

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

Civil Case No. 96 of 2014

BETWEEN: HARRY KILETERE
First Claimant

AND: ALBANO NENDIS
Second Claimant

AND: PETLA DONNA
Third Claimant

AND: SERGE BULE
Fourth Claimant

AND: JOHN WORWOR
Fifth Claimant

AND: TASSO ZACKIAS
Sixth Claimant

AND: PLANTATION DU RUSSET VANUATU LTD
First Defendant

AND: DAVID RUSSET
Second Defendant

Date of Hearing: Monday 21 September 2015 at 3 pm

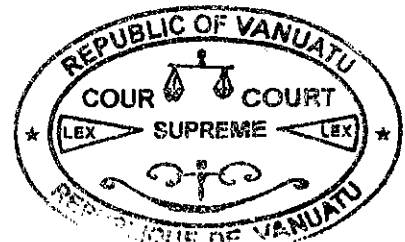
Date of Judgment: Tuesday 29 September 2015

Before: Justice Stephen Harrop

*In attendance: Eric Molbaleh for the Claimants
John Malcolm for the Defendants*

*Also present: The First Claimant, Harry Kiletere
The Second Defendant, David Russet*

**JUDGMENT OF JUSTICE SM HARROP AS TO
APPLICATION TO STRIKE OUT AMENDED CLAIM**

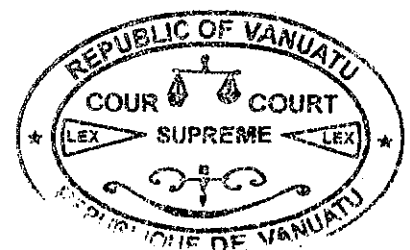


Introduction

1. The first defendant owned a cargo vessel called MV Veronica. The claimants say that the defendants employed them (with the exception of the third claimant Mr Petla Donna who was a passenger on board the vessel at the relevant time) as workers on that ship. They say that on 2 June 2008, the second defendant insisted that the boat leave from Luganville transporting cattle to Port Vila at a time when there was a tropical depression. Overnight, conditions worsened and the waves damaged the boat to the extent that it took on water and ultimately sank on the afternoon of 3 June with the loss of everything on board including the cattle.

2. The claimants floated on the life raft for two days and nights without food and water in rainy and windy conditions. Ultimately they came ashore in South Malekula and were rescued and hospitalised. The captain unfortunately died before they reached shore. The claimants allege that the second defendant made no attempt to contact them or to try to rescue them or even to find out if they were alright after they came ashore. They plead that they suffered significantly during their ordeal and that MV Veronica was old boat in need of repair which the defendants had not attended to for years. They further allege that as a result of the incident they lost their jobs because the defendants did not take them back on as employees after the incident.

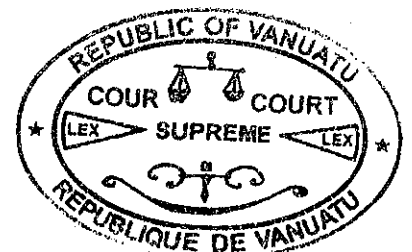
3. The prayer for relief is as follows:-
 - “1) *A declaration that the defendants are responsible to compensate the claimants for having gone through the raft (sic) time at sea for two nights and two days;*
 - 2) *A declaration that the defendants were negligent and took the risk when there was a tropical depression;*
 - 3) *A declaration that the defendants are responsible to pay the severance allowance for the claimants (employees) and other related work entitlements;*
 - 4) *Amount for compensation to be assessed;*
 - 5) *Damages for negligence to be assessed;*
 - 6) *Severance entitlements for each claimant (sic) work to be assessed;*
 - 7) *Interests;*
 - 8) *Costs;*
 - 9) *Any other orders the Court deem fit.”*



4. Although the defendants have each filed defences denying any liability they have also applied for the amended claim to be struck out. That application was heard at a chambers hearing on Monday 21 September 2015 and this judgment determines that application.

