

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**

*(Civil Appellate Jurisdiction)*

**Civil Appeal Case No. 40 of 2007**

**BETWEEN: THE GOVERNMENT OF THE  
REPUBLIC OF VANUATU**  
Appellant

**AND: DICK IAUKAS**  
Respondent

30 NOV 2007

**Coram:** Justice Bruce ROBERTSON  
Justice John von DOUSSA  
Justice Oliver SAKSAK  
Justice Christopher TUOHY  
Justice Hamlison BULU

**Counsel:** Mrs. Viran M. Trief for the Appellant  
Respondent in person

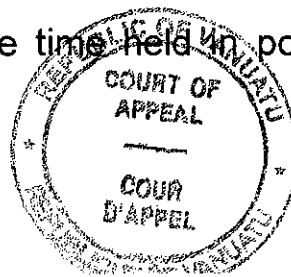
**Date of Hearing:** 27<sup>th</sup> November 2007

**Date of Decision:** 30<sup>th</sup> November 2007

## **JUDGMENT**

### **Background Facts**

On 25<sup>th</sup> January 1998 the respondent alleges he was assaulted by one Uriel Leo, a policeman in the employ of the appellant. The respondent was at the time held in police

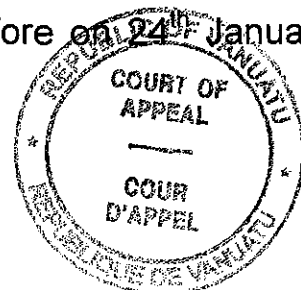


custody. Two days later, on 27<sup>th</sup> January 1998 the respondent was admitted to the Vila Central Hospital and was hospitalized for a period of one month, two weeks and three days. He was then discharged and went into hiding at the Teoma Bush for three months for fear that the police would find him and assault him again. He returned into town from time to time to have his injuries assessed on 20<sup>th</sup> April 1998, 5<sup>th</sup> May 1998, 31<sup>st</sup> May 2002 and finally on 16<sup>th</sup> August 2002. On this date one Dr McNamara had confirmed the extent and permanency of the respondent's injuries.

On 22<sup>nd</sup> October 2003, the respondent filed an application seeking leave to file a claim out of time together with a supporting sworn statement. The respondent did not have enough money to pay the filing fees of VT20.000 in one payment and paid instalments as follows:-

- 2,000vt on 30 April 2004;
- 3,000vt on 17 August 2004;
- 3,000vt on 17 August 2004;
- 2,000vt on 10 October 2004.

On 12 December 2004 the Registry returned the respondent's documents as fees were not completed. However on 22 December 2004 the respondent paid up the remaining 10,000vt. He was advised that he should re-file his documents as the previous ones had expired. Therefore on 24<sup>th</sup> January



2005 a second application seeking leave to file the claim out of time was filed by counsel. The matter was given several listings during which directions were issued for sworn statements and written submissions to be filed by the parties.

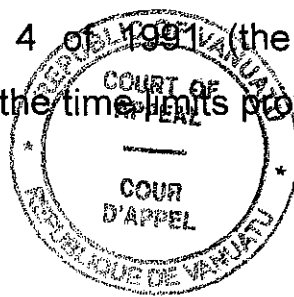
The application was heard inter-partes by the learned Chief Justice who on 20<sup>th</sup> February 2007 issued an oral order granting leave to the respondent to file his claim for damages against the appellant out of time. The reasons for the orders were published on 12<sup>th</sup> November 2007.

The judgment is an interlocutory one and as such there is no immediate right of appeal. Under Rule 21 of the Court of Appeal Rules, leave is required to be obtained prior to filing an appeal.

The appellant filed an application seeking leave to appeal on 13<sup>th</sup> April 2007. The application has not been dealt with by the Court below. As the application is not challenged it is assumed leave has been granted and we accept the appeal on that basis.

### The Appeal and Grounds

The appeal was filed with basically two grounds: first that the primary Judge had misdirected himself in apprehending that section 15 of the Limitation Act No. 4 of 1991 (the Act) conferred a general discretion to extend the time limits provided



by section 3 of the Act. And secondly, that the respondent had satisfied the requirements of section 15(3) of the Act.

