IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No. 28 OF 2014

BETWEEN: **FAMILY FARM DEVELOPMENT LIMITED**
Appellant

AND **NICHOLLS LIMITED (Struck Off)**
First Respondent

AND **CLAUDE NICHOLLS**
Second Respondent

AND **RENE LAURENT**
Third Respondent

AND **THE GOVERNMENT OF THE REPUBLIC OF VANUATU**
Fourth Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru

Counsel: *Mr Nigel Morrison for Appellant*
Mr Edmond Toka for First and Second Respondent
Mr Robert Sugden for Third Respondent
Mr Kent Tari Ture for Fourth Respondent

Date of Hearing: *5 November 2014*
Date of Judgment: *14 November 2014*

JUDGMENT

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1. This appeal arises from a judgment of Justice Harrop given on 29 July 2014 in a matter which has a long, and unfortunate history. Justice Harrop has described the facts in detail at [2] – [17] of his reasons for judgment, and it is not necessary to set them out in detail.

2. The present proceeding follows earlier proceedings by the appellant Family Farm Development Ltd (FFL) arising from the fact that Nicholls Ltd (the company) when it

was registered in November 2009 signed two separate contracts to transfer its interest in certain leasehold land (the land) to two different entities. The first was to FFL for Vt 27 million, and the second was to third respondent, Rene Laurent (RL) for Vt 30 million. Subsequently, RL settled on his contract and the land was transferred to him.

3. Despite knowing about the registered transfer to RL, FFL on 6 May 2010, some six months after its contract was entered into, settled on that contract by paying the company Vt 27 million in exchange for a signed transfer of the land. It could not have had that transfer registered because the transfer to RL had already been registered. FFL then brought proceedings to have the transfer to RL removed from the register on the ground that it had been procured fraudulently for certain specified reasons. That application was unsuccessful: see the decision of the Court of Appeal in Rene Laurent v. Family Farm Development Ltd (Civil Appeal Case No. 36 of 2012). In the course of hearing the appeal, it emerged that FFL, in addition to the allegations of fraud which it had made to that time, also wished to assert that the transfer should be set aside for fraud based upon the director and principal shareholder of the company, Claude Nicholls (CN) having unlawfully been coerced into signing the contract to RL. It was accepted at that time that there was no evidence then available to FFL to support that allegation. In those circumstances, as FFL had simply failed to make out its pleaded case against RL, the Court of Appeal allowed the appeal and dismissed the claim itself.

4. At the time of doing so, the Court of Appeal said at [53] of its judgment:

> *"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".*

It is clear enough that the Court of Appeal, by that observation, was referring to the problem which might confront FFL in renewing a claim to have the registration to RL set aside for fraud because it had failed previously to allege all the grounds of fraud which it might later seek to allege in further proceedings in the Supreme Court, having regard to what is called the rule in Hendersen v. Hendersen [1843] 67 E. R. 319, and now commonly known as Anshun estoppel, based upon a decision of the High Court of Australia in Port of Melbourne Authority v. Anshun Pty (1981) 55 ALJR 621.

5. That observation apparently prompted FFL to bring separate proceedings in Supreme Court Action 228/2012, against CN only, for specific performance of the contract for the transfer of the land to it, and alternatively for repayment of the Vt 27 million and damages as a result of the contract not being able to be performed.

6. CN in that proceeding, issued a third party notice against RL alleging that he had been unlawfully coerced by RL into signing the contract to transfer the land to RL. He did not assert that the same coercion applied to the time at which he signed the transfer of the land pursuant to that contract which was registered. CN did not at that time particularise his claims of unlawful coercion. Ultimately, he did not pursue that claim and it was withdrawn.

7. That left FFL's claim against CN on the basis referred to above. FFL then discontinued that claim. It did so following a chambers conference of 24 February 2014. On that occasion it was stated by counsel for FFL that it intended to discontinue the proceeding and to bring a fresh claim against CN. The Order notes (after its correction after the slip rule) *"Matter to be discontinued and Notice of Discontinuance to be filed."*

8. It is important to notice the sequence of events. Subsequently, on 25 February 2014, that is the day after that order, FFL commenced Supreme Court Action 4 of 2014 in which the judgment the subject of this appeal was given. It was purportedly commenced against the company, which it described in the heading as *"Nicholls Ltd (struck off)"* and against CN, RL and the Republic of Vanuatu (the latter, simply to secure an effective order if its claim against RL succeeded). Subsequently, on 10 March 2014 the previous Supreme Court action 228 of 2012 was discontinued.