Relevant procedural history

5. This claim was filed on 20 May 2014, only a fortnight or so short of six years after the alleged incident which forms the basis of the claim.
6. An application to strike the claim out was made on 14 August 2014 but the claimants then filed an amended claim on 10 April 2015.
7. The current application was filed on 27 April 2015.
8. No notice of opposition or any sworn statement in support has been filed despite a direction made on 28 May 2015 that this be done by 18 June 2015 or alternatively that a second amended claim be filed remedying the challenges made if that were considered possible.
9. On 25 June 2015, nothing having been filed by the claimants, my Associate at my direction contacted Mr Molbaleh and he said he was still waiting for documents from his clients. He said they had unsuccessfully tried to obtain the files back from a lawyer who had previously acted for them and he apologised for the delay.
10. At the next conference on 2 July 2015, Mr Molbaleh did not attend and no reason was given, before or after the conference, as to why. The strike out application was set down for hearing on 5 August 2015 and the claimants were warned that it would proceed then with or without Mr Molbaleh's attendance.
11. On 5 August 2015 Mr Molbaleh appeared together with the wife of the first claimant, Mrs Kiletere. He said that he accepted that the present amended claim needed to be further amended and that his clients wanted the opportunity to do that having only just obtained the former lawyer's file. Accordingly the hearing was adjourned but it was also noted that it was

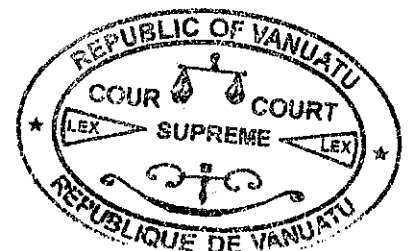


not simply a case of filing an amended claim but that also there were limitation problems overcoming which would require an application for leave to be made and granted.

12. The claimants were given nearly a month, until 2 September, to file the further documents they said they wished to file.
13. The hearing date for any Limitation Act application and the strike out application was fixed for 21 September 2015, some seven weeks after 5 August 2015. An hour was set aside for the hearing. Submissions were directed to be filed by 18 September.
14. The claimants filed nothing after the conference on 5 August 2015. Mr Molbaleh and the first claimant Mr Kiletere attended the hearing on 21 September but had no documents they wished to submit. Mr Molbaleh simply submitted that the claim should not be struck out and should be heard on its merits. Mr Malcolm had filed the defendants' submissions on 18 September, as directed. He supplemented these with brief oral submissions and requested that the claim be struck out except perhaps to the extent of the severance claim. Judgment was reserved.

The Correct Approach on a striking out application

15. As I noted in *Ishmael v. Kalsev* [2014] VUSC 88: "*Although there is no rule in the Civil Procedure Rules expressly providing for striking out of a statement of case which does not disclose a reasonable claim, there is no doubt the power exists, in the inherent jurisdiction of the Court. See for example: Iririki Holdings v. Ascension Ltd [2007] VUCA 13 at [17], and see generally Jenshel on Civil Court Practice in Vanuatu at paragraph [4.2.1] The Court does not evaluate evidence but proceeds on the assumption that every factual allegation is true or capable of proof. The power is to be sparingly exercised and only in a clear case. The claimant's case must be so clearly untenable that it cannot possibly succeed: Electricity Coop Ltd v. Geothermal Energy Ltd [1992] 2NZLR641 (cited with approval in the Iririki Holdings Case). Unless the statement of case is irremediable, the usual order will be to strike out but grant leave to replead.*"



16. In the present context therefore I proceed on the assumption that despite the denials and the defences all of the factual allegations in the amended claim are capable of proof. I do not understand that the essential details relating to the ordeal are disputed by the defendants but their responsibility for them is. There is no doubt that the claimants suffered a very traumatic experience. However, it is a different question whether they have a good claim of any kind against the defendants. The blame for everything adverse that occurs in life is not always able to be sheeted home to someone else. The fact an incident was very traumatic cannot translate an untenable claim into a tenable one. For present purposes, the defendants' factual responsibility for what happened must be assumed but the legal tenability of the claim is to be determined in this judgment.

The application to strike out

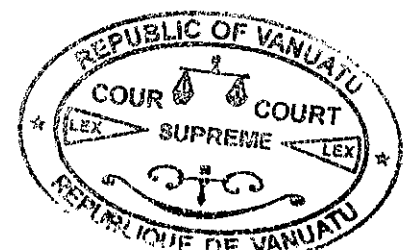
17. Mr Malcolm submits that the claims for declaratory judgments as to negligence, employment and compensation issues are not founded in any Vanuatu law. He says there is no cause of action entitled "compensation for two nights and two days at sea." Further he points out that because the claim is effectively one for personal injuries there is a three-year limitation period under the Limitation Act [Cap 212]. Further, under section 20 of the Employment Act [Cap 160] there is also a three-year limitation on claims were employment-related remuneration, except for severance.

Discussion and Decision

18. I accept Mr Malcolm's submission that there is no jurisdiction for the Court to grant declarations as to liability in contract, negligence, employment-related claims or "*compensation*". There are circumstances in which a declaratory judgment may be issued in the judicial review context but this is not such a case.

19. However, being practical about the claim and as fair as I can (and must) be to the claimants, I am prepared to treat the claims as being capable of re-pleading as claims for breach of contract, negligence and breach of employment contract.

