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

Civil
Case No. 18/1894 SC/CIVL

BETWEEN: 100% PUR FUN LIMITED (In Liquidation)
Claimant

AND: STAGE FOUR LIMITED as trustees FOR THE MONTREAL TRUST
First Defendant

AND: BLUE GUM HOLDINGS LTD.
Second Defendant

AND: REPUBLIC OF VANUATU
Third Defendant

AND: GRAND ISLE HOLDINGS LTD trading as PACIFIC ADVISORY MANAGEMENT
Fourth Defendant

AND: BREAKAS HOLDINGS LIMITED
Fifth Defendant

Date: *5 June 2023*

Before: *Justice V.M. Trief*

Counsel: *Mr M. Hurley for the Claimant*
Mr. N. Morrison for the 1st and 5th Defendants
No appearance for other parties

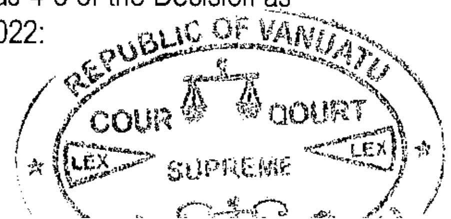
DECISION AS TO FIRST AND FIFTH DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

A. Introduction

1. This was a contested Application for Leave to Appeal against Decisions dated 21 October 2022 and 24 October 2022. This matter was listed for hearing however counsel were content to receive a decision on the papers. This is the decision.

B. Background

2. The background includes the following which was set out in paras 4-8 of the Decision as to Claimant's Application to Reinstate Action dated 24 October 2022:



> 4. *100% Pur Fun had filed the following documents and taken the following steps to prosecute its Claim since 14 August 2018:*
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> > a) *On 28 June 2019 its then counsel, Dane Thornburgh, attended a conference before Justice Fatiaki;*
> >
> > b) *On 26 July 2019 it filed its submissions in opposition to the First Defendant's Urgent Application to Set Aside the Orders dated 19 July 2018; and*
> >
> > c) *On 3 September 2019, it filed a Defence of the First, Second and Third Defendants added by Counterclaim of the First and Fifth Defendants.*
>
> 5. *On 2 December 2019, the First Defendant Stage Four Limited (as trustee of the Montreal Trust) ('Stage Four') and the Fifth Defendant Breakas Holdings Limited ('Breakas') filed Application seeking the following orders:*
>
> > a) *That the Claim against them be struck out pursuant to rule 9.10 of the CPR;*
> >
> > b) *Judgment be entered against the Claimant in default of filing and serving a reply to the Counter Claim;*
> >
> > c) *Costs; and*
> >
> > d) *Any such other order that the Court deems appropriate.*
>
> 6. *On 3 March 2020, Mr Hurley filed his Notice of Beginning to Act.*
>
> 7. *On 16 March 2020, the Court struck out the Claim pursuant to rule 9.10 of the CPR, ordered that judgment be entered for the Stage Four and Breakas in default of filing and service of a Defence to the Counter Claim, and ordered costs in their favour to be taxed if not agreed.*
>
> 8. *The preamble to the Orders stated:*
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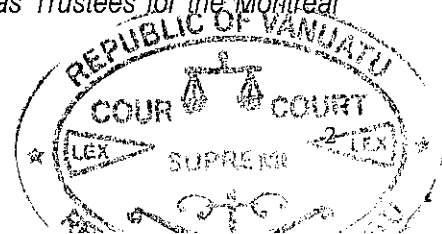
> > *HAVING read the filed Application by the First and Fifth Defendants, and Sworn statement of Robert John Herd in support, and having considered the said Application and Sworn statement AND NOTING that the Claimant has neither filed a Response or Defence to the First and Fifth Defendants' Defence and Counterclaim filed on 30 November 2018 AND that the Claimant has not taken any steps to advance these proceedings since the filling and service of the Claim on or about 14 August 2018.*

3. On 9 June 2022, 100% Pur Fun filed an Application seeking reinstatement of the Claim. It was opposed.

4. I heard this Application on 12 July 2022 and reserved my decision.

5. On 27 July 2022, the First Defendant Stage Four Limited (as trustees for the Montreal Trust) ('Stage Four') and the Fifth Defendant Breakas Holdings Limited ('Breakas') filed Application that the Claimant's Application to Re-instate Claim be relisted for hearing.

