

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No.41 of 2008

BETWEEN: CYCLAMEN LIMITED

Claimant

AND: PORT VILA MUNICIPAL COUNCIL

First Defendant

AND: GEORGE VASARIS & CO.

Second Defendants

Coram: V. Lunabek CJ

**Counsel: Mr. Dane Thornburgh (then) of Geoffree Gee & Partners for
Claimant**

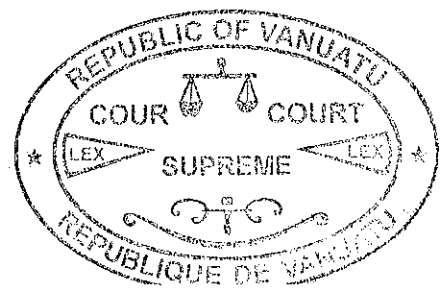
Mr. Ronald Warsal for First Defendant

Mr. Mark Hurley for Second Defendant

JUDGMENT

Introduction

1. Cyclamen Limited has issued proceedings against the Port Vila Municipal Council and Cyclamen's previous lawyer George Vasaris arising from difficulties which arose with respect to Cyclamen's development of a tourist resort in Port Vila. The PVMC and Mr. Vasaris have applied to strike out all claims against them.
2. This is another case where all the parties would have been significantly better off if they had simply proceeded to trial.

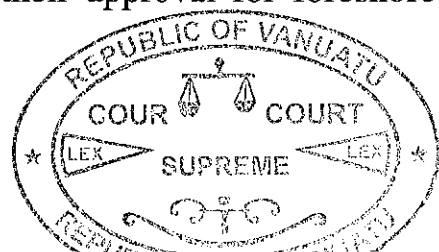


Background facts

3. Cyclamen was the lessee of a lease 048 in Captain Cook Avenue in Port Vila. In 2000 the Minister of Lands agreed to surrender the residential lease of this property and replace it with a commercial tourism lease to facilitate Cyclamen's proposed tourism development. The PVMC granted planning permission for the construction of a resort on the land in 2001. The work was to be completed within 2 years but with the right to apply to the PVMC for an extension of the building permit. There were subsequent Supreme Court proceedings by neighbours of the development which temporarily halted construction. Construction resumed in 2002. By February 2003 the two years to construct the building had expired without the completion of the first stage. In September 2003 the Minister of Lands advised Cyclamen it revoked the consent given to transfer the lease from residential to commercial/tourism. At this stage, the administration block part of stage one of the developments had been effectively completed. Cyclamen stopped work as directed.

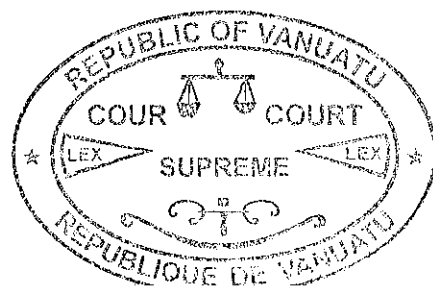
4. In early October 2003 Cyclamen re-opened the resort. It has considered that the commercial lease had been granted. However Cyclamen then received a notice from the PVMC advising it to cease all work. Cyclamen advised the PVMC that it proposed to challenge the lawfulness of this direction to stop work. In the meantime the Minister of Lands advised Cyclamen that there was still no commercial lease with respect to the property and by continuing to develop the property Cyclamen risked forfeiture of the whole of the lease.

5. After legal advice Cyclamen stopped work on the land. The PVMC then made an inspection of the property. They concluded that the work done by Cyclamen on the property was in breach of their approval for foreshore



development. Judicial review proceedings by Cyclamen followed relating to the PVMC report with respect to the foreshore development. Further the judicial review challenged the PVMC's notice to halt the building work.

6. By early 2004 the Minister of Lands agreed to a commercial lease for the property on particular terms. However no agreement could be reached on those terms. Further judicial review proceedings followed. The judicial review application was refused in the Supreme Court by Tuohy J. The Minister and Cyclamen then signed a commercial lease with effectively five of the original six conditions incorporated.
7. In his judgment Tuohy J declared (amongst other orders) that the PVMC's notice to Cyclamen on 14th October 2003 requiring Cyclamen to stop work on the property was ultra vires and unlawful. Further the judge said that the PVMC's requirement in that same letter that Cyclamen re-submit an application for a new permit for the whole development was wrong in law.
8. In January 2008 following this judgment, PVMC granted Cyclamen an extension of the building permit first requested on 1st October 2003.
9. Cyclamen says that the construction of the resort was therefore delayed by over 4 years from 2003 when the original order by the PVMC halting construction until 2008 when the decision by the PVMC was declared unlawful. It seeks damages from PVMC for this delay on the basis that the PVMC actions delaying the construction were unlawful.



