

BETWEEN: DICK IAUKAS
Claimant

AND: THE GOVERNMENT OF REPUBLIC OF VANUATU
First Defendant

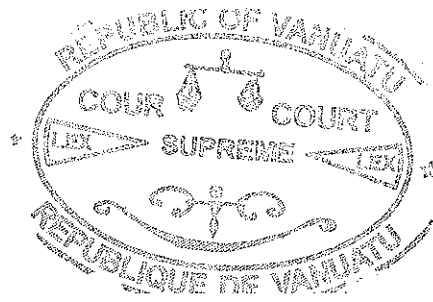
AND: URIEL LEO
Second Defendant

Corum: Vincent LunabeK CJ

Counsels: -The Public Solicitor for the Claimant
-The Solicitor General for the First and Second Respondents

JUDGMENT

1. On 27 March 2008, the court orally issued this judgment and its reasons in this proceeding. Below is the type version of the Judgment.
2. On 20 February 2007, the Supreme Court made Orders granting leave to the claimant to file his claim out of time. The reasons for the court judgment were published on 12 November 2007.
3. On 30 November 2007, the Court of Appeal in Civil Appeal case No.40 of 2007 quashed the Orders of the Supreme Court dated 20 February 2007 and remitted the case for reconsideration of the following issues:
 - (a) Whether pursuant to section 3 of the Limitation Act, the claimant's cause of action is subject to a 3 year or a 6 year limitation period?
 - (b) Is the claimant out of time in either case? If a 6 year limitation period applies, when this proceeding commenced, ie- 22 October 2003 or 24 January 2005?
4. The background facts are set out below:
 - On 25 January 1998, the claimant alleges he was assaulted by a Police Officer.
 - On 20 April 1998, 5 May 1998 and 31 May 2002, the claimant has his injuries assessed.



- On 16 August 2002, the claimant attended Dr McNamara whose medical report of that date confirmed the extent and permanency of the claimant's injuries.
 - On 22 October 2003, the claimant filed an application seeking leave to file a claim out of time together with a supporting sworn statement. The claimant did not have enough money to pay the filing fees and paid the fees in instalments.
5. On 12 December 2004, the Registry returned the documents to the claimant as the filing fees were not completed.
 6. On 22 December 2004, the claimant paid the balance of his claim's filing fee.
 7. On 24 January 2005, the Claimant filed a second application to file his Supreme Court claim out of time.

THE LAW

8. The following are relevant Provisions of the Limitation Act No.4 of 1991 [CAP 212]

PART 2 – PERIODS OF LIMITATION FOR DIFFERENT CLASSES OF ACTION

3. Limitation of actions of contract and tort and certain actions

(1) The following actions shall not be brought after the expiration of six years

from the date on which the cause of action accrued, that is to say –

(a) actions founded on simple contract or on tort;

(b) actions to enforce a recognizance;

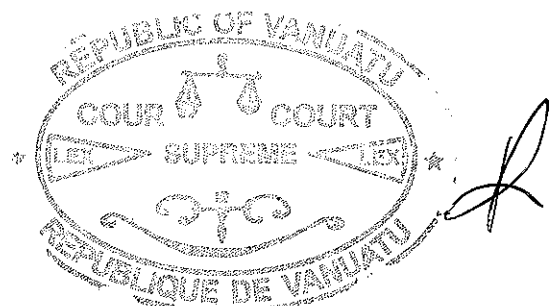
(c) actions to enforce an award, where the submissions is not by an instrument under seal;

(d) actions to recover any sum recoverable by virtue of any Act, other than a penalty or forfeiture or sum by way of penalty or forfeiture:

Provided that –

(i) in case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any contract or such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years; and

(ii) ...”[Emphasis Added]



15. Extension of time limit for actions in respect of personal injuries

(1) The provisions of subsection (1) of section 3 shall not afford any defence to an action to which this section applies, in so far as the action relates to any cause of action in respect of which –

- (a) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (b) the requirements of subsection (3) are fulfilled.

(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(3) The requirements of this subsection shall be fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –

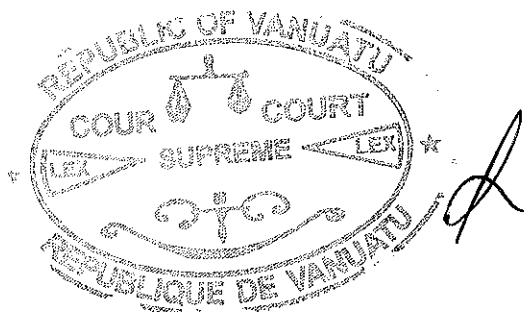
- (a) either was after the end of the three-year period relating to that cause of action or was not earlier than twelve months before the end of that period; and
- (b) in either case was a date not earlier than twelve months before the date on which the action was brought.

(4) For the purpose of subsection (3), reference to the three-year period relating to a cause of action means a reference to the period of three years from the date on which that cause of action accrued.