6. On 12 August 2022, I heard the Application that the Claimant's Application to Re-instate Claim be relisted for hearing. At the conclusion of the hearing, I declined and dismissed the Application. I reduced it into writing in the Reasons for Decision as to First and Fifth Defendants' Application to Relist the Claimant's Application for Hearing dated 21 October 2022: *100% Pur Fun Ltd (In Liquidation) v Stage Four Ltd as Trustees for the Montreal Trust* [2022] VUSC 182.



7. By Decision as to Claimant's Application to Reinstate Action dated 24 October 2022, I granted 100% Pur Fun's Application to Reinstate Action filed on 9 June 2022, set aside the 16 March 2020 Orders, and ordered that the costs of the Application are costs in the cause of the action.

8. On 21 November 2022, Stage Four and Breakas filed Application for Leave to Appeal to appeal against both Decisions (the 'Application'). It is opposed

9. On 19 April 2023, the First and Fifth Defendants filed Leave to Appeal Submissions.

10. On 2 May 2023, the Claimant filed Submissions in Opposition to First and Fifth Defendants' Application Seeking Leave to Appeal.

C. The Application

11. By the Application, Stage Four and Breakas seek the following orders:

    1. Leave to Appeal granted.

    2. Appeal allowed.

    3. The Claimant's Application to reinstate the proceedings is dismissed.

    4. The Claimant pay the Appellant's costs.

12. The grounds of the Application (and of the proposed appeal) are as follows:

    1. That in making the decision to reinstate the proceedings, I erred by finding that the Court had the jurisdiction to set aside a decision striking out a proceeding;

    2. By finding that the proceedings were not *res judicata*;

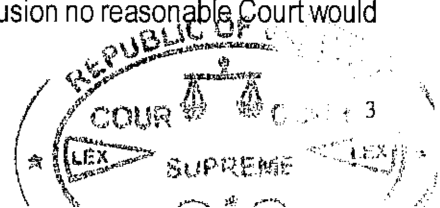
    3. That I failed to provide reasons, or by providing inadequate reasons, for any finding about the adequacy of the explanation for the delay in 100% Pur Fun bringing its application to reinstate;

    4. By finding as a matter of fact that the requisite Defence to Stage Four and Breakas' Counter Claim was filed on 3 September 2019 where there was no evidence to that effect and in circumstances where such a conclusion is so unreasonable no reasonable Court would make the finding;

    5. By finding as a matter of fact that the delay was explained when there was no explanation in any evidence before the Court of the significant delays;

    6. Failing to have regard to prejudice to Stage Four and Breakas, and the overriding objective of the CPR, including to ensure that the case is dealt with speedily and fairly; and

    7. In making the 21 October 2022 Decision, I erred by failing to have regard to 100% Pur Fun's purported evidence was all improper and inadmissible; and by finding that the matters the subject of Stage Four and Breakas' Application were relevant only to merits which was a conclusion no reasonable Court would have reached.



13. Mr Morrison submitted that the Court did not have 'at large' jurisdiction to "re-open" the proceedings, that I failed to provide adequate reasons, that the Court found that a defence *had* been filed, without evidence, that the Court's finding that the delay was adequately explained was made against the weight of the evidence, I failed to have regard to relevant matters, and that I erred in failing to take into account relevant considerations to the exercise of the Court's discretion in determining the Application to re-open Application to supplement evidence.