Supreme Court Action 4 of 2014

9. It is now convenient to set out in very broad terms the allegations in the action, and how the primary Judge disposed of them on an application for summary dismissal of those claims. The end result was that each of those claims was struck out as an abuse of the process of the Court. It is from those orders that this appeal is brought.

(a) The Claim against RL

10. As against RL, it was alleged that RL procured the contract and the transfer of the land from the company by fraudulently inducing the contract as a result of unlawful coercion of the company and of CN. It therefore sought, as it had previously sought in the earlier proceedings, that the Director of Lands rectifies the register by taking RL from the title, and then substituting FFL pursuant to its contract. Alternatively, it sought an order that the company or Mr Nicholls repay to it the sum of Vt 27 million.

11. Each of RL on the one hand and the company and CN on the other applied for the claim against them to be summarily dismissed, and each application were successful. The reasons for judgment of Justice Harrop set out in detail the underlying facts and it is not necessary to further refer to them.

12. His Lordship considered that, in all the circumstances, it was an abuse of the court process to make a claim against RL on the basis that it had had the chance to make that claim in the previous proceedings against RL, which had been unsuccessful, and did not then make that claim. There was no explanation why, in the earlier proceeding, there had been no allegation of fraud by coercion. Justice Harrop said that it was an abuse of the court process for FFD to now prosecute such a claim of fraud against RL twice with the same basis of fraud. In other words, the Anshun estoppel rule applied to show that it was an abuse of process. His Lordship noted that there were no special circumstances which might remove the present case from the application of that rule. In particular, in the Supreme Court proceeding against RL, there were still no particular allegations of fraud by coercion, other than a very general allegation, and no indication that FFL had available to it evidence which might support such a claim. His Lordship noted to that, in the third party notice of Mr Nicholls against RL in the earlier proceeding he also had not given any particulars of the alleged fraud by coercion. He also observed the curiosity, of FFL settling and paying for the transfer of the land to it on 6 May 2010 when it was aware of the registration of the land to RL. No explanation for any of that conduct was given.

13. His Lordship concluded at [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 re-enforces that conclusion."*

(b) The appeal against the decision concerning RL

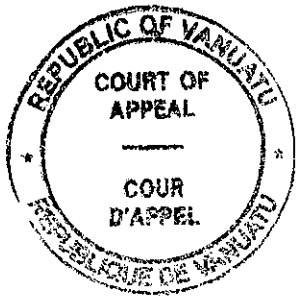
14. In relation to the appeal by FFL concerning RL, attacking that conclusion of the primary judge, we note that it is accepted that the Anshun principle applies in this jurisdiction, and that it is not suggested that the primary judge misunderstood or mis-applied that principle.

15. For the reason which his Lordship gave, in our view, there is no error in his approach to the consideration of that claim. The appeal itself should be dismissed as against RL. The reasons are clear and correct.

16. One matter deserves particular attention. We do not regard the decision in Roqara v. Takau [2001] VUCA 15 applies in the circumstances which the primary judge was required to address. In that case the Court of Appeal concluded that the appeal should be allowed, but remitted to the trial judge the re-hearing of the primary action because there had been an allegation which had been ventilated at first instance and about which there had been some evidence. Accordingly, although the appeal had succeeded, the issue remained a triable issue, identified in substance and in respect of which there was clearly some supporting evidence. That warranted the matter being remitted to the Supreme Court for a re-hearing of that aspect. In this case, as was common ground, the Court of Appeal in its earlier decision noted that there was no foundation asserted for, nor any issue previously raised, about fraudulent conduct by wrongful coercion to get the signature on to the contract and the transfer to RL, nor any suggestion that there was available evidence to support such a claim. Consequently, the Court of Appeal simply dismissed the appeal.

(c) The claim against the company and CN

17. In relation to the company, as the heading of the action itself asserted, it was a *"struck off"* company. His Lordship correctly proceeded on the base that, if it was no longer registered, it was incapable of being sued or having any judgment recorded against it. The claim against it was struck out on that basis.



18. But for the way which we propose to address the strike out of the claim against CN, there will be no reason to disturb his Lordship's ruling on that matter. The fact is that the parties, and the Court, proceeded on the basis that that company had not been sued in fact because it was unregistered at the time of the proceeding and it could not have been sued without being restored to the Register. There is a procedure by which that might have been done, but it had not been taken up: see section 335 (4) of the Companies Act.