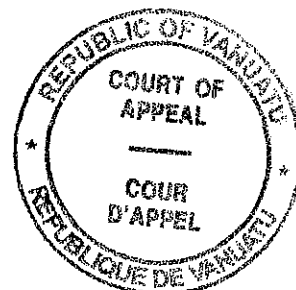
We are grateful to the appellants for their detailed written submissions which clearly outline the chronology of events performed by the respondent from 25<sup>th</sup> January 1998 being the date of the assault to 24<sup>th</sup> January 2005 being the date of filing the claim out of time, and the legal position on the matter.

### Issues

Two issues arise for the Court.

1. Pursuant to Section 15 (3) of the Act, whether the last occasion on which the respondent acquired knowledge of a material fact was on 16<sup>th</sup> August 2002 when Dr. McNamara issued a medical report concluding a permanent disability. The Chief Justice found it was and there was no challenge to that finding.
2. Pursuant to section 3 of the Act, whether this cause of action was a 3 or 6 years limitation period. The appellant contended this was a 3 year limitation action and submitted that even if it was a 6 year limitation action, the respondent was still out of time.

### Relevant Legal Provisions



The relevant sections of the law are:-

1. Section 3(1) (i) of the Act which provides:

*"(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-*

- a) actions founded on simple contract or tort,.....*

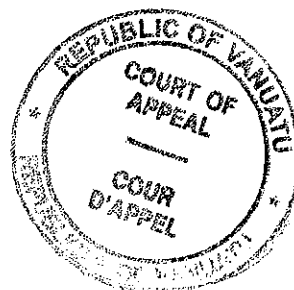
*Provided that:-*

- (i) in case of actions for damages for negligence... or breach of duty... where the damages claimed by the plaintiff for the negligence .... consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."*

2. Section 15 (1) and (3) of the Act provides:

*"(1) The provisions of subsection (1) of section 3 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which :-*

- a) the Court has, whether before or after the commencement of the action, granted leave for the purposes of this section, and*
- b) the requirement of subsection (3) are fulfilled.....*



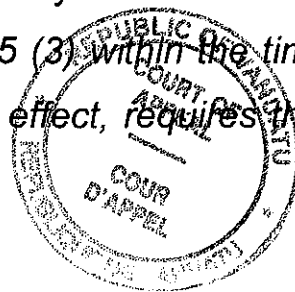
- (3) *The requirement of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:-*
- a) *either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and*
  - b) *in either case was a date not earlier than twelve months before the date on which the action was brought.”*

The above provisions should always be considered and construed together with the provisions of sections 16, 17, 18, 19, 20 and 21 of the Act for completeness.

### Discussions and Conclusions

We accept the relevant case law on the issue of sections 3 and 15 is the case of **Raffey Taiwia & South Pacific Construction Ltd v. Robson Edward** [1998] VUCA 14: Civil Appeal Case No. 2 of 1998 where the Court said this at page 6 :-

*“ the power to extend time is essentially conditioned on fulfillment of the requirements of s. 15 (3) within the time frame specified. That time frame, in effect, requires that*



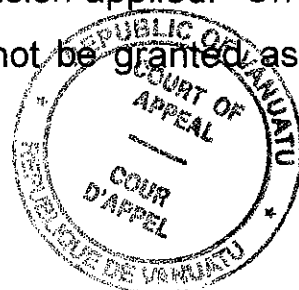
*the potential plaintiff ascertain a material fact of a decisive character within 12 months before the day on which leave to extend time is sought. Three critical expressions used in s. 15 (3) namely "material facts relating to that cause of action", "facts of a decisive character", "outside the knowledge (actual and constructive) of the plaintiff are precisely defined in ss. 18, 19 and 20 with s. 21 giving further definition to the concept of knowledge of the plaintiff."*

And on page 11 the Court said:

*"..... section 15 (3) is central to the power to extend time. Unless the requirements of that subsection are fulfilled, the application for leave must fail".*

From the facts the respondent had established having knowledge of material facts on 16 August 2002 when he obtained a medical report from Dr. McNamara. The medical report amounted to "appropriate advice" within the meaning provided in section 21 of the Act. From 16 August 2002 the respondent had 12 months to file his claim. He did not do so until 22 October 2003. He was outside of the time period required by s. 15 (3) by about 2 months.

