IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 32 of 2013

BETWEEN: NATIONAL HOUSING CORPORATION
Appellant

AND: JOHN TARILAMA AND EILEEN TARI
Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Appearances: George Nakou for the Appellant
Felix Laumae for the Respondents

Hearing: 15 November, 2013

Judgment: 22 November, 2013

JUDGMENT

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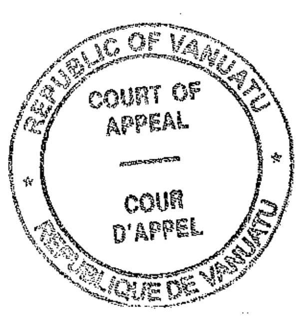
1. The NHC sued the respondents seeking orders permitting the NHC to exercise its power of sale under the mortgage it held over Mr and Mrs Tari's property at Fresh Wota Port Vila - lease title No. 11/OG33/030. The claim alleged that Mr and Mrs Tari were in significant default under their obligation to make payments on the loan secured by the mortgage. Mr and Mrs Tari defended the claim on the basis that they were not in default and that accordingly there had been no breach that should entitle the NHC to obtain orders for possession and sale of the property.

2. The Supreme Court dismissed the claim save to order that Mr and Mrs Tari pay NHC an amount of Vt 297,663 which was specified to be the *"outstanding payments owed under the mortgage"*.



3. The NHC appeals against the decision of the Supreme Court not to permit it to take possession of and sell the property pursuant to the terms of the mortgage.

4. We note from the outset that NHC did not claim for judgment for the mortgage arrears but simply for orders permitting the NHC to exercise its power of sale under the mortgage. To that end, the judgment of the Supreme Court went beyond the pleadings. There may be quite different issues that arise when it comes to making an assessment as to the exact amount that was required to be paid by Mr and Mrs Tari under the mortgage as against what they did in fact pay; that is, whether the loan account has been settled in full as Mr and Mrs Tari claim or whether it is outstanding as claimed by the NHC.

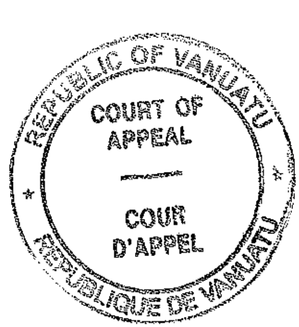
5. Be that as it may, the claim as pleaded depended upon the court below finding that the Taris were in breach of the mortgage in relation to their obligations to meet the instalment repayments of the loan. That is the principal issue on which the Supreme Court was required by the pleadings to focus. The Supreme Court did, however, reach certain conclusions that are important in this case and to which we will return.

Application for leave to amend the grounds of appeal

6. We heard this appeal last Friday, 15 November 2013 and reserved our decision for delivery at 4.00 pm today. Yesterday (21 November 2013) at 4.00 pm, the NHC applied for leave effectively to amend its grounds of appeal by the inclusion of an additional ground and for the appeal (as amended) to be adjourned for hearing at the next session of this court in 2014. In short, the NHC wished to reshape and re-present its appeal in an attempt to have the case returned to the Supreme Court for rehearing.

7. The new or additional ground of appeal sought to be introduced was designed to address a matter considered to be of significance in the court below and one which was addressed directly during the course of the appeal hearing last Friday. In summary, the NHC sought to challenge the weight that the primary judge gave to the evidence of Mr Tarilama particularly as he was not cross-examined on his sworn statement filed in accordance with CPR 11.3. It is appropriate at this stage to refer to CPR 11.7 as to the use that a sworn statement has in proceedings:

> ***11.7 Use of sworn statement in proceedings***
>
> *(1) A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled it inadmissible.*



(2) The sworn statement need not be read aloud during the trial unless the court orders.

(3) A witness may be cross-examined and re-examined on the contents of the witness's sworn statement.

(4) A party who wishes to cross-examine a witness must give the other party notice of this:

(a) at least 14 days before the trial; or

(b) within another period ordered by the court.

8. The court reconvened at 9.00 am this morning to hear the application which, we note for completeness, was opposed strenuously by Mr Laumae. After giving the matter due consideration, we consider that leave should not be granted to amend the grounds of appeal. We do not consider that this appeal would have a different outcome even if leave was given for the grounds of appeal to be expanded in this way. That notwithstanding, it is also clearly in the public interest that there is finality in litigation.

