

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

**Civil Appeal**  
**Case No. 19/3371 CoA/CIVA**

**BETWEEN: RON NEWMAN**  
Appellant

**AND: GEORGE LEUNG AH TONG**  
First Respondent

**AND: MOUMOU AH TONG**  
Second Respondent

***Date of Hearing:*** 17 February 2020

***Before:*** Chief Justice V. Lunabek  
Justice J.W. Hansen  
Justice R. C. White  
Justice O. Saksak  
Justice D. Aru  
Justice V. M. Trief

***In Attendance:*** Appellant in person  
Mr J C Malcolm for the Respondents

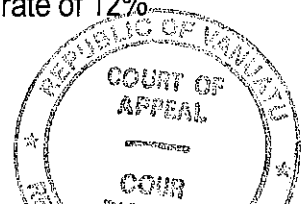
***Date of Decision:*** 19 February 2020

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**JUDGMENT**

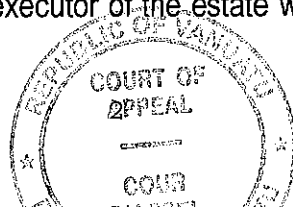
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1. This appeal is against orders of the Supreme Court which had the effect of terminating summarily an action commenced in 2007 concerning the recovery of a loan said to have been made in 1978.
2. In order to understand the issues which arise, it is necessary to set out some history.
3. In the action in the Supreme Court, the appellant claimed VT15 billion which he says is the modern day equivalent of a loan of 1,249,151 francs at an interest rate of 12%



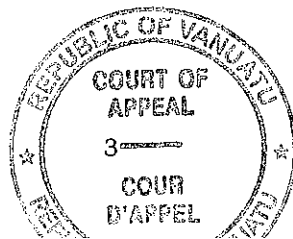
which he claimed his late father, Oscar Newman, made to the respondents in September 1978. He claimed that the loan was never repaid. Oscar Newman died in 1979.

4. There is a dispute as to whether the claimed loan was ever made, as the respondents contend that all Oscar Newman did was guarantee a loan made by the Banque Indosuez to the first respondent and that that loan was repaid without the guarantee ever being called upon. However, for the purposes of this appeal that issue can be put to one side.
5. In 2007, the respondents sought the summary dismissal of the action on the basis that it was frivolous or vexatious and did not disclose a reasonable cause of action. The respondents contended, first, that because the appellant was not the legal personal representative of his late father, he did not have legal standing to bring the action. Secondly, they contended that the claim was time-barred as it had been commenced well after the expiration of the 6 year limitation period.
6. Justice Tuohy refused the application for summary judgment: *Newman v Ah Tong* [2007] VUSC 102. Although His Lordship accepted that the appellant did not have legal standing to bring the action, he thought it possible that the appellant may be able to correct that position if the trustees of the father's estate relinquished that office or agreed in some other lawful way to the appellant bringing the action and allowed the appellant to be appointed in their place.
7. Justice Tuohy noted that Section 3(1) of the Limitation Act fixes a period of six years for the bringing of actions to enforce a contract, and that that period applied to the appellant's claim. If the six year period commenced in 1978, it had expired in 1984, well before the appellant commenced his action in 2007. However, Tuohy J considered it possible that a payment alleged to have been made by the first respondent in 2005 could be regarded as an acknowledgment of liability. If so, s.11(3) of the Limitation Act would apply and would have the effect that the six year period commenced from the time of payment in 2005.
8. Having regard to these matters, Tuohy J ordered a stay of proceedings until further order. He indicated, however, that the stay order could be lifted if the appellant could demonstrate that he had become the authorised legal personal representative of his late father's estate, or if the executor of the estate wished to be substituted as the

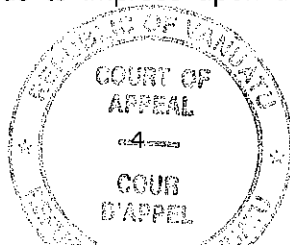


claimant. The judge pointed out that, in either event, it would be necessary for an amended claim to be filed indicating when the cause of action arose.

9. In the 12 years after the ruling of Tuohy J on 13 November 2007, the appellant took only limited action to pursue the matter. On 18 March 2013, Edwin Newman provided a sworn statement in which he deposed that he and his brother Alex Newman had been joint trustees of Oscar Newman's estate until Alex's death. He said that he was continuing as the sole trustee. Edwin Newman deposed that, because he was not a resident in Vanuatu, the dispute with the first respondent "has been left with Ron Newman, Allan Newman, Brian Newman and Rona Newman" to act on behalf of the remaining ten family members.
10. But apart from Mr Napuati, Mr Thornburgh and Mr Tevi informing the Supreme Court on 25 May 2015, 17 October 2017 and 28 September 2018 respectively that they were now acting for the appellant, no further steps were taken to prosecute the action until 9 August 2019. On that day Mr Tevi filed on behalf of the appellant an application for orders setting aside the stay order of 13 November 2007 and granting leave to the appellant to file an amended Supreme Court claim. That application was supported by a sworn statement of the appellant's sister, Rona Newman, and by Mr Tevi himself.
11. The primary judge acceded to the application to lift the stay but refused to grant leave to amend the claim. The judge considered that the appellant still lacked legal standing to bring the claim and that the claim was, in any event, time-barred. His Lordship indicated that the 2007 action was dismissed by saying that the file was now closed.
12. The appellant brings the present appeal against the second and third of these orders.
13. At the Call-Over of the appeal cases on 10 February 2020, the appellant did not have legal representation. The Court then deferred the hearing of the appeal until 17 February so as to give him the opportunity to seek representation or other assistance with his appeal. However, on 17 February the appellant was still without legal representation. He made submissions on his own behalf with the assistance of an interpreter. The appellant was also permitted to have a friend, Mr Samuel Bule, make some submissions in support.