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10. Cyclamen also submits that the legal advice given to them by the second defendants about halting construction was wrong and negligent. Similarly legal advice given by the second defendants to Cyclamen that Cyclamen should halt construction also turned out to be wrong and was negligently given.

11. In these proceedings therefore Cyclamen sues firstly the PVMC through an amended statement of claim of 14 May 2009 alleging:

- (a) A breach of statutory duty by the PVMC;
- (b) Misfeasance of public office by the PVMC;
- (c) Negligence by the PVMC.

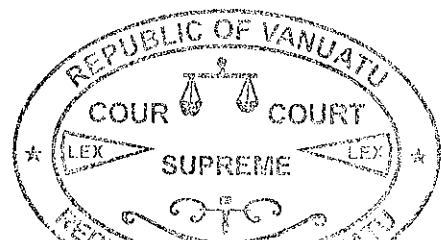
12. Secondly the second defendants are sued by Cyclamen alleging the legal advice given by the Second Defendants to Cyclamen as to the actions of PVMC in October 2003 was negligent.

13. Originally the pleadings alleged breaches of the Vanuatu Constitution by PVMC however that cause of action has now been abandoned.

14. Both defendants now apply to strike out all of the claims by Cyclamen against them.

The Strike out Applications

15. In summary the first defendant says that none of the three claims against them by Cyclamen discloses a reasonable cause of action. PVMC submits that it cannot be established that PVMC owed any statutory duty or any duty of care to Cyclamen or that the PVMC breached any such duties. As to the misfeasance of public office cause of action, the PVMC submits that



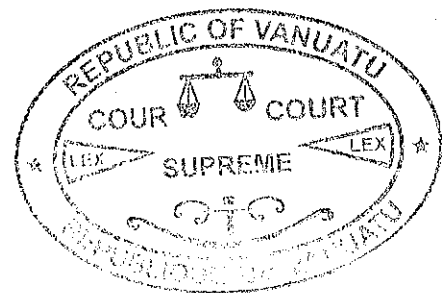
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Cyclamen's proceedings failed to show any fact from which bad faith, malice or recklessness (essential elements in misfeasance of public office) can be inferred.

16. In any event PVMC says that there is no connection between the pleadings that PVMC wrongly issued enforcement notices to stop construction and the subsequent loss claimed by Cyclamen.
17. The second defendants' application is based on the proposition that the claimant cannot establish any causal connection between the conduct of the second defendants complained of and Cyclamen's loss.

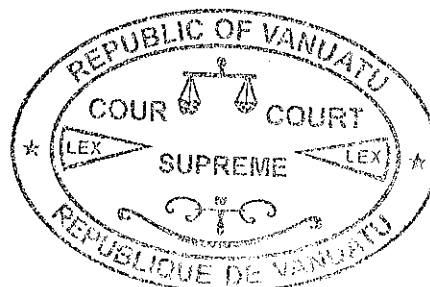
The Law and Submissions

18. It is common ground that this Court has jurisdiction to strike out a claim if no reasonable cause of action is revealed by the pleadings (or unable to be identified by reasonably amended pleadings).
19. It is also clear that this jurisdiction should be sparingly used. It is a significant matter to conclude that a claimant's claim is so defective that it should not have its day in court. On the other hand where a claim cannot possibly succeed fairness dictates a defendant should not be put to the unnecessary expense of a full contested hearing. A strike out application is not an occasion to determine disputed facts. Where disputed facts exist the claimant's view of the facts must be assumed correct.



