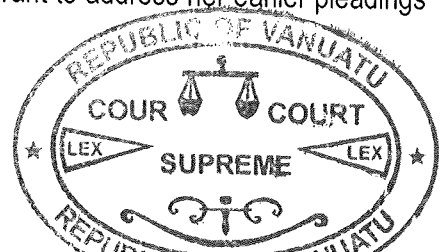
D. Discussion

13. Mr Sugden disputed the Master's finding that the Wyllies has standing to make their counter-claim – he maintained that only RGL, as a separate legal entity, could claim the losses due to negligence/incompetence as set out in the most recent version of counter-claim. He further submitted that the 16 specific allegations of negligence/incompetence on the part of the Fishers were now being raised in 2018 for the very first time – and he said that was unfair, prejudicial and contrary to the provisions of section 3 of the Limitation Act.
14. A further aspect of the new Set-off allegations involved the claim that the Fishers were caught by a guarantee which had been given as part of the sale agreement. Mr Sugden submitted that the guarantee was unenforceable; that it was out of time being first claimed more than 6 years after the event; and that the consolidation of the Set-off with the Amended Counter-claim gave the Set-off document status in the proceedings. He pointed out that the same 16 specific points were alleged in both documents; and re-iterated the difficulty faced by the Fishers to be able to adequately respond after the significant passage of time.
15. Mr Sugden advanced the proposition that that his application ought to have been considered as per the principles applying to cases where there is an application to dismiss for want of prosecution. In particular he relied on the notion that the inordinate or inexcusable delay had caused prejudice to the conduct of the defence, and was therefore unfair.
16. Mrs Wyllie was at a disadvantage as she was representing herself and her husband. She relied on her written submissions which refuted Mr Sugden's guarantee arguments and prayed in aide the Master's findings that: (i) there was nothing new in her contested pleadings, and (ii) that as fraud had been alleged, the time in which to file has been extended to 2021. She also referred to her sworn statement filed on 26 February 2018 in support of her Defence and Counter-claim and submitted that as she had set out explicitly in that document the various allegations repeated in her latest pleadings the Fishers could



hardly now claim to be surprised or caught unawares of her allegations. She maintained there was no prejudice flowing from her latest pleadings.

17. I do not need to determine whether the Master was correct in holding that the Wyllies had standing to file their latest pleadings; or whether the guarantee is enforceable as against the Fishers. For reasons that will shortly be obvious, I also do not need to determine whether or not consolidation of the pleadings ought to have been granted.
18. This appeal turns on the far more fundamental basis of proper, permissible pleadings; as well as the provisions of the Limitation Act.
19. Firstly I will address the Civil Rules of Procedure [No 49 of 2002], and in particular Rules 4.1, 4.2, 4.5, and 4.8.
20. Cumulatively those Rules require that a "statement of case" be set out in the defence – namely what happened between the parties, plus areas of both agreement and disagreement. Each statement must be as brief as the circumstances allow, as long as all the relevant facts are set out, including any principles of law relied on - as well as any remedy sought. A defence must deal with every fact in the claim; and where facts in the claim are disputed, a denial must be made together with an alternative version of events.
21. A Counter-claim must also contain a statement of case, and it must set out the details as if it were a claim. If general damages are sought, the exact circumstances in which the loss or damage was suffered must be included.
22. These Rules are not discretionary. They invite mandatory compliance – anything less is in danger of being struck out and/or not being permitted to be filed.
23. I do not, with respect, agree with the Master's statement that Mrs Wyllie has continuously raised mismanagement of the business throughout this litigation. The first time I can see reference to this is in the form of a bald statement in the 16 May 2015 Defence denying fraud and alleging "...through illness or ineptitude they [the Fishers] failed to maintain a good financial standing". Further in the Counter-claim part of that document is the allegation that the Fishers "...had failed to maintain the business they had bought". I accept that Mr Jessop is referred to in that pleading, but only in an extremely limited way and not such as to require the elaboration now claimed to be justified and set out in the Set-off pleading.
24. These are the very first mentions in any of the several pleadings filed by the Wyllies, as earlier described, of allegations of negligence and/or incompetence – there is no mention whatever of that earlier. Those references do not sufficiently spell out or even allude to what is now being claimed in the latest two pleadings.
25. The rules relating to how cases ought to be pleaded require the complete defence to be put from the outset. If incremental pleadings were to be accepted, cases would drag on interminably and justice between the parties would be unduly delayed and very probably be ultimately unattainable. Mrs Wyllie's very late sworn statement, which she relies on as having given notice of her intentions, was in fact irrelevant to address her earlier pleadings



and could well have been excluded at that point in time as inadmissible. It cannot save her latest pleadings.