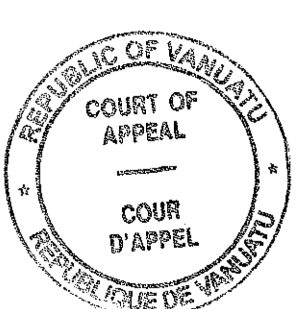
9. The claim was heard at a full trial in the Supreme Court. To allow an unsuccessful litigant to have its case reheard by the Supreme Court when there was no error made by the primary judge would clearly be contrary to the public interest in having finality in litigation. It would be tantamount to an abuse of process

10. This public interest issue was addressed by Lord Cooke of Thorndon in the decision given by him for the Court of Appeal of Samoa in ***Fiso v Reid***[1] albeit within a different situation to what we have before us here. However, the principles relating to finality in litigation as explained by his Lordship have universal application.

"The Principle of Finality

We have no doubt that in considering the exercise of the discretion to extend time the principle that there ought to be an end to litigation is a consideration to be taken into account. It is not the only consideration, but it is a major one in a case such as the present. An expression of the principle which has come to be cited very often in the last eighty years or so is contained in the judgment of Wigram V.-C. in Henderson v Henderson (1843) 3 Hare 100, 115 –

[1] ***Fiso v Reid*** *[2002] WSCA 2; Misc 70 2002 (2 December 2002)*



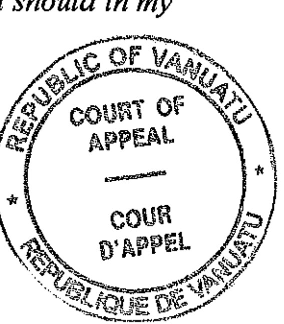
... when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward... The plea of res judicata applies, except in special cases ... to every point which properly belonged to the subject of litigation , and which the parties, exercising reasonable diligence, might have brought forward at the time.

Henderson v Henderson and many subsequent cases have been reviewed in the House of Lords in Johnson v Gore Wood & Co. [2000] UKHL 65; [2001] 1 All ER 481. Delivering the leading speech, Lord Bingham of Cornhill concluded at pp. 498 to 499 –

It may very well be, as has been convincingly argued (Watt 'The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter' (2000) 19 CJQ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.

Lord Bingham continued –

The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my



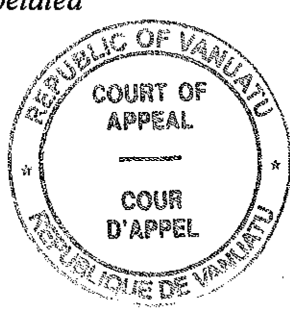
opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

Similarly Lord Millett concluded at p.525 –

While the exact relationship between the principle expounded by Sir James Wigram and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented.

Johnson v Gore Wood appears to have inspired an article entitled 'A Closer Look at Henderson v Henderson' in (2002) 118 LQR 397 by K. R. Handley (Handley JA of the New South Wales Court of Appeal). The author analyses Henderson v Henderson itself as based on cause of action estoppel, argues that this point has been overlooked or misunderstood in some later cases of high authority, but applauds Johnson as returning Henderson to its proper place, as an example of a category of abuse of process. He accepts that a broad merits-based approach is now required, even though this means 'a discretionary judgment and ... will tend to generate extensive argument and lengthy evidence.'

In the present case the argument was not lengthy, nor was any new evidence called for. Both the risk that the solicitor's letter of April 1992 (expressly pleaded in the statement of defence) would be seen by the Court of Appeal as significant, and the argument that the award of only $200,000 for fill was based on a wrong principle, were or should have been obvious at all material times. On Fiso's side those possibilities must be treated as having been impliedly accepted when a cross appeal was not brought. What generated the present very belated



application were the obiter observations of the Court of Appeal in their judgment. Those observations were the only 'special circumstances' which Mr Toailoa could suggest to take the case out of the principle of finality . No doubt they were unexpected observations, but they cannot in our view override the plain fact that the opportunity of cross appealing was not taken.

