

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

**Civil
Case No. 16/941 SC/CIVL**

BETWEEN: ISLENO LEASING COMPANY LIMITED

Claimant

AND: AIR VANUATU (OPERATIONS) LIMITED

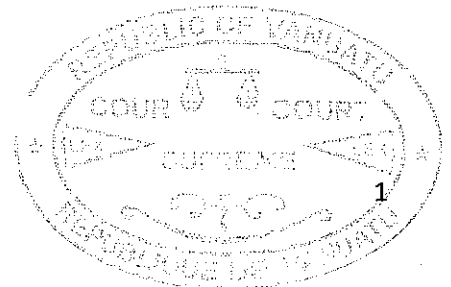
Defendant

Before: *Justice Chetwynd*
Hearing: *26th September 2016*

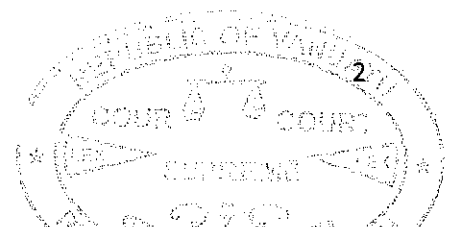
Counsel: *Mr Robert Sugden for Claimant*
Mr Edward Nalyal for Defendant

DECISION

1. The Claimant ("Isleno") is the Claimant in all the cases being considered and the Defendant ("the airline") is the Defendant in all the cases. On 14th December 2009 Isleno filed a claim against the airline in Civil Case No. 189 of 2009. The Particulars give details of a contract between the parties for the lease of an aircraft. The agreement or contract was dated 30th September 2009. On a date which was 12th November 2009 or maybe possibly earlier, the airline repudiated the agreement. That is what caused Civil Case No. 189 of 2009 to be filed. By clause 12 of the Particulars in the filed claim in CC189/09 Isleno acknowledges and accepts the repudiation of the 30th September agreement by the airline.
2. Civil Case No. 189 of 2009 proceeded in a rather halting way. In Minutes dated 28th November 2012 her Lordship Sey J noted that there has been no proceeding over the past one year.



3. There is an explanation for that. Isleno tried to enforce the contract by other means. Basically, political contacts were called on to obtain the benefit of the contract. In October 2011 a deed was said to have been executed which set out a settlement process. The Airline refused to accept the deed of settlement and on 9th November 2011 Civil Case No. 212 of 2011 was filed.
4. Isleno did nothing in Civil Case No. 189 of 2009 preferring to press its claim under the deed of settlement in CC212/11. As a result an application to strike out was made and that resulted in the Order by Sey J on 28th November 2012. As far as I am aware Isleno did nothing about Civil Case No. 189 of 2009 from that day until a recent application to re-instate was made, I believe the application was filed on 23rd June 2016. I see from the copy of the application attached to Mr Laloyer's sworn statement of 8th July 2016, paragraphs 8, 9, 10, 11 and 12 refer to November 2011. That should be 2012. I do not know if this error was drawn to Sey J's attention when the application was heard.
5. The proceedings in CC No. 212/11 were heard in April of this year by me and a written decision was published on 7th June 2016.
6. On 8th June 2016 Isleno served the claim in this case (the "new claim") on the Airline. The claim was actually filed on 1st April 2016.
7. The Airline has filed an application to strike out the new claim. It was filed on 7th July. It was listed for today. Isleno has made an oral application asking that I recuse myself. I have refused to do so. This application not about the credibility of witnesses. Isleno has produced no evidence in respect of the application to strike out. It says it will rely on sworn statements it has filed in CC 189 of 2009. These proceedings, i.e. the new claim are not consolidated with CC. 189 of 2009 and Isleno did not introduce any argument to establish on what basis it could so rely on those sworn statements in the new claim. This application to strike out involves the judicial exercise of discretion not the consideration of evidence.
8. The first issue to consider is whether the claim should be struck out for abuse of process on the basis that it is time barred by reason of the Limitation Act [Cap 212]. I have doubts that a claim can be struck out for abuse on the basis it was commenced outside of

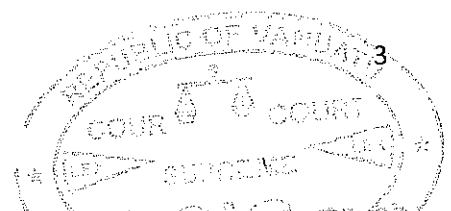


the time allowed in the Limitation Act. My understanding is the limitation issue is a defence and not a reason to strike out for abuse. Of course it may be a consideration in the excuse of discretion but I do not believe it can in itself be a reason to strike out.

9. The question is whether the issue of this present claim is an abuse of process. In order to consider that question the time line or time table in respect of the various proceedings should be set out.