16. Application for leave of court.

(1) Any application for the leave of the court for the purposes of section 15 shall be made *ex parte*, except in so far as rules of court may otherwise provide in relation to applications which are made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of any relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –



(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court may grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence were adduced in that action, that evidence would, in the absence of any evidence to the contrary, be sufficient –

(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(b) to fulfil the requirements of subsection (3) of section 15 in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as, apart from the last preceding section, to afford a defence under subsection (1) of section 3.

(4) In this section, "relevant action", in relation to an application for the leave of the court, means any action in connection with which the leave sought by the application is required [Emphasis Added]

9. The following are the relevant provisions of the Civil Procedures Rules.

Overriding objective

1.2 (1) *The overriding objective of these Rules is to enable the courts to deal with cases justly.*

(2) *Dealing with cases justly includes, so far as is practicable:*

(a) *ensuring that all parties are on an equal footing; and*

(b) *saving expense; and*

(c) *dealing with the case in ways that are proportionate:*

(i) *to the importance of the case; and*

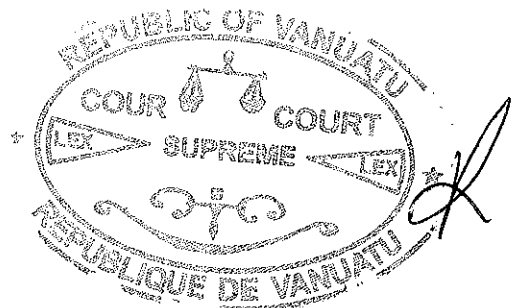
(ii) *to the complexity of the issues; and*

(iii) *to the amount of money involved; and*

(iv) *to the financial position of each party; and*

(d) *ensuring that the case is dealt with speedily and fairly; and*

(e) *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*



Courts to apply overriding objective

- a. The courts must give effect to the overriding objective when they:
- (a) do any act under these Rules; or
 - (b) interpret these Rules.

Duties of the parties

- b. The parties to a proceeding must help the court to act in accordance with the overriding objective.

Kinds of proceedings

2.1 These Rules provide for the following types of civil proceedings:

- (a) claims; and
- (b) applications made during a proceeding.

How to start a proceeding

2.2 A proceeding is started by filing a claim.

Where to start a proceeding - Supreme Court

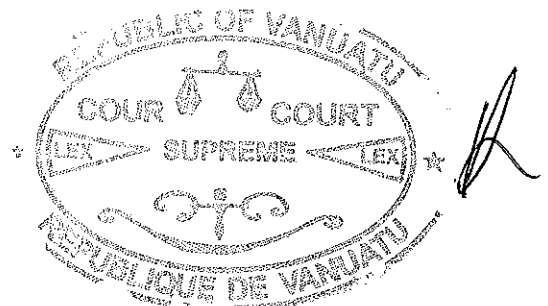
2.3 A proceeding in the Supreme Court is started by filing a claim in an office of the Supreme Court anywhere in Vanuatu.

Claim

- 4.3 (1) A claim must:
- (c) for the Supreme Court, be in Form 5; and
 - (e) have with it a Response Form.

Court fees

- 4.12 (1) The fees set out in Schedule 1 are payable.
- (2) However, if Vanuatu is a party to a Convention that provides that fees are not payable for particular proceedings, no fees are payable for those proceedings.
- (3) The following provisions apply to the payment of fees:
- (a) the fees are payable to an officer of the court; and
 - (b) a filing fee is payable at the time of filing; and



- (c) *if Schedule 1 fixes another time for paying another fee, the fee is payable at that time; and*
- (d) *for a filing fee, the officer must write the amount of the fee, and the date and time it was paid, on the document; and*

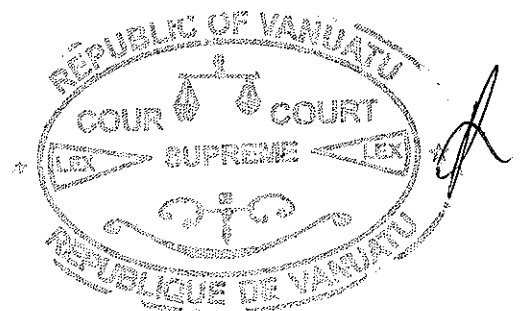
Times for filing documents

4.15 *If a claim is not served within the 3 month period required by rule 5.3:*

- (a) *the claimant may apply to the court to have the claim renewed; and*
- (b) *if the claimant does not do this, the claim ceases to be of any effect.*