Returning to the appeal

11. In the Supreme Court, the NHC called two witnesses being Rebecca Aru (the in-house legal officer) and Davina Tosusu, its senior accountant. Both those witnesses were cross-examined at the trial.

12. The evidence for Mr and Mrs Tari was by the tendering of the sworn statements of John Tarilama. It is of significance that Mr Tarilama was not required for cross examination. That was treated of particular significance in the Supreme Court and indeed we consider quite rightly so.

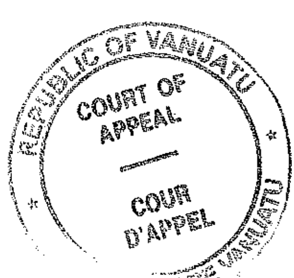
13. Rebecca Aru produced an agreement bearing date 16 July 1992 between the NHC and the Taris which the Taris conceded that they had executed. We pause to mention here that the Taris did not have independent legal advice in respect of the loan documentation. Clearly, they relied upon the NHC officers with whom they dealt.

14. That loan agreement unhelpfully does not detail the amount of the loan. That part of the agreement is left blank. However, the agreement does refer correctly to the property. Additionally, it specifies that the loan made by the NHC to the Taris would bear interest at the rate of "10% per annum". There is also no detail inserted in the clause purporting to specify the repayment installments required in respect of the loan principal and interest. The relevant paragraph states:

> *"the borrower shall repay the principal of the loan and interest thereon by consecutive installments of ……….…each, commencing on the …………… day of …………., 19….. and be made between the first and tenth day of the month of their due date, without demand by the Corporation. The amount of the final installment may be varied. The borrower may repay any part of the principal at any time in advance of the date."*

15. There is also provision made in the agreement for penalty interest of 14% to apply in the event of default in respect of the payments required.

16. This loan was secured by a mortgage registered over the property which mortgage specified a principal loan amount of Vt 1,793,106. The schedule to the mortgage



again refers to an interest rate of 10% per annum and a penalty rate of 14% per annum in respect of any overdue payments.

17. At this stage, it is convenient to have regard to the evidence of Mr Tarilama. He explained that in 1988 the NHC commenced a low cost housing scheme at Fresh Wota in Port Vila. The NHC was established by the National Housing Corporation Act [Cap.188] on 4 August 1986.

18. We note that the National Housing Corporation Act confirms that the NHC was formed for the purpose of providing houses and ancillary buildings for sale or for leasing in accordance with programs approved by the Minister responsible for housing – s. 4(1).

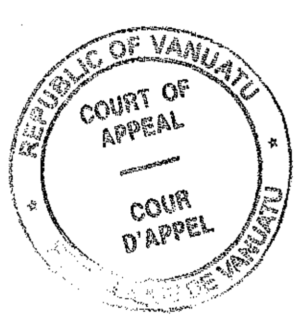
19. There can be no doubt that Mr Tarilama was correct when he stated that in 1988 the NHC started the low cost housing scheme at Fresh Wota which was advertised to the public. That conforms with sections 4 and 5 of the Act.

20. In particular, s. 4(3) directed the Corporation to,

> *(3) In exercising its functions, the Corporation shall endeavour so far as is practicable with the need to provide housing at a minimum cost to purchasers to balance its income and expenditure taking 1 year with another.* ***It shall not be an object of the Corporation to make a profit.*** (emphasis added)

21. Mr Tarilama explained that on 9 May 1988, his wife and he applied to the NHC to purchase a house under the Fresh Wota scheme. They completed a form with the assistance of *"officers of the claimant (the NHC)"* who emphasised to the Taris that the scheme was set up by the Government not to make a profit but to assist Ni-Vanuatu to own real property. Mr Tarilama stated that before the application form was completed, the *"officer of the claimant"* provided them with an explanatory document that showed that there were two different types of houses available for purchase under this low cost housing scheme. The complete house had a cost price of Vt 1,940,166 and an incomplete house a cost price of Vt 1,477,670.

22. It was considered by the primary judge to be of particular significance that the form provided to the Taris by the *"officer of the claimant"* provided a breakdown of not just how the purchase price was made up with the addition of fees but also what repayments would be required. In particular, paragraph *"a4"* provided:-



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23. The document then sets out in detail how the price for an incomplete house of Vt 1,477,670 was increased, with various fees applied less a deposit requirement of Vt 50,000, to a *"total mortgage value including legal fees"* of Vt 1,547,950. To this amount was then added a 10% interest sum of Vt 154,795 resulting in a *"total principal plus interest loans*" of Vt 1,702,745. This is against the loan principal of Vt 1,703,106 specified in the mortgage.

