

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

Civil

Case No. 13/149 SC/CIVIL

BETWEEN: Albino (Alan) Salpietro
Claimant

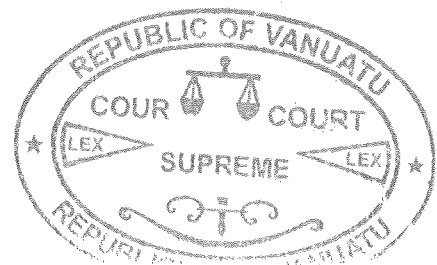
AND: George Winslett
First Defendant
100% Pur Fun Limited (In Receivership)
Second Defendant
Sean Winslett
Third Defendant
Breakas Resorts Management Limited (In
Receivership)
Fourth Defendant
Breakas Holdings Limited
Fifth Defendant

Date: 20 November 2019
Before: Justice G.A. Andrée Wiltens
In Attendance: Mr D. Thornburgh for the Claimant (absent)
Mr N. Morison for the Fifth Defendant

JUDGMENT

A. Introduction

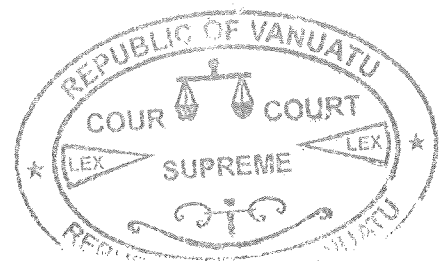
1. This is a long-running saga, involving the unravelling of former friendships and related commercial dealings.



2. This particular matter is a part of numerous pieces of litigation and involved the seeking of an injunction regarding an alleged threat of oppression, followed by a Claim alleging the misappropriation of funds for the benefit of others.
3. Since December 2013, there has been an alleged lack of specificity of claim with numerous requests, both formal and informal, for further and better particulars.

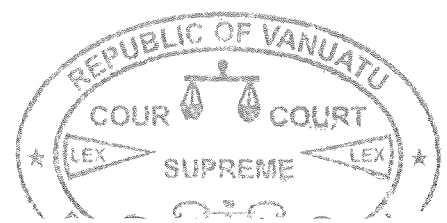
B. Background

4. The injunction was sought, and granted, in July 2013.
5. The Claim was filed in August 2013. It was claimed that the First Defendant, as Director of the Second Defendant, had misappropriated funds of the Second Defendant. It was further alleged that the other Defendants had received the benefit of the misappropriated funds.
6. On 6 December 2013, this Court directed an Amended Claim be filed by 14 February 2014. That was in response to a complaint that the Claim did not particularise what funds had been misappropriated, or when or how that had occurred.
7. Eventually, on 31 August 2015, a formal application was filed by the Fifth Defendant to strike out the Claim due to no cause of action having been demonstrated on the pleadings, as well as the continuing failure by the Claimant to comply with the Court's orders.
8. That matter was not progressed for some time as the Second Defendant had been placed in receivership, and the Court needed to know whether the appointed Receivers would participate in the proceedings. In the end, counsel acting for the Receivers withdrew from the case. As well, there were attempts to settle the differences between the various parties, which occupied some 15 months – during which time several Court hearing dates were vacated by consent. Inter-related litigation was also continuing, which affected the parties' ability/desire to deal with this case.
9. On 27 September 2017, an application was filed for Leave to Amend the Claim. This was then scheduled to be heard together with the strike out application. Time-tabling orders were made in an attempt to have both matters ready for hearing – that included the filing of a Draft Amended Claim. Those orders, by no less than two previous docket judges, were not complied with.
10. Mr Thornburgh, counsel for the Claimant throughout, appeared at Conferences before me on 30 March 2018, 7 June 2018, and on 2 August 2018 – each time seeking more time to comply. As he was the only counsel appearing, he was granted the indulgences sought. At each Conference further time-tabling directions were issued – however, all were not complied with. At the last Conference Mr Thornburgh advised that he intended to file an Amended Claim in an associated case, namely Civil Case No. 18/1894. He advised that would then enable him to advance an application to join this present case with Civil Case No. 18/1894. As a result, he submitted the need to file a Draft Amended Claim in this case was no longer necessary; and that once he had joined the two cases the application to Strike out would fall away. The Court acceded to that plan of action.



11. Mr Thornburgh had filed the Amended Claim in Civil Case No. 18/1894 by the time of the next Conference, which was on 7 September 2018. Mr Morrison, for the Fifth Defendant in this case and for several of the Defendants named in the Amended Claim in Civil Case No. 18/1894, advised he would be filing formal Defences to the Amended Claim on behalf of his clients. Mr Thornburgh wished to see those defences prior to either seeking a stay in this case or joinder of the 2 cases.
12. A further application to Strike out the Claim was filed by the Fifth Defendant on 24 October 2018 – the same date as the next scheduled Conference. Mr Thornburgh did not attend the Conference – his non-appearance was unexplained. The basis of this second Strike Out application was the continued failure by the Claimant to comply with the Court's directions as to the filing of a Draft Amended Claim. Effectively, the Fifth Defendant was again seeking better particulars of the Claim. There were again time-tabling orders made to attempt to have the application ready for hearing.
13. The Strike Out application was scheduled to be heard on 5 April 2019. That was thwarted by the time-tabling orders as to the filing of submissions not being complied with. It accordingly had to be deferred to 26 April 2019.
14. At that hearing, Mr Morrison proposed an alternative solution. He suggested, and Mr Thornburgh agreed with the suggestion, that the matter could be disposed of and the case progressed if Mr Thornburgh either: (i) filed a fully particularised Amended Claim, or (ii) filed for joinder of this matter with Civil Case No. 18/1894. The deadline for Mr Thornburgh to attend to this was agreed to be by 31 May 2019. Accordingly the Strike Out application was adjourned sine die, with no order as to costs. The Court Minute further records:

