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

Civil Appeal
Case No.17/1045 CoA/CIVA

BETWEEN: WONG JOK KEONG, WONG KHU RWOO JAQUES, WONG KU KIT MICHAEL AND WONG JEANNE trading as NEW LOOK FASHION
Appellants

AND: MRS TRU THI HUE
First Respondent

AND: MRS TRU THI NGA
Second Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Paul Geoghegan*** ***Hon. Justice David Chetwynd***
Counsel:	*Mr. Nigel Morrison for Appellant* *Ms. Christina Thyna for Respondents*
Date of Hearing:	*13th July 2017*
Date of Judgment:	*21st July 2017*

JUDGMENT

1. This is a very belated application for leave to appeal out of time. The judgment in question was delivered on 11th of December 2014 in favour of the respondents for close to US$450.000, but the application for an extension of time was not filed until 25th April 2017, more than two years and three months out of time.

2. Regrettably the delays in this matter are far greater than those since the judgment. The proceedings between the parties, which concern money claims which arose in 1993 were commenced on 10 November 1998. The trial commenced in 2003 but because of adjournments was not concluded until 2004. The judgment had not been prepared when the courthouse was burnt down in 2007 and the court file and the trial papers were destroyed. Eventually a trial file was reconstructed as far as possible from records retained by the parties'

lawyers, but it was not complete. It was not until late 2014 that the trial Judge confronted the task of preparing a judgment. At that point in time, so long after the trial and with incomplete papers, the judge had two available courses. He could either order that the matter be re-tried afresh, putting the parties to the cost of a further trial, or to do his best on the available material thus saving the costs of another trial. The judge choose the latter course, but inevitably this course was fraught with risk that if a party was dissatisfied with the result, there could be an appeal on the ground that the delay rendered the result so unsafe that it should be set aside.

3. In the present case that is the proposed ground of appeal if an extension of time is granted.

4. It is now well accepted that on an application for an extension of time within which to appeal the court will consider the length of the delay in seeking to appeal, the reason for the delay, the chances of the appeal succeeding if time is extended, and the degree of prejudice to the potential respondent if the application is granted (see: *Laho Ltd v. QBE Insurance (Vanuatu) Ltd [2003] [VUCA 26]*).

5. The parties have agreed that if after considering these matters the court is minded to grant an extension of time, the court should decide the merits of the appeal on the arguments advanced on the leave application. Those arguments have canvassed in detail the substantive merits of the proposed appeal.

6. A delay of the length here will almost invariably be fatal to an application to extend time, but in this case the reason for the delay is unusual and in our opinion provides a compelling reason to extend time.

7. Due to the extreme delay in the resolution of the proceedings the parties who are related took steps to re-establish good family relationships. At least on the part of the claimants (the appellants) they understood the respondents had forgone their claim, and indeed after judgment it seems the respondents did not at the time make any communication with the appellants to indicate otherwise.

8. After delivery of judgment the lawyer who had represented the respondents at trial sought to recover his costs which totalled several millions of Vatu. The respondents apparently sought help from the appellants to pay this sum. It is not clear how much assistance was offered, but apparently some money was provided. However the lawyer was not satisfied. He sued, and obtained a judgment in his favour against the respondents. Then under an enforcement summons he recovered money from the sale of a piece of land of which one of the respondents was a lessee. At no time during the proceedings by the lawyer

or the sale of the property was any action taken which would evince an intention on the part of the respondents to enforce the Supreme Court Judgment. It was not until 30th September 2016 after the sale of the respondents' property was complete, and after the respondents' former lawyer sought to recover from them an outstanding balance of his fees of VT3,477,290 that the respondents again approached the appellants for assistance to discharge this outstanding debt, but no assistance was forthcoming. On 9th March 2017 the respondents' new lawyer then applied for an enforcement order to collect the judgment debt. That led to the application for leave to appeal.

9. In 2015 the appellants asked the first respondent to sign an acknowledgment that the appellants had discharged their liability under the judgment but she refused. How that event fits into the history of the family relationship between the date of judgment and the filing of the present application is not clear. A suggestion was offered from the bar table that the discharge was sought as part of a proposal by the appellants to assist in paying the respondent's legal fees, but there is no evidence on file to that effect. However counsel for the respondents acknowledged in submissions that there had been discussions between the parties about the payment of the lawyers' fees claimed from the respondent, and counsel did not dispute the explanation being advance by the appellants for the delay. The impression given to the Court by the submissions of both counsel is that the reason for the present application is the pressure recently applied by the respondents' former lawyer to recover the balance of his fees. But for that balance it seems no action would have been taken on the judgment.

