IN THE COURT OF APPEAL **Civil Appeal**
OF THE REPUBLIC OF VANUATU **Case No. 17/2321 CoA/CIVA**
(Appellate Jurisdiction)

BETWEEN: MATHEW ERCEG & ISLAND AIR LIMITED

Appellants

AND: SARATOGA LIMITED AND CHRISTINE BOLAND

Respondents

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: ***Mr Dane Thornburgh for Appellants***
Mr Mark Hurley for Respondents

Date of Hearing: ***8th November 2017***
Date of Judgment: ***17th November 2017***

JUDGMENT

Introduction

1. On 17 June 2017 the Supreme Court was due to hear two applications by the Respondents that part of a previous consent order by the parties be amended and that the Appellant's defence and counter-claim be struck out.

2. The day before the hearing the appellants filed an application for adjournment of the 17 June hearing because Mr Erceg was in hospital in Australia.

3. The Judge refused the application for the adjournment and then proceeded to hear the two applications which he granted.

4. The appellants filed appeals challenging the decisions to refuse the adjournment, to amend the consent order and to strike out the defence and counterclaim. Leave was not sought to file these appeals although at least the refusal to grant the adjournment and the application to amend the consent order were proposed appeals from interlocutory orders (R.21).

5. The appellants made application for leave in their submissions filed in support of the appeal should that be necessary. We see no reason not to grant the application and we do so.

Appeal against refusal to grant Adjournment

6. We first consider the challenge to the refusal to grant the adjournment. The appellants filed an application to have sworn evidence admitted at this appeal. Sworn statements were provided which identified the evidence which could be given of the adjournment. The application to adduce further evidence relates directly to the adjournment application and we will therefore consider that application in the course of this challenge.

7. On 30 May 2017 Mr Erceg was involved in an accident and was injured. On 2 June he was sent to Australia for further medical treatment. On 14 June three

days before the hearing counsel for Mr Erceg, by letter, told the Court and counsel for the respondents about Mr Erceg's hospitalization and that an adjournment application would be made. On 15 June Mr Thornburgh filed a sworn statement in support of the adjournment. On 17 October the application for adjournment was made based on the fact that counsel could not get instructions from Mr Erceg on the outstanding matters relating to the case.

8. On 17 October 2016 the Supreme Court had made a wasted costs order against the appellants of VT10,000 to be paid by 31 October 2016. No payment had been made by the appellants by 17 June 2017. On 15 December 2016 the Supreme Court made an order that both parties file their list of documents by 21 January 2017. The appellants failed to comply and the appellants asked the Supreme Court, on 13 February, to extend time for compliance to 20 February 2017. There was still no compliance by 20 February.

9. On 25 April 2017 the respondents sought orders that the appellants show cause why their defence and counter-claim should not be struck out. The appellant's did not file any documents in response. In Mr Thornburgh's sworn statement in support of the adjournment application he said he had expected to complete the list of documents outstanding on 5 June when he had an appointment with Mr Erceg and receive instructions then on the application to strike out. Mr Erceg did not attend an appointment with Mr Thornburgh on 5 June. Sometime later he found out about Mr Erceg's accident and evacuation.

10. The evidence that Mr Erceg now wishes to file relating to the adjournment application confirms he suffered the accident on 30 May and was sent to Australia for medical treatment on 2 June 2017 and had not contacted Mr Thornburgh until sometime after 17 June.

11. We do not consider this proposed evidence takes the appellants' case any further. Counsel for the appellants' submission was that the Judge, in his reasons for refusing the adjournment, said there was no evidence before the Court of Mr Erceg's medical condition and this was a reason why he had refused the adjournment. Counsel submitted the evidence proposed to be given before this Court had not been available at the time of the adjournment and so the Judge had incorrectly taken this failure into account. Mr Erceg was in the hospital and unable to communicate at the time of the hearing. The proposed evidence now established Mr Erceg's incapacity.

12. We are satisfied that at the time of the application for adjournment the Judge knew Mr Erceg was in hospital in Australia. He was told that by counsel for both parties. In his reasons for refusing the adjournment the Judge remarked that he would have expected a medical certificate from Vanuatu relating to Mr Erceg, and as a courtesy, for his counsel to have notified opposing counsel and the Court of the application for adjournment much earlier.

13. In Mr Thornburgh's sworn statement of 15 June in support of the application for adjournment he made clear he had been told before the hearing that Mr Erceg had been in the care of Dr King in Vanuatu before evacuation. This comment was no doubt the source of the trial Judge's observation about a medical certificate from Vanuatu. In the circumstances the Judge's comment was justified. However the Judge's refusal to grant the adjournment was based on other grounds.