14. He submitted in conclusion that:

    a. There are important issues of law raised in the proposed Appeal;

    b. The proposed Appeal has significant merit;

    c. Stage Four and Breakas would be prejudiced should leave not be granted; and

    d. 100% Pur Fun would not suffer any prejudice should leave be granted as it still has the benefits of the cautions and the delays in the proceedings have been of its creation and that of its lawyers.

D. Submissions in response

15. Mr Hurley submitted that the Court was correct to conclude that this Court has jurisdiction to set aside its own Orders, that I set out adequate reasons for 100% Pur Fun's delay in bringing its reinstatement application and that it was immaterial that Stage Four and Breakas do not agree with those reasons. He submitted that the Court correctly exercised its discretion to set aside its irregular judgment as to the Counter Claim, that there was evidence before the Court to support the findings of fact in para. 14 of the Decision as to explanation for 100% Pur Fun's delay, and that this Court's exercise of discretion to refuse to relist the reinstatement application could not be said to have been as a result of my failing to have regard to relevant factors.

E. Discussion

16. Leave to appeal interlocutory orders will not generally be granted unless there are reasonable prospects of success: *Ebbage v Ebbage* [2001] VUCA 7 at [33].

17. Mr Morrison also submitted that the following factors were relevant, citing *Saolo v Berry* [2007] VUCA 2:

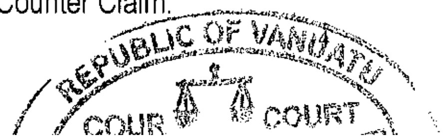
    a. The consequences to Stage Four and Breakas of the Decisions being allowed to stand; and

    b. The potential prejudice to 100% Pur Fun, including whether steps are available to limit that prejudice.

18. I now consider the merits of the proposed appeal.

Proposed Ground 1 – The Court did not have 'at large' jurisdiction to "reopen" the proceedings

19. By the Orders dated 16 March 2020, I struck out the Claim pursuant to rule 9.20 of the CPR and entered judgment in default on Stage Four and Breakas' Counter Claim.



20. By the Decision dated 24 October 2022, I set aside those Orders. My reasons included that the 16 March 2020 Orders were clearly incorrect in stating the following:

    a. That 100% Pur Fun had not filed a response or defence to Stage Four and Breakas' Counter Claim when on 3 September 2019, it filed a Defence of the First, Second and Third Defendants added by Counterclaim of the First and Fifth Defendants; and

    b. That 100% Pur Fun had not taken any steps to advance the proceedings since the filing and service of the Claim given the matters set out in para. 4 of the Decision dated 24 October 2022.

21. In addition, the Chief Registrar did not send notice of the strike-out of the Claim as required by rule 9.10(4) of the CPR.

22. Further, the evidence is that the 16 March 2020 Orders were not served on 100% Pur Fun's counsel as required by rule 9.3(6) of the CPR: para. 8 of the Sworn statement of Mark J. Hurley filed on 23 June 2022.

23. I consider that the 16 March 2020 Orders were not made on the merits of the case. This is a case involving a matter of process and the integrity of the Court's process in circumstances where there is, on the face of it, clear irregularity therefore involving exercise of the Court's jurisdiction to set aside those Orders and resume case management of the matter to trial on the merits of the case: *Republic of Vanuatu v Natonga* [2016] VUCA 28 and *Esau v Sur* [2006] VUCA 16.

24. In the circumstances, this proposed ground of appeal lacks merit and prospects of success.

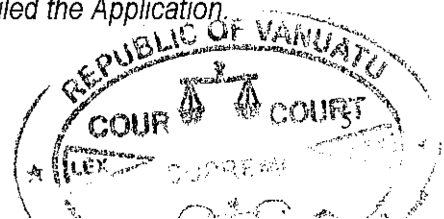
<u>Proposed Ground 2 – The proceeding was *res judicata*</u>