10. On the question of prejudice if leave is given, the respondents point out that the causes of action arose in 1993, and the proceeding were commenced in 1998. The first respondent is now 72 years of age and the second is now 58. However, the prejudice that is relevant to the application is prejudice arising from the delay since the time for appeal expired, and no particular prejudice arising during that period has been demonstrated. By January 2015 when the time for appeal expired, the parties would have been suffering much the same disadvantages in memory that they suffered when the present application was filed. The assertion of prejudice is not strong.

11. That leaves for consideration the chances of a successful appeal, and we consider this should determine the outcome of the application.

12. The Supreme Court proceedings were commenced by the appellants. They alleged that the respondents worked for them as employees in the New Look Store in Port Vila. The appellants alleged that the respondents had ordered but

not paid for goods in the sum of VT778,505, and paid for airfares on the appellants' account but not reimbursed VT1,148,927.

13. The respondents answered that they were the owners of the New Look Store which had been set up with US$450.000 which the respondents had given the appellants for that purpose. They alleged that they had given the appellants further monies as well to operate the store and acquire stock. The appellants had failed to account for these advances but instead had wrongly taken possession of the New Look Store. The respondents counterclaimed for the loss of their business and stock and for the repayment for US$450.000.

14. For reasons explained in the judgment the Supreme Court limited the respondents' counterclaim to one for the return of US$450.000. In the result both the claims and the counterclaims were allowed, the former being set off against the latter.

15. Both sides gave oral evidence and produced documents. There was a clear conflict between the oral evidence of the principal witnesses for each side which had to be resolved. As the trial judge observed, the central question in the case was whether the court could be satisfied on the balance of probabilities that the first respondent, Mrs. Hue, gave Mrs. Wong (representing the appellants) the sum of US$450,000 to invest in the New Look Store as alleged in the counterclaim.

16. On this question it was essentially a case of word against word between these two people. In such a case a trial judge often has the advantage of seeing and hearing each party give evidence, and that can often be a very powerful, if not decisive, aid in deciding credibility.

17. The trial judge recognised that with the passage of time his recollection of impressions he may have formed at trial about the witnesses could be very unreliable. The trial judge said at paragraph 10 of his judgment:

> "*In considering the respective cases of the parties each party has set out why I should accept their versions of events both in the evidence called and in the submissions made by them. I consider that my assessment of the respective credibility of each party's versions of events should be based on the relevant documentation and the inferences available from it alone. Given the length of time that has passed with respect to the pivotal events in this case (1990 – 2000), I do not propose to rely upon any "impression" a witness may have left on me when giving evidence*".

18. In considering a case where delay is raised as a ground of appeal Arden LJ in the Court of Appeal in Bond v. Dunster Properties Ltd [2011] All ER (D) 248, posed the appropriate test for the appellate court in these terms:

> *"As in any appeal on fact, the court has to ask whether the judge was plainly wrong. This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. However there is an additional test in the case of a seriously delayed judgment. If the review court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed".*

19. We find that to be a helpful guide. Here, it is not a case of there being diminished importance in the circumstances of special advantage in interpreting the evidence. Rather the judge notes that through the passage of time the special advantage has been altogether lost. Even if that loss had not been so frankly acknowledged, we think it is inevitable that after a delay of about 10 years a court would assume in favour of the appellant such a likelihood. In these circumstances we consider there would need to be very strong evidence independent of the assertions of the witness whose case is accepted to support the judgment. Sometimes even the probabilities of the case being advanced might provide additional support to one side or the other. The ultimate test must be whether the Court of Appeal is satisfied that the result reached is safe in the sense that the judge came to the right conclusion.

20. The essential conflict in the oral evidence here was between the appellant Mrs. Wong and the respondent Mrs. Hue. Mrs. Hue said that through hard work, the sale of assets and trading on the black market she and her family were able to accumulate US$450,000 in Vietnam. That sum was then smuggled into Australia in US$100 notes. This money was given to Mrs. Wong in Sydney, and then smuggled in money belts by Mrs. Wong and two family members out of Australia and into Vanuatu. Mrs. Wong however denied all this, saying Mrs. Hue and her family were very poor in Vietnam, there was no transfer of money in Sydney, and she never received a lump sum of money from Mrs. Hue.