20. The existence of possible causes of action based on the pleaded facts however must be considered in the context of the relief which is sought. The claimants are essentially complaining about a traumatic experience involving pain and suffering, deprivation of food



and water and considerable stress and anxiety arising from both the sinking incident and the life-threatening period which followed. In addition, there are consequential claims relating to the loss of the employment which followed the loss of the boat.

21. Section 3 of the Limitation Act provides as follows:

"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:*

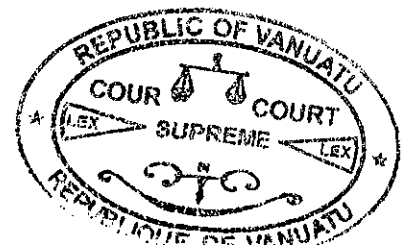
Provided that –

(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) nothing in this subsection shall be taken to refer to any action to which section 5 applies.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:



Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

(4) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which the judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

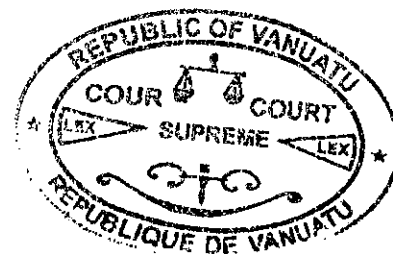
(5) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any Act shall not be brought after the expiration of two years from the date on which the cause of action accrued:

Provided that for the purposes of this subsection the expression "penalty" shall not include a fine to which any person is liable on conviction of a criminal offence.

(6) Subsection (1) shall apply to an action to recover seamen's wages, but save as aforesaid this section shall not apply to any cause of action within the jurisdiction of the Supreme Court which is enforceable in rem.

(7) This section shall not apply to any claim for specific performance of a contract or for any injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as has, prior to the commencement of this Act, been applied."(emphasis added)

22. As will be seen, there is an important proviso to the six-year limitation period referred to in section 3 (1). Where the damages claimed "*consist of or include damages in respect of personal injuries to any person.....*" the limitation period is only three years.
23. In section 1(1) there is an extended definition of "*personal injuries*" : "*includes any disease and any impairment of a person's physical or mental condition*".
24. On this basis, leaving aside the employment claims, all of the adverse consequences suffered by the claimants come within the definition of "*personal injuries*". That means any claim had to be lodged by 5 June 2011. As I have already noted, no claim was lodged until 20 May 2014, so that was almost three years too late.



25. This is not the end of the matter because under section 15 of the Limitation Act there is the possibility of an extension of that time limit. That section needs to be read with section 16 which provides the mechanism for an application for leave to extend.

26. These two provisions provide as follows:

"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.

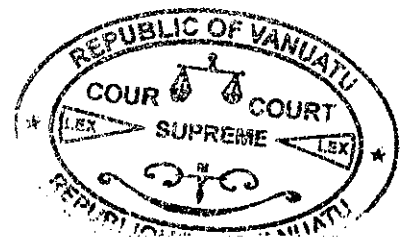
(2) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any Act or independently of any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach 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:



Provided that –

(a) in relation to any cause of action in respect of which, by virtue of section 10, action could have been brought after the end of the period of three years from the date on which that cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period up to the end of which an action could, by virtue of that section, have been brought in respect thereof;

(b) in relation to a cause of action in respect of which, by virtue of section 14, the period of limitation did not begin to run until a date after the cause of action accrued, any such reference to the three-year period relating to that cause of action shall be construed as a reference to the period of three years from the date on which, by virtue of that section, the period of limitation began to run.

(5) Nothing in this section shall be construed as excluding or otherwise affecting –

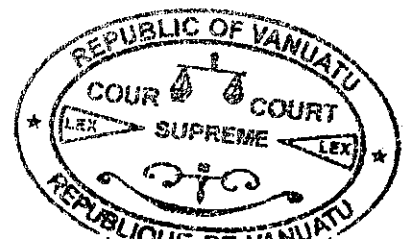
(a) any defence which, in any action to which this section applies, may be available by virtue of any provisions of any Act other than those contained in subsection (1) of section 3 (whether it is an Act imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any Act or of any rule of law or equity which, apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the 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 –

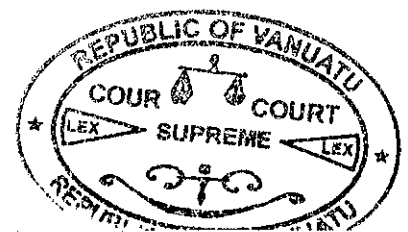
(a) to establish that cause of action, apart from any defence under subsection (1) of section 3; and

(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."