“Due to the history of this matter, and the number of directions not complied with by the Claimant, if neither event occurs, then the Court intends to strike out this claim for want of prosecution, with costs.”
15. Mr Thornburgh filed a bare Application for Joinder, within time. There was no material filed in support, such as the other pleadings, a draft of the new proposed pleadings, or even a sworn statement by the Claimant. Mr Morrison formally objected to joinder.
16. I suggested the matter be dealt with on the basis of written submissions being filed and the Court then making a determination. Counsel were invited to file their submissions accordingly (duly time-tabled) and to advise whether they also wished to address the Court orally.
17. The joinder application was scheduled to be heard on 15 October 2019. The time-tabling orders were again not complied with; and Mr Thornburgh further advised that he wished to also be heard on the application. He agreed that he would file his submissions by 4pm on 24 October 2019, in time for Mr Morrison to respond; and he advised that his oral submissions would be brief. Accordingly the matter had to be further deferred – this time to 4 November 2019.
18. Mr Thornburgh advised he was unavailable to appear on 4 November 2019, for unspecified personal reasons. He was granted the indulgence of a further adjournment to 20 November 2019. At the scheduled time on 20 November 2019 there was no appearance by Mr Thornburgh, nor any explanation for his absence. Mr Morrison appeared and filed submissions



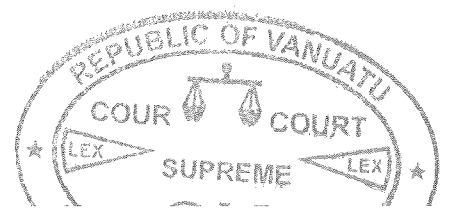
in opposition to joinder, even though there were no submissions filed by Mr Thornburgh in support of his application. Mr Morrison's submissions went on to address the issue of delay and to seek a strike out of the case.

C. The Application

19. Mr Morrison addressed numerous objections to the joinder application, all of which appear to me to be well grounded.
20. As well, the reality is that this case has been in the Court system since later 2013 – a period of 6 years. A number of interlocutory matters have been dealt with, but the basic position remains that the Defendants do not know what allegations they face – a requirement that needed to be addressed appropriately in the pleadings from the very commencement of the case: Rule 4.2. The fact that there still no compliance with this basic requirement supported the application for a strike out.
21. This Court has on numerous occasions ordered an Amended Claim be filed. Those orders have been disregarded. The delay in completing this case was also said to be in breach of the objectives set out of Rule 1.2 of the Rules. The delay was submitted to be largely due to the inaction by the Claimant.
22. The application by Mr Morrison points to these matters and to Rule 9.10, which deals with the situation where a Claimant does not take the steps required by the Rules or comply with Court Orders. Rule 9.10(2)(d) provides that in that situation if no steps have been taken for 6 months, the proceeding may be struck out without notice.
23. Mr Morrison accordingly invited the Court to strike out the Claim

D. Discussion

24. The application to join the 2 cases is dismissed for want of prosecution. The lack of supporting material evidencing the desirability of joinder, and of counsel's submissions in support of the application leave the Court with no alternative but to dismiss the application. There have been several indulgences given to counsel for the Claimant to comply with Court directions, but the lack of taking advantage of those opportunities is ultimately determinative.
25. There is no doubt this case has languished far too long within the Court system without any real progress being made as to finalising the disputes between the parties.
26. I agree with Mr Morrison's submissions that much of this delay lies at the feet of the Claimant. I agree also that enough is enough. To keep this litigation alive, after all this time, without any real interest being shown in the matter, by anyone but the Fifth Defendant, is contrary to the interests of justice. The Court's time and facilities is better reserved for those with an interest in using the procedures to settle outstanding disputes.
27. The repeated failures to comply with Court orders cannot continue.
28. I am conscious of making orders ending this case without the benefit of counsel for the Claimant. His absence is unexplained. I am satisfied that even if he had appeared, there was



in reality very little he could have said to keep this case alive. His lack of action cannot be easily explained away, and after this length of time, it also cannot be excused.

E. Result

29. The application to join this case Civil Case No. 13/149 with Civil Case No. 18/1894 is dismissed.
30. The Claim is struck out in its entirety as against all Defendants.
31. Costs in the entire cause (not just these 2 applications), on the ordinary basis, are to follow the event. In the event they cannot be agreed, they will be taxed by the Master. Once settled, they need to be paid within 21 days.

**Dated at Port Vila this 20th day of November 2019
BY THE COURT**


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Justice G.A. Andrée Wiltens