APPLICATION OF LAW

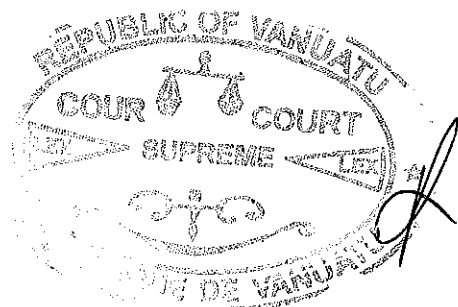
10. Applying the law to the facts, I shall now answer the two (2) questions posed in turn.
11. As to the first question:
 - (a) Wether pursuant to section 3 of the Limitation Act, the claimant's cause of action is subject to a 3 year or 6 year limitation period?
12. The claimant's counsel substantive part of his written submissions is concentrated on the existence of a duty and the breach of that duty by the Defendants. The claimant, thus, filed a claim for damages consequential to that breach of duty.
13. During the hearing, the court queries as to whether or not the breach of duty as a cause of action is pleaded the claimant's counsel concedes that the breach of duty is not pleaded in the claim for damages filed on 24 January 2005.
14. If the claim for damages is for breach of duty, then, that cause of action is under section 3 (1) (ii) of the Limitation Act of 1991.
15. The Defence Counsel, however, refers the court to Part 7 of the claim and submitted that the claim for damages, is a claim based on tort. It appears to be what it is in part 7 of the claim.
16. The claim for damages is a claim based on tort and as such it is subject to a 6 year period under section 3(1) (a). That is my answer to the first question.
17. The next question, then, is:
 - (b) Is the Claimant out of time in either case? If a 6 year limitation applies, when was this proceeding commenced, ie 22 October 2003 or 24 January 2005?
18. The critical question is when the proceeding was filed.



19. The claimant's counsel reminds this court on what the Court of Appeal stated in the Judgment in civil appeal case No. 40 of 2007 (at page 8 parag 3):

"The incident was on 27th January, 1998, and the first documents were filed on 22nd October 2003 which is within the 6 years period. But there was the problem about payment of the court fees and refiling of the documents did not occur until 24th January, 2005 which is more than 6 years after the event."

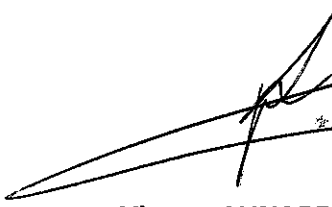
20. The claimant's counsel submits that the Application was filed on 22nd October 2003 and it is within 6 years period. Consequently, he submits that the claim filed on 22nd October 2003 is still valid and can be proceeded with and pursued in the Supreme Court for the reward of damages and compensation as sought by the claimant in this case.
21. The Solicitor General submits in response that the claimant's cause of actions accrued on 25 January 1998, being the date of the alleged assault.
22. He went on to submit that even if a 6 year limitation period applies, the claimant must have commenced proceedings by 25 January 2004.
23. He refers to Rule 2-2 of the Civil Procedure Rules. A proceeding (or action) is started by filing a claim. The court fees for filing a claim are payable at the time of filing the claim (Rule 4 – 12 (3) of the Rules).
24. He further submits that the claimant sought to file an application for leave to file a claim out of time on 22 October 2003, however, the required filing fees was not paid until 24 December 2004 because the application has expired.
25. The claimant filed a second application to file a statement of claim out of time on 24 January 2005.
26. The Solicitor General submits that even if a 6 years limitation period applies, the claimant is clearly out of time.
27. I agree and accept the submissions of the Solicitor General and dismiss the claimant's claim for the following reasons:
28. First, filing an application for leave to file a claim out of time does not amount to commencing the relevant action. Section 16(2) of the Limitation Act applies. As at 22 October 2003, and even as at 24 January 2005, the claimant had not filed a claim. The documents that were eventually filed by the claimant were an application to file a claim out of time and supporting sworn statement.



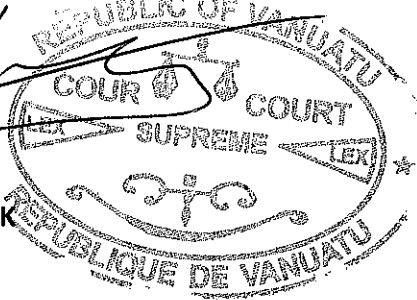
29. Second, the relevant filing fees were not paid until 24 December 2004. Accordingly, the application for leave to file a claim out of time was not filed until 24 December 2004, by which time it was determined to have expired. A fresh application was not filed until 24 January 2005. The payment of an action filing fees is an integral part of the filing of a claim.
30. Third, even if the claimant had lodged a claim with the registry on 22 October 2003, and even if lodging the claim with the registry without paying the required filing fees constituted filing a claim, the claimant did not serve the claim on the Defendants within 3 months of the date of filing the claim and accordingly it would have been of no effect (*see Rule 5.3 of the Rules*). There is no application to renew the claim pursuant to Rule 4.15.
31. These are the reasons of the judgment made by this court on 28 March 2008.

DATED at Port-Vila this 27 day of March 2008

BY THE COURT



Vincent LUNABEK
Chief Justice



The seal of the Supreme Court of Vanuatu is circular. It features the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "COURT SUPREME". There are decorative elements and a central emblem within the seal.