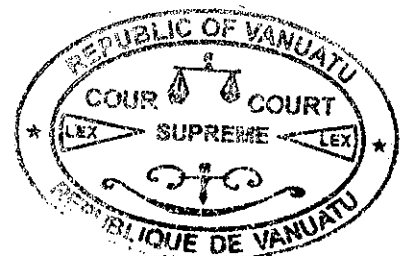
27. These provisions are not the most user-friendly on the statute books of Vanuatu. I had cause to consider them carefully, together with their English antecedents and cases commenting on them, in my judgment in *Nikiau v. Telecom Vanuatu Ltd* [2014] VUSC 90, a copy of which I supplied to counsel to assist them with their submissions when I issued my Minute of 5 August 2015. It is not necessary to go through that judgment in detail. The short point is that the effect of sections 15 and 16 is that leave may only be granted if the claimants did not know about the material facts relating to the cause of action until either the end of the three-year period or within 12 months before the end of that period. Further, the date when the



requisite knowledge was acquired may not be more than 12 months before the date on which the action was brought.

28. Here, despite various directions and comments made at several conferences the claimants have made no attempt to seek the necessary leave. Strictly speaking on a strike out application the focus is on the claim in isolation and normally any question of limitation, being a matter for the defendants to raise rather than the claimants to pre-emptively address, would be put to one side for later consideration if the claim is found to be otherwise tenable. However, in this context where the question of limitation has been squarely raised not only in the defences filed but in both of the striking out applications and in discussions at conferences, I consider I am entitled to take a pragmatic approach and consider the prospects of any application for leave to extend time under the Limitation Act, if one were filed.
29. On the information available to me, I can see no prospect of such an application succeeding. The claimants of course personally experienced the ordeal of the ship sinking, their time in the life raft which followed, the death of the captain and their hospitalisation. There is nothing more they needed to know to mount a claim than what they had personally experienced.
30. In these circumstances, even if I were to conclude, perhaps generously, that the foundation facts for the claim provide potentially legitimate causes of action giving rise to the personal injuries suffered, the claim has been lodged far too late and any attempt to extend the time for filing appears to me doomed to failure.
31. In these circumstances I am satisfied that the claim relating to personal injuries must be and is struck out.
32. As to the employment-related claims, Mr Malcolm referred to section 20 of the Employment Act which provides:

“20. Period of limitation



No proceedings may be instituted by an employee for the recovery of remuneration after the expiry of 3 years from the end of the period to which the remuneration relates.

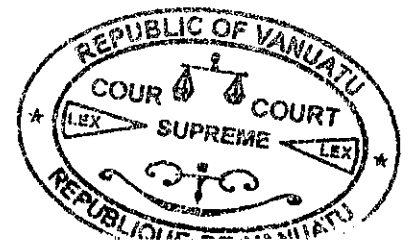
33. He helpfully referred me to the Supreme Court judgment in *Mawa v. Vanuatu Internal Air Services Ltd* [2009] VUSC 24 and to the Court of Appeal judgment on which it relied in *National Bank of Vanuatu v. Cullwick* [2006] VUSA 39. The effect of those decisions, as he acknowledges, is that any claim for severance is not one for “remuneration” which his constrained by section 20. However, to the extent that the claim seeks, as it does, other work-related entitlements, these appear to me to be too late to claim. There is no provision for the extension the three-year period.

34. As to severance however there is currently insufficient information to determine whether or not that claim may be tenable. It seems likely that it is not because, as Mr Malcolm notes, as the law stood in 2008 an employee had to have been employed for at least 10 years before an application for severance could be made. I infer from his submissions that the defendants would say that this criterion was not met in respect of any of the claimants (the third claimant of course, being merely a passenger on the boat, has no employment claim). However, there is no evidence as to the potential validity or otherwise of the severance claim and accordingly I decline to strike out the claims for severance. If they are to be pursued then an amended claim particularising them will need to be filed and sworn evidence provided confirming employment for at least 10 years on the part of each claimant who wishes to pursue that claim.

Summary and Conclusions

35. The amended claim filed on 10 April 2015 is struck out in its entirety except for the claim that the defendants are responsible to pay a severance allowance to the first, second, fourth, fifth and sixth claimants.

36. If the severance claims are to be pursued then an amended and properly particularised claim is to be filed and served within 28 days of the date of this judgment. Alternatively, by the same date, Mr Molbaleh is to indicate by memorandum that the claim is not being pursued.



37. The defendants are entitled to standard costs against the claimants and if these cannot be agreed the defendants may make a formal application for taxation.

BY THE COURT

Robert M. Williams