24. The document then clearly set out the calculation method for determining the monthly payments required to settle the loan over a 15 year term. It did this effectively by dividing Vt 1,702,745 by 180 (15 years x 12 months per year) to reach a monthly repayment rate of Vt 9,460.

25. The document goes further and undertakes much the same calculation in respect of a complete home at the higher price.

26. The Tari's application was approved by the NHC. Mr and Mrs Tari then indicated to the NHC that they would prefer to repay the loan over eight years rather than fifteen years. This was permissible as the loan allowed early reductions in principal without penalty. The monthly installment payment was re-calculated to be Vt 17,750 over that eight year term. A deposit was then paid and on 16 July 1992 the transfer of the property to the respondents was registered together with the mortgage for the loan.

27. Mr Tarilama stated that he calculated that they have paid a total of Vt 1,875,750 to NHC which he contends amounts either to an excess of Vt 173,005 against the amount calculated initially by the "officer of the claimant" or an excess of Vt 82,644 against the amount specified in the mortgage. Of course, that assumes that a one-off interest charge of 10% was to apply to the loan and not 10% per annum It is not clear to us from the evidence in the court below that this is necessarily so even if the Taris are correct and that a one-off interest charge was applied up-front to the loan. The evidence before the Supreme Court suggests that the Taris underpaid their monthly requirements on occasions which may have activated a penalty interest recalculation.

28. As previously mentioned, the claim is not for judgment for an amount under the loan but for orders permitting the NHC to exercise its power of sale under the mortgage. In short, the NHC had to prove that the Taris were in default in respect of their loan

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repayment obligations and thus in breach of the terms of the mortgage giving the NHC the power to take possession of and sell the property. This is where the decision not to cross-examine Mr Tarilama became of particular moment with us as it clearly did in the Supreme Court.

29. The primary judge dealt with the decision not to cross examine Mr Tarilama at paragraphs 28, 29 and 30 of her decision.

> *"28 It is pertinent to note that John Tarilama was not cross-examined by the Claimant's counsel on his evidence. To my mind this witness gave a correct narration of the facts surrounding the sale and purchase transaction in question. He said that he and his wife Eileen Tari were given the keys to the house sometime in 1988 by the then General Manager, Mr Bule, for them to complete the house. He said arrangements to that effect were commenced then but that no documents were signed at the at stage. He testified that the signing of all the ddocuents took place in 1992 and not in 1989 as alleged by the Claimant. He also said that his wife signed at the old Court House building whilst the document was signed by him at his house.*
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> *29 It is submitted by defence counsel that John Tarilama's evidence must be accepted as it was unchallenged'*
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> *30 In the case of **Hack v Fordham** [2009] VUCA 6; Civil Appeal Case No. 30 of 2008 (30 April 2009) at paragraphs 21 and 30 the Court of Appeal commented as follows:*
>
> > *"21. In considering whether the termination was unjustified, counsel for Mr. Hack contends that the trial Judge should have given weight to other matters asserted by Mr. Hack in sworn statements filed by him and a witness on his behalf, including that the respondent had been guilty of a serious misconduct, and was at the time of his dismissal conducting another business on his own account. The difficulty with this contention lies in the way the trial was conducted. At trial counsel for both of the claimant and the defendants tendered the sworn statements filed before trial on their clients' behalf, and, apparently by agreement, then did not cross examine the deponents. This procedure deprived the Court of the opportunity to see and hear the deponents respond to the challenges made to their evidence. Without seeing and hearing the witnesses cross-examined on disputed facts the Court was in no position to decide issues of credit between the witnesses. In particular the disputed allegations of misconduct and other business activities made against the respondent were not tested.*