Timetable

1) Agreement	30/09/09
2) Repudiation	12/11/09
3) CC 189/09 filed	14/12/09
4) Order made in CC 189/09 for Claimant to find lawyer	17/08/11
5) Second Order made in CC 189/09 for Claimant to find a lawyer	2/09/11
6) Deed of release	17/10/11
7) Repudiation	17/10/11
8) CC 212/11 filed	10/11/11
9) Criminal procedure against Laloyer (Date of information)	7/08/12
10) Nolle entered	13/08/12
11) Application to strike out CC 189/09	26/11/12
12) Decision to strike out	28/11/12
13) CC 941/16 filed	1/04/16
14) Trial in CC 212/11	21/04/16
15) Judgment in CC 212/11 reserved	23/04/16
16) Judgment in CC 212/11 published	7/06/16
17) CC 941/16 served	8/06/16
18) Letter from Airline in CC941/16 re strike out	21/06/16
19) CC 189/2009 application to re-instate	22/6/16
20) Application to strike out CC 941/16	7/07/16
21) Notice of hearing of application to strike out CC941/16	14/07/16
22) Notice of hearing to re-instate CC 189/09	07/09/16
23) Service of notice on the Airline in CC189/09	08/09/16
24) Hearing of application to re-instate CC189/09	14/09/16



10. I am not the Judge dealing with the application to re-instate. However I feel it only correct to pass a copy of this decision to Sey J for her consideration. This is particularly so because at paragraph 7 of the filed application in CC 189/09 the Applicant/Claimant says,

“It is also the duty of counsel to bring all matters to the attention to the Court that are relevant to the Court’s function.....the existence of Civil Case 212 of 2011 and its subject matter was relevant and important.”

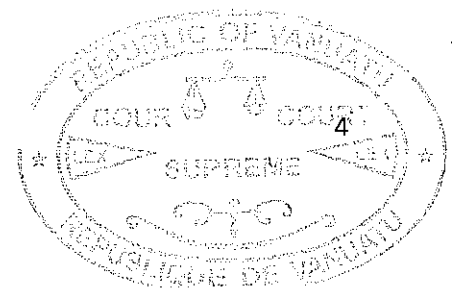
11. It is therefore extra ordinary that the proceedings in CC 941/16 and the application to strike them out were not brought to the Court’s attention at the application to re-instate. The time line shows that the notice of the hearing to strike out was issued on 14th July 2016 some 6 weeks before the application to re-instate CC189/09 was filed.

12. It is not the only time Isleno has been coy about which cases are in motion. At no time before trial in CC 212/11 was I made aware that CC 941/16 had been filed. The time line shows that the new claim was filed on 1st April 2016 prior to the trial in CC212/11.

13. At no time did Isleno in CC 941/16 inform the Court, meaning the Judge hearing the application to strike out, that an application was being made in CC 189/09 to re-instate.

14. It also seems, although I have not seen any sworn statements in the CC 189/09 application, that Sey J might not have been told that His Lordship the Chief Justice ordered Isleno to find a lawyer some 12 months before the application to strike out was heard.

15. I do not have the papers in CC 212/11 with me. I understand an appeal had been filed. However there is a copy of the original claim annexed to Mr Laloyers’ sworn statement (see JL 3). It is clear that the claim raises as an alternative claim the repudiated “lease”. That much seems obvious from paragraphs 9 and 10 of JL 3. In CC 212/11 the whole of the claim was struck out. To my mind that raises the question of issue estopped (known in Australia Law as Anshun estoppel).



16. The Court of Appeal case *Family Farm Development v. Nicholls Ltd* [2014] VUCA 28; Civil Appeal Case 28 of 2014 (14 November 2014) considered the operation of the principle. The rule or principle was originally formulated in the English case of *Henderson v. Henderson* [1843] 67 ER.319. It was more recently considered in Australia in *Anshun* and by the English Courts in *Johnson v. Gore Wood & Co* [2002] 2 AC 1. In relation to CC 941/16, it appears to me to be an attempt to re litigate what was litigated in CC 212/11. It is clear from my judgment in CC 212/11 that much of what was relied on in CC 189/09 was advanced in support of the claim in CC 212/11. On that basis alone CC 941/16 is clearly an abuse of process and should be struck out.
17. Whilst I have indicated my view that the limitation point in itself is not a reason to strike out, it is a consideration. Given the acknowledgment of the repudiation of the original agreement, time would have begun to run from the acceptance of the repudiation which was the date of issue of CC189/09 (see Clause 12 of the statement of Claim). The limitation period would expire on 15/12/2015.
18. As indicated earlier, I am not dealing with CC 189/09 but my findings above beg the question whether CC 189/09 is re-litigation of CC 212/11.
19. In my view the entire way Isleno has litigated this matter is questionable. There must be finality to litigation and that is missing in this litigation. However I am not considering the entire litigation. I am only considering whether the issue of a claim in CC 941/16 is an abuse. I believe it is and I strike out the claim. Isleno shall pay the costs of the Airline, Those costs are to be taxed on a standard basis if not agreed.

DATED at Port Vila this 27th day of September 2016.

BY THE COURT


.....
DAVID CHETWYND

Judge