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20. Some of the difficulties in this case arise from the fact that the amended statement of claim has been drafted by Mr. Hogarth a director of the claimant. While his efforts as a lay person are to be commended the pleadings still leave much to be desired. Further Mr. Hogarth's submissions filed in opposition to the strike out application do not provide significant assistance for the Court. Should this case proceed to trial the claimant as a company must be represented by a lawyer from the start to the end.
21. The claimant's first cause of action arises from the PVMC decision to issue a schedule 2 (of the Physical Planning Act [CAP. 193]) notice requiring all work to halt on Cyclamen's site and for Cyclamen to apply for a new permit for the work to be done. Cyclamen says in giving this direction the PVMC was acting in breach of a statutory duty. This breach they say was established by Tuohy J's conclusion in his 2008 judgment that PVMC was wrong to halt the work and wrong to require a new building permit. This action, Cyclamen says caused the four year delay complained of and resulted in loss of profits and additional expenses for Cyclamen.
22. This first cause of action has close parallels with the claimant's third cause of action alleging negligence by PVMC. Here Cyclamen alleges that in issuing its notice of 14 October 2003 the PVMC had a duty of care to Cyclamen as a lessee. Cyclamen claims the PVMC breached that duty of care when it negligently gave notice to Cyclamen to stop work on the property. Further Cyclamen says PVMC was negligent when it required a new permit to be obtained for the work when a renewal of the existing permit was all that was required.



23. The crucial point raised by PVMC in its application to strike out these proceedings is that it owed neither statutory duty nor a duty of care to Cyclamen in these circumstances. Therefore Cyclamen's claim cannot succeed.

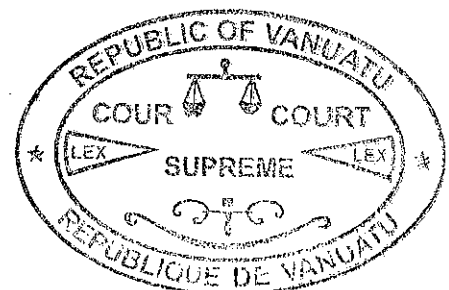
Discussions

24. I am satisfied that Cyclamen's claim for breach of statutory duty and negligence should be struck out. First as to breach of a statutory duty there are acknowledged to be four circumstances where a private law proceeding can be brought against a public body such as PVMC (see X (minor) v Bedfordshare C (1995) AER 355). They are:

- (a) Breach of statutory duty;
- (b) Carelessness in the performance of a statutory duty;
- (c) An action based on a duty of care arising from statutory duty;
- (d) Misfeasance of public office.

25. Grounds (a) to (c) above required the existence of an identified statutory duty by a public body to members of the public. A cause of action for a private citizen will arise where the statutory duty can be shown to have been imposed on a limited class of private citizens and that the statute intended to create a private cause of action for that breach.

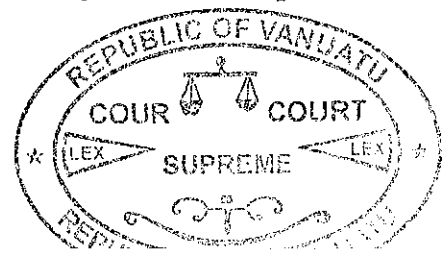
This right of action is not intended to be available where the public body is undertaking general administrative functions with administrative discretion involved.



26. I am satisfied that the two actions by the PVMC in October 2003 respectively; the notice to stop work because of the expiry of the time limit under the building permit and; the treatment of the application of an extension of the permit as a new permit, were administrative actions involving administrative discretion. The PVMC has rules which govern the construction of buildings in their location. They require a permitted building to be constructed within a certain time (typically 2 years). When construction is not completed within that time the PVMC require the building work to stop. The building work can resume when and if a renewal of the permit has been issued by the PVMC. Schedule 2 is designed to give authority to a municipal authority to issue enforcement notices to enforce the rules developed to control construction in Port Vila municipal area. The issue of such notices where there has been no compliance with the rules is a consideration of an administrative task. Indeed the rules provide that after 2 years the building permit expires, work on the construction cannot continue until a permit is granted. The fact the PVMC required the wrong application be made (of a new permit) when a renewal only is required, was an error by the PVMC of an administrative function.

27. I am satisfied therefore that no statutory duty arises from the PVMC's issue of the October 2003 enforcement notice. In those circumstances the claimant's first cause of action will be struck out and it is struck out.