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> *Not surprisingly, the Court has made no findings about them. Rather the trial Judge confined his findings to matters which appeared to be common ground. As the disputed allegations made by Mr. Hack were not tested by cross-examination, the trial Judge was correct not to make findings on those topics. For the same reason, it is not possible for this Court to resolve the disputed evidence* [2]
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> *30. We have already mentioned the procedure adopted by the parties in this case of not cross examining on sworn statements where the facts deposed to are in dispute. Counsel in a trial must appreciate that when a deponent is not cross examined, a trial Judge will not be in a position to reject the deponent's evidence in favour of a different version of the facts where the dispute turns on the credit of the witnesses."*"

30. Furthermore, at para 40, the primary judge considered that she had *"no alternative but to accept (Mr Tarilama's) assertion that the interest was placed on a fixed term calculation"*. That is, that all that was required to be paid was the purchase price plus the fees plus a one off 10% interest amount rather than interest of 10% per annum accruing from time to time over the term of the loan.

31. The primary judge had no option but to reach that conclusion given the decision made by counsel for the NHC not to cross-examine Mr Tarilama.

32. As was correctly stated by the primary judge, it is trite law that a party who asserts a fact must prove it. In this case, the burden of proof was on the NHC and to the standard of the balance of probabilities. What was required to be proven was a breach of the mortgage by the Taris such as to activate the mortgagee sale provisions.

33. While the primary judge determined that the respondents owed NHC the sum of Vt 297,663 as the outstanding balance of the loan, with respect that was not an issue raised by the pleadings. If it had been, we cannot discount the possibility that the matter may have been pleaded and argued differently particularly for Mr and Mrs Tari and the case determined on a slightly different basis.

34. The issue before us is whether the primary judge should have held that Mr and Mrs Tari were in breach of their obligations under the mortgage. In this respect, we consider that we are in as good a position as the primary judge was to determine that

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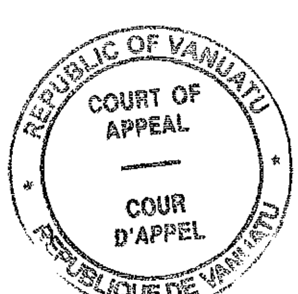
[2] ***We have set out the full text of paragraph 21 rather than the abbreviated version adopted by the primary judge***



issue. The evidence is simply not convincing that there was such a default. The failure to cross-examine Mr Tarilama meant that his evidence in this particular respect could not be dismissed. Moreover, his evidence provided a basis for the defence contention that the Taris were induced to enter into the transaction on the representation that the purchase price would include only a one-off 10% charge for interest. In the context of a national housing scheme that operated on a "not-for-profit basis", such a one-off interest charge does not appear to us to be surprising as would unquestionably be the case in a normal commercial transaction.

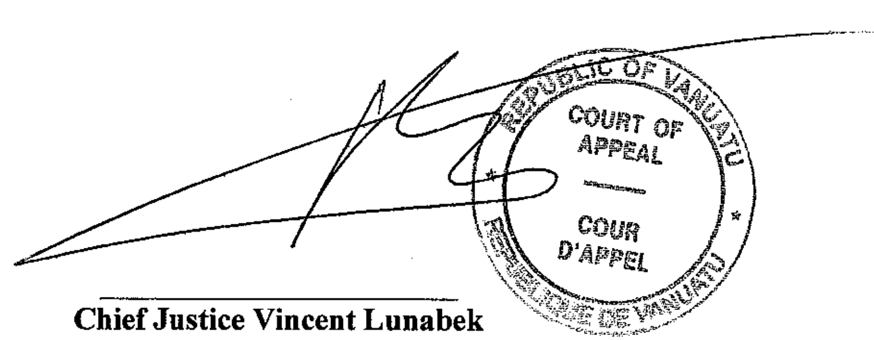
35. For these reasons, we consider that the outcome of the case in the Supreme Court was correct although we have approached it in a slightly different way to the primary judge.

36. We observe that the failure of this appeal does not preclude the NHC from commencing a claim that seeks to establish exactly what, if anything, is owing by Mr and Mrs Tari to the NHC in respect of this loan.

37. For these reasons, the appeal in a general sense cannot succeed. The NHC is not entitled to take possession of and sell the property. Furthermore, and for the reasons given, we set aside the order that the Taris are indebted to the NHC in the sum of Vt 297,663. That is a matter to be separately addressed.

38. The respondents are entitled to costs on this appeal on a standard basis to be agreed or taxed.

FOR THE COURT



Chief Justice Vincent Lunabek