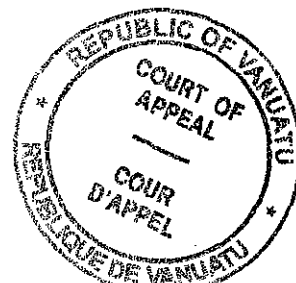
The case was argued on the basis that a 3 years time limit applied and that the 12 month leave provision applied. On that basis we are satisfied that leave could not be granted as the time limits were not fulfilled.



The second issue however is whether this is a case which involved a 3 year time limit. The general time limitation period in section 3 of the Act is 6 years.

Is this claim, which is for an intentional assault, an action for damages for negligence nuisance or breach of duty? It is only if it falls into that category that a 3 year limitation arises and not 6 years. That has not been argued or considered and is a difficult legal proposition. See Letang v. Cooper [1965] 1QB 232 decided on legislation very similar to s. 3 of the Limitation Act No. 4 of 1991, a decision not followed in Australia; see "*The Law of Torts in Australia*" 3<sup>rd</sup> Edit, by Francis Trindale and Peter Cain at pgs 328 – 338. In the absence of proper argument and without full library resources available it is impossible for the Court of Appeal to consider the matter afresh at this stage. It is abundantly clear that the claim is not one for negligence or nuisance. It is arguable that it is for breach of duty but equally may be seen as a simple claim in tort for an intentional assault.

If however the matter is treated as coming within the 6 year categorization, a subsidiary issue arises. The incident was on 27 January 1998 and the first documents were filed on 22 October 2003 which is within the 6 years period. But there was the problem about payment of the Court fees and refileing of the documents did not occur until 24 January 2005, which is more than 6 years after the event.





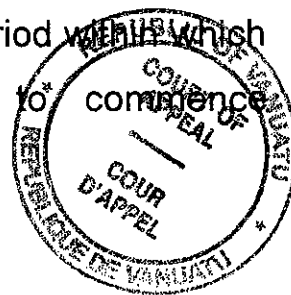
There will have to be a determination of when this proceeding was commenced, as against the circumstances of a person lodging a claim, it being accepted, some payments being made and then its being rejected and being resubmitted later.

There was a further issue which Mrs. Trief raised namely whether there had been a breach of duty. That needs to be determined when there is a consideration of whether the proviso to section 3 is applicable. If there is no breach of duty then we are back at the 6 year limitation.

There is a final issue which has not been considered in all of this and that is whether Mr. Iaukas could establish that there had been a breach of his fundamental rights under Article 5 of the Constitution, which he is entitled to enforce in Article 6 of the Constitution by way of a petition under Article 53. In the circumstances alleged in this case, that possibility cannot be ignored.

This case has been made more complicated by the fact that at call over Mr. Iaukas was represented by Mr. Hilary Toa. Without approval or justification Mr. Toa chose to leave the jurisdiction before the time fixed for hearing, so Mr. Iaukas was placed at great disadvantage.

We have satisfied ourselves that there was no answer to the case of the Government on the issue of the period within which there was a discretion to grant leave to commence



proceedings. It was in this case too late out of time. We therefore heard the case and on that point have allowed the appeal. The other matters however require further work and the issues are remitted for further consideration in the Supreme Court.


The oral orders of the Supreme Court dated 20 February 2007 and the reasons therefore published on 12 November 2007 are accordingly quashed. The case is remitted for reconsideration. In the circumstances there will be no order as to costs.


Dated at Port Vila, this 30<sup>th</sup> day of November, 2007

BY THE COURT

  
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Hon. Justice B. ROBERTSON

  
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Hon. Justice J von DOUSSA

  
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Hon. Justice O SAKSAK

  
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Hon. Justice C. TUOHY

  
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Hon. Justice H. BULU