25. Stage Four and Breakas abandoned this ground: paras 49-50 of the submissions filed on 19 April 2023.

<u>Proposed Ground 3 – Alleged failure to provide reasons, or by providing inadequate reasons, for any finding about the adequacy for 100% Pur Fun's delay bringing its application to reinstate</u>

26. I set out the following reasons in para. 14 of the Decision dated 24 October 2022 for 100% Pur Fun's delay in bringing its reinstatement application:

    > *14. 100% Pur Fun has explained why it did not sooner seek reinstatement of the Claim. Despite the requirement in rule 9.10(4) of the CPR, the Chief Registrar did not inform 100% Pur Fun via Mr Hurley of the strike-out of the Claim until 24 February 2021. Mr Hurley promptly gave notice of 100% Pur Fun's intention to apply to reinstate the claim and has worked with his client since 11 March 2021 to have signed undertaking as to damages filed. Mr Fielding obtained Mr Hurley's advice as well as independent legal advice before providing a signed undertaking as to damages on 19 May 2022, which was filed on 31 May 2022. Subsequently, on 9 June 2022, 100% Pur Fun filed the Application.*



27. I do not accept therefore that I failed to provide reasons or adequate reasons for the exercise of the Court's discretion. I adopt Mr Hurley's submission that the fact that Stage Four and Breakas do not agree with those reasons is immaterial.

28. It follows that this proposed ground of appeal is without merit and has no prospects of success.

Proposed Ground 4 – The Court found that a defence *had* been filed, without evidence

29. Mr Morrison submitted that the Court found positively that a Defence *had* been filed when the document was not filed by 100% Pur Fun, nor served by it, nor relied on by it was not a finding open on the evidence. Further, the evidence of Mr Charles David Connop Haines was that there was *an intention* for the document to be relied on as a defence, and that only *with some modification* it could be. Mr Morrison submitted that the error being fundamental to the decision, leave to appeal in that regard must be allowed and the decision overturned.

30. Mr Hurley submitted that the starting point was that the order giving judgment on the Counter claim was irregular and therefore the Court had the power to set it aside. He submitted that it was an irregular judgment because the Counter Claim was for an amount of damages to be determined and contrary to rule 9.3(2) of the CPR, the request for default judgment was not in Form 13. Further, the evidence is that Stage Four and Breakas did not serve the judgment (contained in the 16 March 2020 Orders) on counsel for 100% Pur Fun: para. 8 of the Sworn statement of Mark J. Hurley filed on 23 June 2022.

31. I accept Mr Hurley's submissions and consider that the Court exercised its discretion to set aside its irregular judgment as it was entitled to. Accordingly, this proposed ground lacks merit and prospects of success.

Proposed Ground 5 – Finding against the weight of the evidence that the delay was adequately explained

32. This proposed ground shows that Stage Four and Breakas are aware of the reasons why I accepted 100% Pur Fun's evidence in support of the delay – this proposed ground can be contrasted with proposed ground 3.

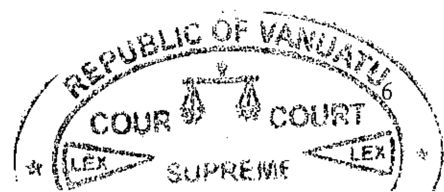
33. I consider this proposed ground is without merit and has no prospects of success.

Proposed Ground 6 – Failing to have regard to relevant matters

34. I adopt Mr Hurley's submission that Stage Four and Breakas' complaint about the alleged prejudice to them by the decision to reinstate the action fails to acknowledge that they are the architect of any alleged prejudice.

35. Further, Stage Four and Breakas' complaint overlooks that their application filed on 2 December 2019 failed to comply with:

    a. Rule 18.11 of the CPR, or alternatively, on the facts, rule 9.10(2)(d) was not enlivened;



b. Rule 9.1 of the CPR; and

c. Rule 9.3 of the CPR.

