

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

Civil Appeal Case No. 665 of 2015

**BETWEEN: GUY BENARD**  
*First Appellant*

**AND: CANDICE BENARD**  
*Second Appellant*

**AND: MARIE CELINE CHANE SI LIN**  
*Third Appellant*

**AND: FRANK & LUCIENNE GALLO**  
*First Respondent*

**AND: SS BABY BLUE**  
*Second Respondent*

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John von Doussa*  
*Hon. Justice Ronald Young*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Paul Geoghegan*

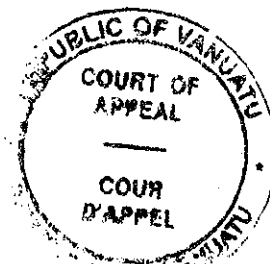
**Counsel:** *Mr Guy Benard in person for the Appellants*  
*No appearance on behalf of the First Respondents*  
*Mr Garry Blake appearing under protest as to jurisdiction and as a courtesy*  
*to the Court for the Second Respondent*

**Date of Hearing:** *Monday 4<sup>th</sup> April 2016 at 11:00 am*  
**Date of Delivery:** *Friday 15<sup>th</sup> April 2016 at 4:00 pm*

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**JUDGMENT**

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1. On 30<sup>th</sup> October 2015, a Judge of the Supreme Court struck out the claimant's proceedings against the respondents pursuant to rule 9.10 (2) (d) of the Civil Procedure Rules. That rule provides:

*"Striking out*

*9.10* .....

*(2) The court may strike out a proceeding:*

*(a) .....*

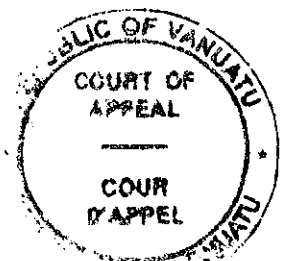
*(b) .....*

*(c) .....*

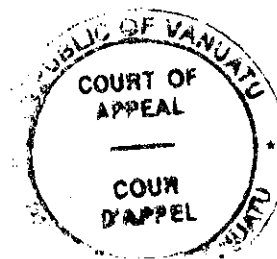
*(d) without notice, if there has been no step taken in the proceeding for 6 months"*

The last step in the proceedings taken by the claimants was on 18<sup>th</sup> August 2014 when a sworn statement in support of an earlier application for summary judgment was filed. No further steps were taken thereafter to bring the matter before the Court.

2. The claimants in the Supreme Court, now the appellants, seek by way of appeal to this Court to have the strike out order set aside. The proper procedure to have an order made under rule 9.10 (4) set aside is to apply in a first instance to a Judge of the Supreme Court. Where the claimant can establish that the justice of the case requires that the proceeding be reinstated, the Supreme Court has jurisdiction so to order. Only if that application fails will recourse to this Court by way of appeal be appropriate.
3. This is not a case where the justice of the case requires that the Supreme Court proceedings be reinstated.

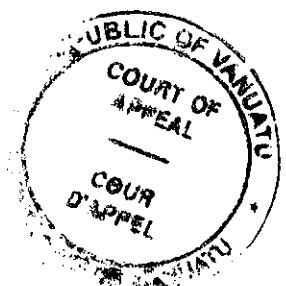


4. The claimants commenced the Supreme Court proceedings on 6<sup>th</sup> January 2014 to recover monies paid to the first respondents under a contract to purchase the vessel SS Baby Blue from the entity intended to be sued as the Second Respondent. The contract was later rescinded because of a complete failure of consideration in that the vessel was not of a condition or standard required by the contract. The First Respondent resides in Noumea and the Second Respondent entity is situated in Noumea. Accordingly, leave to serve the proceedings on the respondents out of the jurisdiction was required by rule 15.14 of the Civil Procedure Rules.
5. The claimants without leave served the respondents in Noumea on 25<sup>th</sup> February 2014. Thereafter the claimants applied for leave to serve out of the jurisdiction and in Noumea. An order granting leave to do so was made on 16<sup>th</sup> April 2014. The Court, in granting leave, pointed out that the service effected on 25<sup>th</sup> February 2014 was ineffective and the claimants would need to re-serve the proceedings along with a copy of the Order giving leave to serve out of the jurisdiction as required by rule 15.14 (5).
6. The claimants have not re-served the proceedings on either the First Respondents or the Second Respondent.
7. Notwithstanding the failure to re-serve the proceedings, the claimants have filed further documents including sworn statements in support of an application for summary judgment, and apparently have served them on the respondents in Noumea.
8. The First Respondents have taken no steps in the proceedings, and have not filed a response. On 19<sup>th</sup> May 2014, lawyers acting for the Second Respondent entity filed a response under



protest contesting the jurisdiction of the Supreme Court. A response filed under protest for this purpose does not dispense with the requirement for proper service out of the jurisdiction; rather it highlights the defect in service.

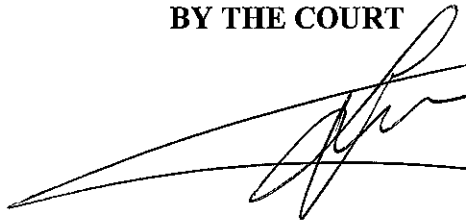
9. As earlier stated, the last step taken in the proceedings was on 18<sup>th</sup> August 2014. Therefore the basis for the exercise of the power under rule 9.10 (2) (d) was made out, and the order striking out the proceedings was in accordance with the rule.
10. The causes of action alleged by the claimants, if good, are not out of time. When this appeal was called, the Court pointed out to the First Appellant that now that the unserved proceedings have been struck out, the claimants are free to commence a fresh action if they wish to proceed in this jurisdiction, and, this time, to proceed in accordance with the rules: ie obtain leave first and then serve the proceedings out of the jurisdiction.
11. As it is still open to the appellants to pursue their claims by adopting correct procedures, the justice of the case does not require that the former proceedings be reinstated. Accordingly the appeal must be dismissed.
12. If the appellants are minded once again to issue proceedings in this jurisdiction to recover monies from the respondents, before they do so, they should reflect not only on the difficulties that arise in serving proceedings out of the jurisdiction, but also on the difficulties that would arise in enforcing any judgment obtained in this jurisdiction against the respondents situated in another jurisdiction. The claimant should evaluate whether their interests might be better served by taking proceedings against the respondents in their place of residence and business.



13. The appeal is dismissed with no order as to costs.

**DATED** at Port Vila this Friday 15<sup>th</sup> day of April, 2016

**BY THE COURT**



**Vincent LUNABEK**  
Chief Justice