26. This case sets a good example as to why the rules earlier described were adopted. The 16 new allegations of misconduct/negligence made by the Wyllies would be nigh impossible in 2019 for the Fishers to refute – even if all the necessary paperwork could be located, the likelihood of material witnesses being located and each of them being able to recall the events under scrutiny with any certainty is extremely slim. The prospects of that are such that it would be grossly unfair to the Fishers for the Wyllies to be able so late in the piece to raise these further issues.

27. Not only must the 27 February 2018 Counter-claim and the 26 March 2018 Set-off documents be struck out for that reason, but both are quite clearly out of time as to the new allegations raised. The Limitation Act prescribes a 6-year time limit within which all contractual claims are permitted. The contract was repudiated on 29 September 2010. Any claims arising from the contract (including Counter-claims and Set-offs) must therefore have been filed by 28 September 2016. Plainly, that has not occurred here in relation to the latest two sets of pleadings.

28. I accept Mr Sugden's submissions regarding the fraud exception. The Wyllies are not now alleging fraud on the part of the Fishers. Had they been, that would be an exception under section 14 of the Limitation Act. However, in this instance it is the Fishers who are alleging fraud – their claim is within time. The Wyllies cannot take advantage of the Fishers' allegations of fraud. The fraud exception has no application to the two sets of pleadings complained of. With respect, I do not agree with the Master's view as to this either.

E. Decision

29. The appeal is allowed.

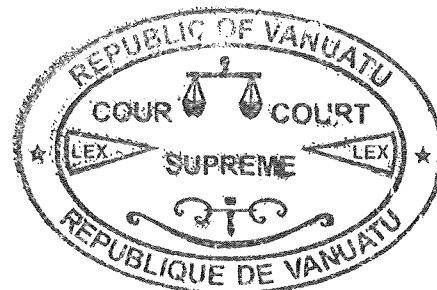
30. Both documents, the 27 February 2018 Counter-claim and the 26 March 2018 Set-off are struck out.

F. Costs

31. Mr Sugden is entitled to his costs, as against the Wyllies, in respect of both the application to strike out and this appeal. Mr Sugden is to present, in the next 14 days, a suitable-for-taxation submission to the Master for determination of the appropriate amount of costs payable. The costs awarded, once the amount has been determined after taxation, are to be paid in full within 21 days.

G. Administration Issues

32. It is apparent, as mediation has failed, that a trial is required. I was as concerned as Mr Malcolm over the length of time this matter has been before the Court without determination. I reserved my decision on the appeal, but indicated that I would release my decision before the end of January 2019.



33. I directed that, in the meantime, it was necessary to desist dealing with only preliminary matters and time to get the substantive trial on for hearing. Accordingly, I directed that all sworn statements intended to be relied on by all parties (in support of the claim, the defence, the counter-claim and the defence to the counter-claim) be prepared, filed and served by the end of March 2019.
34. The indications from counsel and Mrs Wyllie were that the trial would need 5-days to complete. I indicated to counsel that I was looking to set the trial down for hearing in May 2019. However, my availability for the hearing of trials in 2019 is rapidly being booked out. Accordingly, I have unilaterally scheduled the trial to occur in the week of 20 – 27 May 2019 at Dumba. I will be most reluctant to have to re-schedule it, and if I do, it will have to be even later in the year, but I invite by return indications of availability from all parties for trial to occur in that week.
35. There will also be a pre-trial conference at 8am on 15 April 2019 to ensure everything is ready for trial.
36. Judicial Conflict
37. There is one further issue that must be addressed. I perceive that Ms Jude Leske will be a witness at trial.
38. Although she is not a close friend, she is effectively my land-lady, as the owner of the property where I reside has appointed her as his agent to deal with the collection of rent and other outgoings and to deal with any other issues such as repairs/maintenance that might arise. I have had numerous dealings with her, and members of her staff, which I foresee as regularly continuing in the future.
39. I would be very uncomfortable if asked to make a determination as to her veracity or reliability at trial.
40. I therefore require counsel and Mrs Wyllie to advise whether Ms Leske is a witness who may be challenged in that way. If she is, I will ask for the file to be re-assigned. If not, we will forge on together towards conclusion of this matter as soon as possible.
41. Lastly, I repeat my oral opinion to Mrs Wyllie that she and her husband would be well advised to be legally represented at trial.

Dated at Port Vila this 8th day of January 2019
BY THE COURT

Gendree Willem
Justice G.A. Andrée Willem