28. I take the same view of the cause of action based on the duty of care. In my view no duty of care arises in such a situation where a discretionary administrative task is being carried out. The decisions by the PVMC relating to the issuing of enforcement notice are likely to be susceptible to

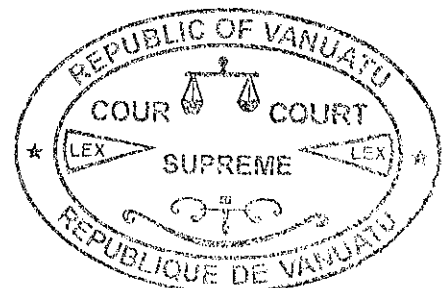


Judicial Review. In fact in this case judicial review was unsuccessfully brought challenging the PVMC's decision. There are also good public policy reasons for resisting the extension of a duty of care too far into the actions of public authorities. Such authorities need to be free to act in the public interest to facilitate the effective function of local authorities. If such decisions can be challenged as in breach of a duty of care to an individual citizen then rather than advancing public interest, public servants will be concerned about the potential litigation by those who may be affected by their action. Cyclamen's claim in this case is effectively based on the complaint that while the PVMC were entitled to stop construction they used the wrong process to consider whether the building permit could be re granted. I consider this is not more than a mistaken administrative function.

29. I am also satisfied that no duty of care arises in this case. The claimant's claim based on negligence with respect to the PVMC is also struck out.

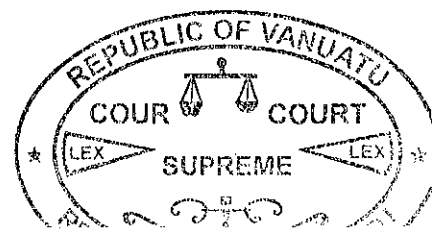
Misfeasance of Public Office

30. The essence of this claim is that PVMC issued the stop work notice and required a new building permit in relation to the claimant's development when it knew it was not entitled to do so. Cyclamen say the PVMC notices were designed to appease neighbours who were upset with the construction and prevent allegations against the PVMC of unlawful behaviour by those affected by the Cyclamen development. This was not a valid ground to issue the stop work notice or require a new permit.



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31. Misfeasance of the public office requires the claimant to prove the defendant public officer has intentionally caused harm, or knowingly acted in excess of his power, or recklessly disregarded the authority given to the public servant. Thus to establish misfeasance of the public official, the public official involved must have a specific intention to cause harm.
32. I am satisfied that, with amendment, this cause of action is properly available to the claimant and should not be struck out. The cause of action alleges that members of the PVMC issued the enforcement order and required the new permit when they knew they were not appropriate or required in the circumstances. The pleadings allege that the public servants involved did so for ulterior motives namely to appease others. And Cyclamen says the public servants did so knowing it would cause significant harm to Cyclamen by the delay of construction.
33. These allegations are the essential ingredients of misfeasance of public office. As I have noted I take Cyclamen's factual allegations at face value. I accept that other issues are likely to arise in trial including causation under the relevant immunity provision in section 67 of Municipalities Act [Cap 126]. But they are properly for trial. I am satisfied the essence of a claim of misfeasance of public office is available in the pleadings of Cyclamen.
34. As to the amendment of the pleadings to give the PVMC proper notice of the allegation against it, the following at least must be done. First the claimants must identify which public servants (by name) in particular acted in the way described in paragraphs 30, 31,32,33,34,35,36 and 37 of the statement of claim. Each of these paragraphs describes a state of mind,



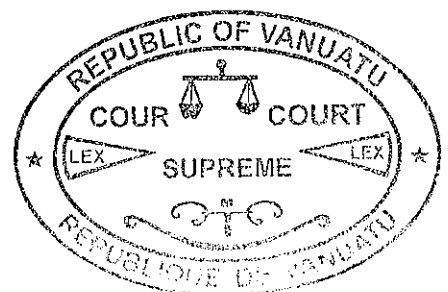
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e.g.: malice, corruption, intention to injure. To establish their case Cyclamen must prove who had these various states of mind and so individual public servants must be named. In addition, the statement of claim needs to mirror the elements of a misfeasance cause of action. It cannot as is currently the case contain a series of general claims. It must be particular. The claimant Cyclamen should understand that this will be a particularly difficult cause of action to prove.

