

BETWEEN: PAUL HOCTEN
Appellant

AND: JIN MING WANG
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Oliver Saksak
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru
Hon. Justice Gus Andree Wiltens

Counsel: Mr Leon Malantugun for appellant
Ms Stephanie Mahuk for respondent

Date of Hearing: 16th November 2021

Date of Judgment: 19th November 2021

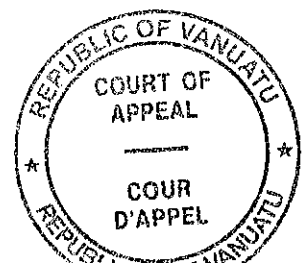
JUDGMENT

Introduction

1. This is an appeal against a decision of the Supreme Court dated 24th September 2021 dismissing the appellant's application for summary judgment, and striking out the appellant's Claim in Civil Case 21/642.

Background

2. The appellant filed his claim in the Supreme Court on 7th April 2021, claiming a refund of Two Hundred Million vatu (VT 200,000,000) which he claims he made by way of deposit towards the purchase of the respondent's property and business known as the Golden Port Hotel and Restaurant at No.2 Area in Port Vila.
3. The respondent filed a defence on 24th March 2021 alleging that there had been discussions between the parties relating to the sale of the Golden Port. However, the respondent denied entering into any contract with the appellant.



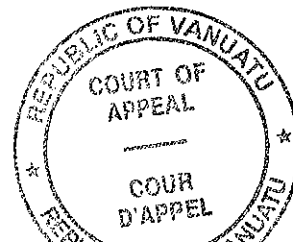
4. The appellant filed an application seeking summary judgment. In addition, the appellant filed an application to amend the claim. The respondent, on the other hand, filed an application seeking to strike out the Claim.

Decision By the Supreme Court

5. The three applications were heard together on 24th September 2021. The primary judge found the defence raised disputed questions of fact to be determined at trial and dismissed the application for summary judgment. There is no appeal against that.
6. The primary judge summarised the respondent's strike out grounds as being that the claim was fabricated and an abuse of process due to:
 - a) *"The evidence is compelling that on the occasions that Mr Hocten purportedly paid VT 200,000,000, he was not in possession or control of such amount,*
 - b) *That there was no contract on foot,*
 - c) *The motivation for the claim is that Mr Hocten is alarmingly indebted to Mr Wang for goods and services obtained from Mr Wang on credit with promises of couching his debt with a promise to purchase the "Golden Port" business and restaurant, however Mr Hocten is unable to service these debts, and*
 - d) *The invoices and receipts relied on by Mr Hocten are demonstrably false."*
7. The primary judge's key finding was that there had to be a written contract for the sale and purchase of real property, and there was none pleaded. Further in submissions it was conceded that there was no written contract. In those circumstances the primary judge considered that there was no cause of action disclosed in the claim.
8. Having struck out the claim, the judge decided that she did not need to go on and consider the application to amend the statement of claim.
9. The appellant sought leave to appeal from the primary judge's decision, which was refused

The Appeal

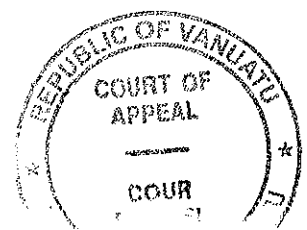
10. The appellant appealed against the strike out decision on the following grounds:
 - a) That the Judge erred in holding the appellant did not have possession and control of VT 200,000,000 and that payments were made, in light of the overwhelming evidence to the contrary (Grounds 1 and 2).
 - b) That the Judge erred in not finding that the respondent had unjustly enriched himself by receiving the deposits (Grounds 3 and 4).



- c) That the Judge erred in not hearing the application for leave to amend the Claim (Ground 5).
- d) That the Judge erred in not applying the principles established by the Court of Appeal in the authorities of *Bokissa Investments Ltd v RACE Services Ltd (in Liquidation)* [2003] VUCA 22 and *Noel v Champagne Beach Working Committee* [2006] VUCA 18.
- e) That the Judge erred in failing to find it just and equitable to set the matter down for trial and in declining the application for summary judgment.

Discussion

11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims, causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was recognised by this Court in *Noel v Champagne Beach Working Committee* [2006] VUCA 18.
12. The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and *McNeely v Vaai* [2019 WSCA 12]. A pleading will be struck out:
 - a) if there is no reasonably arguable cause of action;
 - b) the claim is frivolous or vexatious;
 - c) it is otherwise an abuse of the process of the court.
13. The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed.
14. The disputed questions of facts or law which the primary judge considered before dismissing the application for summary judgment and striking out the case were:
 - a) Whether or not the appellant had possession and control of VT 200,000,000?
 - b) Whether or not there was a contract on foot?
 - c) Whether or not there were outstanding debts by the appellant to the respondent? And



d) Whether or not the receipts issued were genuine?

15. In our assessment there were other possible causes of action.
16. The appellant submitted in the course of argument that the respondent had unjustly enriched himself by receiving the VT 200,000,000 claimed to have been paid by the appellant. We see possible merit in this claim.
17. On the face of it the appellant paid very large sums of money to the respondent. If he did so on the incorrect basis that there was in existence a contract to purchase the property and business, then he paid the money under mistake and may have a claim for money had and received.
18. However, the appellant's claim did not specifically plead this. This failure or omission may have required an amendment to the claim, but that is not fatal to it being considered as a possible successful basis of claim for the purposes of a strike out application and this appeal. Claims should only be struck out if even on the best pleadings possible following amendment the claim is not reasonably arguable.
19. Further, there were other arguments open to the appellant given the large sums that were ostensibly handed over. It may be that an estoppel arose, or that despite the lack of a written contract, none was required as there had been part performance. Consideration will also have to be given to pleading the claim on this basis.
20. We emphasise that we put these forward only as arguable claims, and we should not be thought to, in any way, find that they will be established. However, Mr Hocten should have the opportunity to plead them and have them determined at a trial. We emphasise that the existing pleadings are inadequate. If necessary, expert help should be sought to assist in the re-drafting process.
21. In our view the learned primary judge focussed only on the existence of an enforceable contract. It may well have been that before the Court no other possible causes of action were put forward. As we have set out, we are of the view that there are other arguable claims in relation to the money paid by the appellant to the respondent.
22. Therefore, in our view, the claim should not have been struck out. There are reasonably arguable causes of action. We do not consider them to be frivolous or vexatious, or likely to cause prejudice or delay, or as being an abuse of the process of the Court.

Conclusion

23. In the circumstances, for the reasons we have given, we are satisfied that the appellant's case is arguable and we grant leave to appeal.
24. For the same reasons, we allow the appeal and set aside the strike out order of the Court below.
25. The file is remitted back to the Supreme Court for case management and a hearing. The appellant should promptly seek to amend the Claim.



26. We reserve the issue of costs in the Supreme Court for that Court to consider when the proceedings are determined.
27. The appellant is entitled to his costs of the appeal, which we fix at VT 75.000, payable by the respondent within 21 days.

DATED at Port Vila this 19th day of November 2021

BY THE COURT

HON. VINCENT LUNABEK
Chief Justice