19. The assessment of the issues in the Supreme Court Action 228 of 2012 and then this proceeding indicated that the same claim against Mr Nicholls was made in each, plus in this case that the ineffective claim against the company. The primary judge considered that it would have been appropriate to further amend the claim in the second proceeding rather than discontinuing it, as both claims clearly arose out of the same offence and sought in substance the same relief. His Lordship therefore regarded the claim against CN in this proceeding as also falling foul of the Anshun principle.

20. His Lordship also considered that there was an alternative basis upon which the same conclusion could be properly reached namely that, the claim against CN in Supreme Court Action 228 of 2012 having being discontinued, Rule 9.9 (4) of the Supreme Court Rules precluded FFL from reviving that claim.

(d)The Appeal against the decision concerning CN and the company

21. It is convenient to deal with the second reason of the primary judge at this point.

22. That aspect of his Lordship's reasons was acknowledged by counsel for CN to have been in error. That simply arises from the sequence of events. Although leave to discontinue the claim was given on 24 December 2013, as noted above in fact the proceeding was not discontinued until 10 March 2014. In the meantime on 25 February 2014 the current claim in Supreme Court Action 4 of 2012 had been instituted. Counsel for CN acknowledged that in those circumstances Rule 9.9 (4) did not operate because the claim against CN (and the company) was not being *"revived"* by the third action, because it had being made in the third action before the discontinuance of the second action.

23. It is not necessary in these circumstances for this Court to explore the concept of *"revival"* in any detail under Rule 9.9 (4) of the Supreme Court Rules. It should also be

noted, in fairness to the primary judge, at the time of contention before the primary judge, FFL had erroneously proceeded on the assumption that the Notice of Discontinuance had been effective by 24 February 2014.

24. In our view, in the circumstances, it was not appropriate to discuss the claim against CN on the Anshun principle. It was apparent that FFL, by its notice of proposed discontinuance, did not intend to abandon the claim to recover the Vt 27 million from him. It does not intend to change the basis of its claim to recover that sum, and there has been no adjudication on the merits of that claim. It is generally when a different claim has been agitated and adjudicated upon in an earlier proceeding that a later claim arising out of the same or much the same facts is not permitted to be pursued.

25. In those circumstances, it is our view that the judgment appealed from, to the extent that it dismissed the claims against CN (and not affecting the company) should be set aside and the matter remitted to the Supreme Court for hearing and determination of these claims. In this instance, given the grounds upon which that claim was dismissed there is no reason why the primary judge should not resume the conduct of the matter.

26. It is the matter for FFL as to whether it applies for re-instatement of the company, to the Register and, if it does so, the basis upon which it seeks relief from the company. As we have noted, in the Court submissions of counsel for CN acknowledged that he was the principal shareholder and the sole director of the company at all material times, and that he had had the benefit of the two separate payments for the land even though, in respect of the contract with FFL, his client had simply chosen not to reimburse the price paid without being able to transfer the land. His defence in Supreme Court Action 228 of 2012 might suggest a position was then being taken different from that which was acknowledged by his counsel on this appeal.

Orders

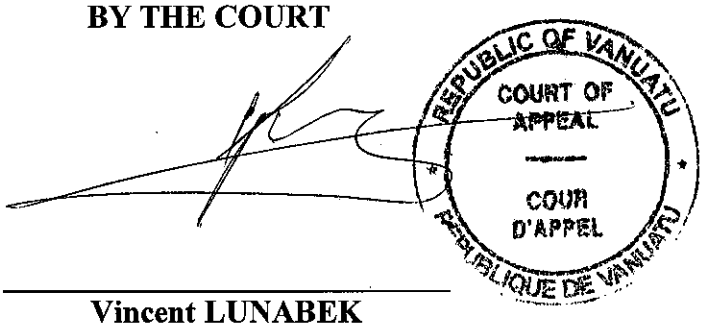
27. In those circumstances, it is our view that, the appropriate orders are that:

(1) The appeal against the order dismissing the claims against RL should be dismissed, and FFL should pay the cost of RL and of the Republic of Vanuatu on the appeal.

(2) The appeal against the order dismissing the claims against the company and against CN be set aside, and the matter is remitted to the Supreme Court to further hear and determine those claims, but given the position adopted by CN, as noted above, the costs awarded to CN and to the company at first instance should be set aside and should abide the event of the further hearing and we also order that the costs of the appeal as between FFL, CN and the company should also follow the event in the further hearing of the Supreme Court claim.

DATED at Port-Vila this 14th day of November 2014

BY THE COURT



Vincent LUNABEK
Chief Justice