36. This proposed ground of appeal is without merit and has no prospects of success.

Proposed Ground 7 – Failing to have regard to relevant matters being further evidence in making the Decision dated 21 October 2022

37. It is submitted that I erred in law by failing to take into account relevant considerations to the exercise of the Court's discretion in declining to relist for hearing 100% Pur Fun's Application to Reinstate Action.

38. The 2 supporting sworn statements filed by Stage Four and Breakas in support of their Application that Claimant's Application to Reinstate Action be Relisted for Hearing were filed on 12 August 2022.

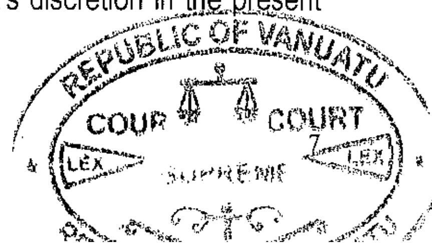
39. I heard Stage Four and Breakas' Application on 12 August 2022 and declined and dismissed it. I set out the reasons for that decision in the Decision dated 21 October 2022 which included paras 13 and 14 as follows:

> 13. *At the commencement of the hearing, both counsel agreed that I need only have regard to the two supporting sworn statements filed on 12 August 2022 if the Court were to agree to re-list 100% Pur Fun's application for hearing. In that event, 100% Pur Fun would need to be given the opportunity to respond to those sworn statements before 100% Pur Fun's Application was reheard. That disposed of the first ground of the Application.*
>
> 14. *As to the remaining grounds of the Application, I did not agree that the matters now raised (including in Mr Morrison's written submissions dated 12 August 2022) were of material facts that 100% Pur Fun was required to make full and frank disclosure of prior to or at the hearing on 12 July 2022. They are matters as to the merits of the Claim which are matters for trial or for another interlocutory application yet to be filed. That disposed of the second and third grounds of the Application.*

40. As set out in para. 13 of the 21 October 2022 Decision, both counsel agreed that I need only have regard to the two supporting sworn statements filed on 12 August 2022 if I were to agree to re-list 100% Pur Fun's application for hearing. That disposed of the first ground of the Application. As to the remaining grounds of the application, I did not agree that the matters then raised were of material facts that 100% Pur Fun was required to make full and frank disclosure of prior to or at the hearing of its Application to Reinstate Action. I concluded that the grounds for the Application lacked merit and thus declined and dismissed it the Application.

41. In the circumstances, I consider that the decision and reasons given in the Decision dated 21 October 2022 constituted an orthodox exercise of the Court's discretion and therefore this proposed ground is also without merit and lacks prospects of success.

42. Finally, Mr Hurley submitted that the cost order made at para. 17 of the Decision dated 21 October 2022 of VT50,000 to be paid to 100% Pur Fun by 4pm on 12 September 2022 has not been paid. This counts against exercise of the Court's discretion in the present decision.



43. In conclusion, I agree with Mr Hurley that having regard to all of the above factors, leave to appeal should be refused because there are no important issues of law raised in the proposed appeal, none of the proposed grounds of appeal are meritorious, and 100% Pur Fun would suffer prejudice if leave is granted as it would involve further costs and delay in progressing this matter to trial.

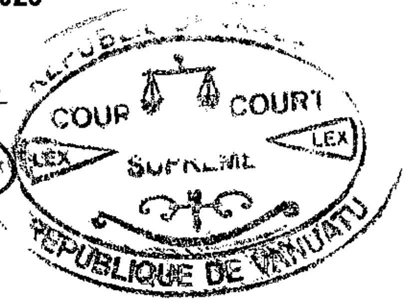
44. For the reasons given, the Application will be declined and dismissed.

F. Result and Decision

45. The First and Fifth Defendants' Application for Leave to Appeal filed on 21 November 2022 is **declined and dismissed**.

46. Costs must follow the event. The First and Fifth Defendants are to pay the Claimant's costs of the Application as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.

DATED at Port Vila this 5th day of June 2023
BY THE COURT



Justice Viran Molisa Trief