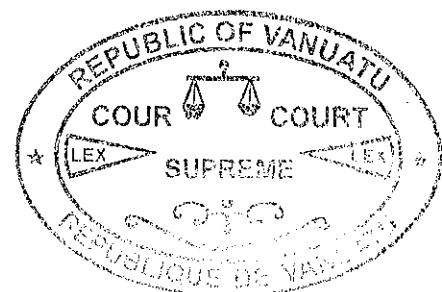
Strike Out by Second Defendants

35. The Claimants claim that the second defendants as their lawyers had either a duty of care in their dealings or had a contract with Cyclamen to act with appropriate professional competence. The existence of the duty whether in tort or contract is not denied. Cyclamen says the second defendants failed in their duty of care (breached their contract) with the advice they gave to Cyclamen regarding the effect of the October 2003 notice by PVMC. The claimant's case is that the second defendants' advice to cease the building work in compliance with the notice was wrong in law and in the circumstances was negligent.

36. The claim that the second defendants' advice was wrong in law is said to be based on Justice Tuohy's judgment when he concluded that the PVMC should not have required the construction work to cease nor should it have required a new permit to be issued. I proceed therefore on the basis that the advice of the second defendant to Cyclamen on these issues was wrong in law.



37. The two grounds in support of the strike out application by the second defendants are that the claimant did not stop work on 14th October 2003 because of the enforcement notice given as a result of any advice given by the second defendants. The second defendants say Cyclamen stopped work in October 2003 because it could not lawfully continue the work developing a tourist resort when it only had a residential lease relating to the land. This is disputed by Cyclamen.
38. I am not prepared to strike out the claim against the second defendants. The question why Cyclamen stopped work on the construction in October 2003 is essentially a question of fact to be best resolved at trial. I accept that there are significant impediments to this part of Cyclamen's claim. Even if the advice by the second defendants relating to the October 2003 notice was wrong that does not mean the second defendants were negligent. Far more evidence will be needed to establish negligence including no doubt the calling of expert evidence to establish the proper standard of advice by a lawyer in these circumstances.
39. I note also that the second defendants appear to have been correct regarding likelihood of success of the Judicial Review proceedings brought by Cyclamen when it told Cyclamen it was unlikely to succeed. Given Cyclamen had been served with a PVMC stop notice it is hardly surprising the second defendants told Cyclamen to stop the work until the lawfulness of that notice had been resolved.



40. However it will be for Cyclamen to consider what evidence it needs to establish negligence. I repeat Cyclamen will have to establish that the standard of conduct of the second defendants fell below that of a competent prudent lawyer in the particular circumstances.

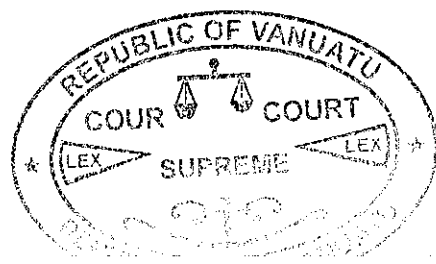
Pleading Admissions

41. I now deal with one final point relating to the pleadings. Initially a number of allegations in the statement of claim address to the PVMC on the first defendant were admitted by them. After further instructions were obtained the PVMC applied to file an amended statement of defense which withdrew some of their admissions. The PVMC said that the admissions made were simply wrong and they wished to correct them. The claimants opposed the application saying that the PVMC should be stuck with the admissions made and should not be allowed to now withdraw them.

42. This case is not immediately at the trial stage although it can be hope that a trial will occur soon. PVMC has an understandable explanation for why the admissions were made through a mistake. It is in the interests of all parties that their true case is placed before the Court in a fair and open way. Allowing the amended statement of defense by the PVMC to be filed will achieve that. The application by PVMC is therefore granted.

Concluding Summary

43. In summary the claimant's causes of action alleging breaches of statutory duties and negligence against PVMC are strike out. The cause of actions relating to misfeasance of public office and the cause of actions against the second defendants will be maintained but amendments are required. The strike out applications relating to these causes of action are refused.



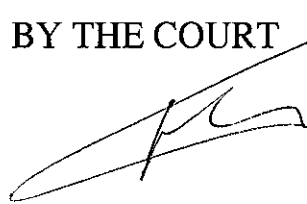
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44. Costs

In the circumstances a final decision as to costs should await trial. The costs are therefore reserved pending trial.

Dated at Port-Vila, this 16th day of December, 2014.

BY THE COURT



Vincent Lunabek
Chief Justice