14. The appellant's notice of appeal indicated only that he sought orders that the appeal be allowed and the case referred back to the Supreme Court for determination. It did not contain any grounds of appeal, let alone indicate the basis on which the decision of the Judge could be said to be affected by error.
15. The appellant made the following submissions in support of his appeal:
- (a) His father did lend monies to the respondents and they had not been repaid. He has witnesses to the making of the loan. Moreover, he has witnesses that his father was concerned when he made his will to ensure that the loan would be repaid. For this reason he had the first respondent as one of the witnesses to the making of his will;
  - (b) Mr Samuel Bule would confirm the making of the loan as he had been present at that time and was also one of the witnesses to the father's will;
  - (c) As the loan has not been repaid , it would be just for him to be permitted to pursue the action against the respondents;
  - (d) In 2011, his brother Edwin had given him a "power of attorney" which authorised him to pursue the claim against the respondents. This document gave him the necessary legal standing;
  - (e) The Limitation Act did not apply to his claim as it was enacted only after the loan had been made;
  - (f) He should be entitled to interest on the loan at the agreed rate of 12%.
16. Mr Bule confirmed that he had been present when a "loan document" between the late Oscar Newman and the first respondent had been signed. He also said that he had spoken to the first respondent about the loan.
17. It is very evident that the appellant has a strong sense of grievance resulting from his belief that the respondents have not made the repayment for which he says they are obliged. He was anxious to impress upon the Court the injustice which he believes has occurred.



18. However, it is not for this Court on this appeal to decide whether or not there was a loan and, if so, whether it has been repaid. These are matters which could only be determined at a trial at which both parties could adduce evidence. The question for this Court is whether the primary judge was in error when he made the orders which have the effect of precluding such a trial.
19. As Tuohy J explained to the appellant in 2007, there can only be such a trial if the appellant has legal standing to bring the claim and the action is not time-barred. As the Supreme Court file does not contain any document described as "*Power of Attorney*", we invited the appellant to provide a copy of the document on which he relied. He did so on the following day (18 February). The substance of the document is as follows:

"To whom this may concern,

This letter certifies that

I, Edwin Frank Newman am the remaining trustee of Late Oscar Newman's estate. My brother, Alex Newman and I were joint trustees until his death a few years ago and this leaves me as the sole trustee.

Monies have been outstanding from Mr George Leung Ah Tong since the late seventies and has never been repaid to the Newman Family.

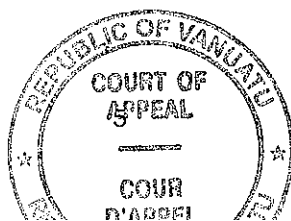
I gave a written authority to Ron Newman in late December 2005 but according to a letter from him (Ron) indicated that the letter was considered a forgery. .... Again in March 2008 I also gave authority to Rona Newman to act on behalf of the Newman Family .....

As I do not reside in Vanuatu the dispute with Mr George Leung Ah Tong has been left with both Ron Newman and Rona Newman to act on behalf of all the remaining family members listed below here: [there followed 12 names].

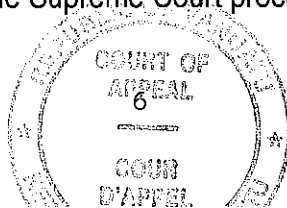
I trust this to be in order.

Yours truly,  
(signed)  
Edwin Frank Newman  
10<sup>th</sup> April 2011."

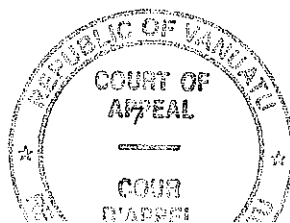
20. Edwin Newman's signature was witnessed by a Justice of the Peace.