21. This conflict was resolved by the trial judge relying essentially on his interpretation of a letter written by Mr. Simpson, the manager of the Santo branch of the Westpac Bank, but the judge acknowledged that the documentary evidence at trial did not point all one way. Mr. Simpson did not give evidence.

His letter was admitted into evidence as a business record. The letter was written to the immigration authorities to support Mrs. Hue's application for residency. The letter said that Mrs. Hue and her family had assets in excessive VT60 million in Vanuatu (this sum equated to about US$450,000). The appellants said about this letter that it was written at Mrs. Wong's request to support Mrs. Hue's application, but the assets referred to were really those of the family generally and in so far as the letter implied that the assets were those of the respondents the letter was a lie. The trial judge considered it was unlikely the letter was a fraud, and he treated Mrs. Wong's assertion that the letter was a lie as damaging to her credit.

22. The trial judge also considered evidence about an improvement in Mrs. Wong's circumstances in the years after the alleged payment to her of US$450,000. He considered that provided some but not strong evidence supporting Mrs. Hue's evidence that the disputed payment had been invested to the advantage of Mrs. Wong. And further, the fact that the Port Vila New Look Shop licences were in Mrs. Hue's name was also supportive of her evidence.

23. The trial judge considered that Mrs. Wong's case rested on the series of lies; lies about Mr. Simpson's letter, lies to the immigration authorities on behalf of Mrs. Hue and about who owned the New Look Store in Port Vila.

24. Whilst the evidence about the shop licences and the turnaround in the appellant's fortunes did provide a measure of support for the appellant's case, the strongest evidence relied on by the trial judge was inferences he drew from Mr. Simpson's letter.

25. Regrettably that letter is not in the appeal papers. It seems it was lost when the court file was destroyed, and that the trial judge was guided to his conclusion not from his own inspection of the letter but from submissions about the letter made by counsel. Those submissions say the letter included the statement "*from our records, we confirm Tru Thi Hue and her family hold assets to a value in excess of VT60 million in Vanuatu*". Whether the letter gave more detail is not known. Evidence was given by another Westpac officer who said that there were no banking records of a deposit confirming a cash holding in the vicinity of VT60 million. The appellants now contend that the proper interpretation of the letter is that the assets referred to were those of the wider family including the assets of the appellants and as such the letter does not support the inferences drawn by the trial judge. The appellants also point out that the Mr. Simpson's letter was apparently dated 15th June 1993 but Mrs. Wong did not return from Sydney where she had met Mr. Hue until July 1993, so if she smuggled the money back, as Mrs. Hue says, it could not have been in Vanuatu when the letter was written.

26. We consider that in the absence of the letter, the inferences drawn by the trial judge must be considered uncertain, especially as the banking records do not show cash assets at the bank consistent with the receipt of US$450,000.

27. Moreover there is an improbability about the movement of the sum of US$450,000 which was not considered by the trial judge. The evidence of the Westpac officer who did give evidence is that this sum, in US$100 notes, would be a pile of about one metre high weighing ten kilograms. That this could be smuggled between countries in money belts by three people in one trip does seem very improbable.

28. After considering the evidentiary material that was available to the trial judge when the judgment was prepared, and without him having any special assistance from his recollection of the oral evidence, we are not satisfied that the conclusion reached by him is safe. In our view for this reason an appeal against the judgment must succeed.

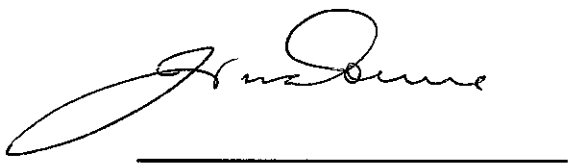
29. Leave to appeal should therefore be granted, and the appeal itself should be allowed.

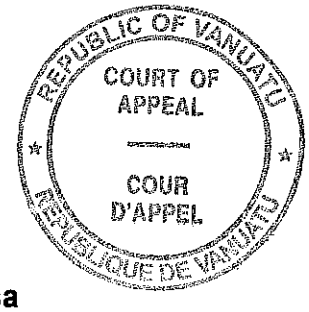
30. The orders of the Court are:

    (1) Leave to appeal out of time granted;
    (2) The substantive appeal is allowed;
    (3) The judgment in the court below is set aside;
    (4) The matter is returned to the Supreme Court for re-trial;
    (5) The respondents must pay the costs of the appellants in this Court to be agreed or taxed on the standard basis.

DATED at Port Vila, this 21st day of July, 2017

BY THE COURT





Hon. Justice John von Doussa