14. The Judge in the Supreme Court said that the application for adjournment was silent as to why the appellant had not complied with orders of the Court from

earlier in the year. Given Mr Erceg's failure to comply with court orders a further delay by an adjournment could not be justified.

15. We have said many times in this jurisdiction that the decision to grant or refuse an adjournment is a discretionary one. This Court will not interfere unless it can be shown the decision is clearly wrong, or some irrelevant matters had been taken into account or there had been a failure to take into account relevant matters.

16. The appellant has not satisfied us any of these grounds exist here to justify interference with the Judge's discretion. In the circumstances of this case there were ample grounds to refuse the adjournment given the repetitive failures to comply with court orders by the Appellants.

Consent amendment

17. The second ground of appeal relates to the Judge's amendment of a consent order. The respondents asked the Court to amend the consent orders so that the respondents could sell the Cessna plane (the subject matter of these proceedings) because its condition and value were deteriorating. The proceeds would be held in trust until the litigation was resolved.

18. In his pleadings the appellant had variously claimed that the engine in the plane belonged to him or that he was entitled to damages for the value of the engine. When submissions began before this Court counsel for Mr Erceg said his client opposed the sale order because he was the owner of the engine. After discussion, counsel for Mr Erceg accepted that his claim was for damages for

the value of the engine. He abandoned his claim of ownership of the engine. He therefore withdrew his appeal against the amendment of the consent order.

Strike out Application

19. The respondents sought an order under R 18.11(2) that the appellants defence and counter-claim be struck out because they had failed to comply with two Court orders; a wasted costs order and an order to file a list of documents.

20. In his decision the Judge noted the appellants had not filed any direct response to the strike out application. The appellants' case was essentially set out in Mr Thornburgh's affidavit filed two days before the hearing that he had partially prepared the list of documents and was expecting Mr Erceg to give instructions to complete the document when he was injured.

21. The Supreme Court Judge set out the circumstances which gave rise to the wasted costs order and the requirements to file the list of documents. Given the circumstances of delay and failure to comply the Judge concluded the appellants had not shown cause why their defence and counter-claim should not be struck out.

22. Mr Thornburgh's submission was that it was only Mr Erceg's accident which prevented him filing his list of documents before the hearing of 17 June. The Judge had therefore been wrong not to give Mr Erceg a further 14 days to file his list of documents.

23. On 15 December 2016 the Court ordered both parties to file their list of documents by 27 January 2017. The appellants did not comply. On 13 February they sought a seven day extension until 20 February for compliance, granted by the Judge. The appellants did not comply. The appellants have given no reason why the wasted costs order remains unpaid either in the sworn statement of 15 June or in their submissions in the Supreme Court or before us.

24. On 25 April the respondents filed the R 18.11 application. The application to show cause was given a return date for hearing of 2 May. The appellants did not respond. The respondents would have been entitled to proceed on 2 May to seek striking out orders. This was weeks before Mr Erceg suffered his accident. As it happened the Court could not hear the application on 2 May and adjourned the hearing until 17 June.

25. Although it was said in Mr Thornburgh's sworn statement a draft list of documents had been prepared, no such draft was produced to the Supreme Court on 17 June nor to this Court. No payment of the wasted costs order has ever been made.

26. This case has some similarities to Traverso v Mera [2016] VUSC 118 and VUCA 51. In that case this Court confirmed an order striking out a claim given the failure of the Claimant to file evidence ordered by the Court and an unpaid wasted costs order.

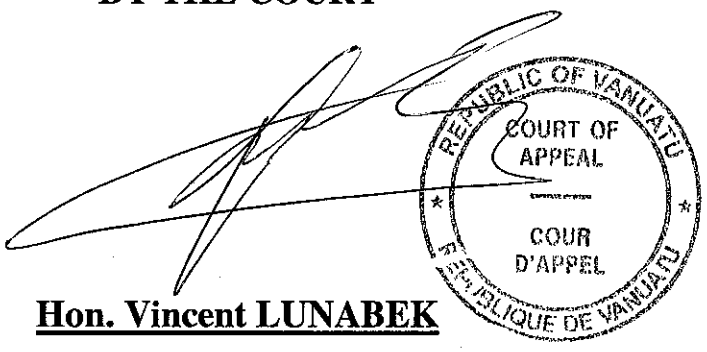
27. We are satisfied that the Judge made no error in his exercise of his discretion to strike out the statement of defence and counterclaim. Our description of the events in this case illustrates a strong case for strike out.

28. For the reasons given the appeal will be dismissed.

29. The appellants will pay standard costs to the respondents.

DATED at Port Vila this 17th day of November, 2017.

BY THE COURT



Hon. Vincent LUNABEK

Chief Justice