21. As is apparent, this document is expressed informally but, for the purposes of this appeal, we are willing to accept that it may be described as a "Power of Attorney".
22. However, for a number of reasons, we are not satisfied that the power of attorney gave the appellant the legal standing required in order to bring the 2007 action.
23. As the surviving executor of the estate of the late Oscar Newman, the power of Edwin Newman to delegate to the appellant the exercise of his powers is contained in, and regulated by, s.25 of the *Trustee Act 1925 (UK)*. That law applies by virtue of Article 95(2) of the Constitution as the Vanuatu Parliament has not yet enacted its own trustee legislation. S.25(1) authorised a trustee, by power of attorney, to delegate the exercise of "all or any of the trusts, powers and discretions" vested in the trustee. However, the following provisions in s.25 regulate both the manner in which the delegation may be made and its duration. Section 25(2) provides that a delegation cannot continue for a period beyond 12 months. Sub-section (5) provides for the form of the power of attorney and makes provision for the costs which may be incurred by the delegate in the execution of the power of attorney.
24. The power of attorney granted by Edwin Newman on 11 April 2011 did not follow the form specified in s.25(6) and made no mention at all of the costs which will be incurred in the exercise of the delegation. However, that aspect can be put to one side because, at best for the appellant, s.25(2) has the effect that the power of attorney expired twelve months after it was created, that is, on 11 April 2012. That meant that it was not open to the appellant to seek to rely on that power of attorney at any time thereafter.
25. There are other difficulties for the appellant with the power of attorney. One is that it grants the power of attorney to both the appellant and his sister Rona Newman. That means that it is necessary for them to act jointly, whereas in the action in the Supreme Court, the appellant was acting individually.
26. The intention of Edwin Newman to grant the power jointly to the appellant and Rona Newman is confirmed by an earlier authority he had provided dated 4 March 2008. Rona Newman annexed a copy of that authority to the sworn statement which she provided in support of the application made on 9 August 2019. However, somewhat confusingly, Rona also deposed that she was the one who had been authorised by Edwin to represent him in the Supreme Court proceeding.



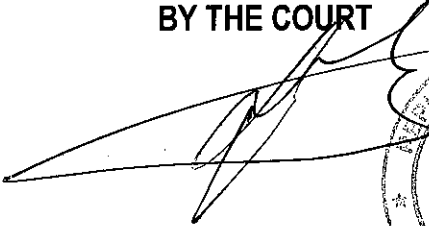
27. Another difficulty is that the power of attorney authorises the appellant and his sister to act only on behalf of the "remaining family members". It does not authorise them to act on behalf of the estate or on behalf of all the beneficiaries under the Will of the late Oscar Newman.
28. Finally, being dated in 2011, the power of attorney did not authorise the proceeding which the appellant commenced on 10 April 2007.
29. In short, the power of attorney on which the appellant relies does not give him legal standing to commence or pursue the proceeding in the Supreme Court on behalf of the estate.
30. Quite apart from this fundamental difficulty, the appellant faces the further difficulty that, even if he did have proper authority, the only claim which he can bring to enforce repayment of the debt is a claim on behalf of the estate and for the benefit of the estate. The proceedings which he commenced in 2007 were commenced by him in his personal capacity. Mr Tevi, the appellant's former solicitor, recognised this in a sworn statement which he provided in support of the application of 9 August 2019 when he deposed "*the original Claimant is not the appropriate person to file a case in which the nature (sic) involves distribution of property under the authority of a Court appointed executor*".
31. Quite apart from the issues concerning the appellant's legal standing to bring the claim, there is the time limitation problem. As already noted, the appellant sought to avoid that problem by submitting that the Limitation Act did not apply in this case because it had been enacted in 1991, after the loan had been made by his father. There are a number of reasons why this submission cannot succeed. First, before the enactment of the Limitation Act in 1991, the limitation legislation of the United Kingdom applied to this claim and it contained a provision to similar effect to s.3 of the Limitation Act.
32. In any event, limitation legislation in at least some jurisdictions is regarded as being procedural in effect and so as not interfering with substantive rights. That being so, the common law presumption against legislation having retrospective effect is inapplicable: *Maxwell v Murphy* (1957) 96 CLR 261.



33. We accept that there may be circumstances in which a court may order that an amendment to proceedings take effect from an antecedent date. There are a number of well-developed principles concerning the exercise of the discretion to do so. For the purposes of disposition of this appeal, we do not consider it necessary to refer to those principles. They were not addressed by either party and there may be some complex issues concerning their application in the present case.
34. There is a stark feature of this case which makes it highly improbable that, even if the appellant did have a lawful authority, a proper exercise of the discretion by the Supreme Court would be to order that any amendment or joinder of parties have retrospective effect. That is the very long unexplained delay by the appellant since the judgment of Tuohy J in 2007. As the history reviewed above indicates, some 12 years have lapsed without the appellant doing anything to pursue the matter. No explanation was provided to the primary judge for the inactivity. This is in addition to the fact that it is now 42 years since the claimed loan was made.
35. We are satisfied that in those circumstances a proper exercise of the discretion could not result in it being exercised in favour of the appellant. He has to bear the consequences of his own inactivity.
36. For these reasons we are satisfied that the judge's decision to refuse the grant of leave to amend the proceeding has not been shown to be an error. Moreover, the judge did not err in making the order he did for the dismissal of the proceedings.
37. Accordingly, the appeal is dismissed.
38. As the respondents indicated that they do not seek an order for costs, there will be no order as to costs.

**Dated at Port Vila this 19<sup>th</sup> day of February 2020**

**BY THE COURT**

  
.....  
**Chief Justice V. Lunabek**

