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

Civil Appeal
Case No. 19/81 CoA/CIVA

BETWEEN: WESTERN PACIFIC CATTLE COMPANY LIMITED

Appellant

AND: EILON MASS trading as RAW FOR BEAUTY

Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel V. Fatiaki*** ***Hon. Justice Gust Andrée Wiltens***
Counsel:	*M. Hurley for the Appellant* *Respondent in person*
Date of Hearing:	*1st May 2019*
Date of Judgment:	*10th May 2019*

JUDGMENT

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1. The appellant seeks to set aside an order made in the Supreme Court on 3rd December 2018 which struck out the appellant's counterclaim which had been filed on 27th July 2015 in Supreme Court proceedings commenced by him.

2. The appellant contends that the order should be set aside as neither of the personal directors of the appellant, Mr Ronan Harvey and Mr Sean Griffin, had received notice of the hearing set for 3rd December 2018 and the order was made in their absence.

3. The respondent resists the appeal contending that his strike out application and notice of the court listing on 3rd December 2018 had been properly served and that the strike out order was properly made in the absence of any representative for the appellant.

4. For reasons given later in this judgment, we conclude that both the respondent's application to strike out the counterclaim, and notice of the time for the court hearing on 3rd December 2018 were properly served even though neither Mr

Harvey nor Mr Griffin had been given notice of the time for the hearing. Notwithstanding the proper service the appellant argues that this court has in past cases emphasized that substance should take precedence over form, and has taken a liberal view in the application of the power in the Civil Procedure Rules 2002 to waive strict compliance so as to enable a defaulting party who has not attended the hearing, or who has not complied with the rules, to present a case and to be heard.

5. The well-known and leading case which expounds that liberal view, Fujitsu (NZ) Ltd. v International Business Solutions Ltd. [1998] VUCA 1 is relied on by the appellant. Based on that decision and later cases that have applied observations of the Court of Appeal made in Fujitsu, the appellant argues that the guiding principle is that the Court should ensure that the matter is determined according to substantial justice. See also the overriding objectives of the Civil Procedure Rules, Rule 1.7(b). The appellant argues that substantial justice in the circumstances of this case requires that it be permitted to prosecute its counterclaim.

6. We have reached the conclusion that this is not an appropriate case where the failure of the appellant to be represented at the hearing on 3rd December 2018 should be excused. To explain why it is necessary that we set out the long history of this litigation in some detail.

History of the Litigation

7. The respondent filed the originating statement of claim on 25th May 2014 seeking to recover machinery and equipment situated on a property owned by the appellant at Velit Bay, and for damages for the destruction of a coconut oil business which the respondent alleged he was intending to conduct on the appellant's property. He pleaded that the destruction was the result of him being wrongly ejected by the appellant from the Velit Bay property.

8. The appellant is and was at all relevant time a company registered in Vanuatu. There are three directors of the appellant, Mr Harvey who now resides in New Zealand, Mr Griffin who lives and works in Vanuatu, and a corporate entity registered in Vanuatu, Astrolabe Limited. Astrolabe Limited's registered office is at first floor, iCount building in Port Vila. That address is also the address of iCount Limited trading as iCount Accountants Consultants Advisors (iCount), and also the address of the registered office of the appellant.

9. The appellant instructed a lawyer who filed a defence in August 2014 which comprehensively denied the respondent's claims and allegations. In particular the defence denied that the plant and equipment claimed by the respondent was

owned by him and on the contrary, asserted that it was the property of the appellant.

10. After several court conferences where the appellant had failed to appear, on 9th May 2015, the lawyer on the record for the appellant withdrew from the proceedings. On 21st May 2015 a new lawyer commenced to act for the appellant and on 27th July 2015 filed an amended defence which included a counterclaim. Several supporting affidavits were filed but none by the personal directors. At further conferences in July and August 2015 the appellant was ordered to file additional sworn statements to support the counterclaim, but these directions have not been complied with.

11. In much of 2015 and the early part of 2016 the respondent was the subject of criminal proceedings, some directly relating to events that were also the subject of the Supreme Court claim and counterclaim. During this time the respondent's ability to progress his Supreme Court claim was restricted.

12. On 15th February 2016 the appellant applied to have the entire claim struck out. Had that application proceeded to success, both the claim and the counterclaim would have been struck out. One of the grounds for the application was that the respondent had been found guilty and was convicted of criminal offences against the appellant (these convictions were later quashed by the Court of Appeal). The appellant filed additional submissions in support of this application in March 2016. In September 2016 the Supreme Court ordered the appellant to file further sworn statements to support its application. These statements have never been filed.

13. In September and October 2016 the appellant took the necessary steps to sell and transfer its Velit Bay property and to remit the proceeds of sale to interests controlled by Mr Harvey overseas. In late October 2016 Mr Harvey published a public notice as a step towards having the appellant removed from the register of companies stating that the appellant "*had discharged in full its liabilities to all known creditors*". No reference was made to the respondent's outstanding Supreme Court claim. On 13th December 2016 the appellant was removed from the register of companies.

14. In January 2017 the respondent sought to progress the Supreme Court proceedings. He applied to add many new parties as defendants, alleging that they had acted in concert to liquidate the assets of the appellant, and put them beyond the respondent's reach thereby defeating the potential fruits of his claim. That application ultimately failed, both in the Supreme Court and later in the Court of Appeal on 17th November 2017; *See:* Mass v Western Pacific Cattle Company [2017] VUCA 42.

15. In March 2017, during a conference hearing relating to the application to join the new parties, the lawyer then on the record for the appellant announced that she would no longer be acting for the appellant as it had been removed from the register of companies. Mr Griffin, who was present at the hearing as a director, also left the conference for the same reason. Thereafter the appellant had no lawyer on the record.

16. On 9th February 2018 on the application of the respondent, the appellant was re-instated to the register as at the time of its de-registration there was the outstanding unresolved claim of the respondent. Mr Harvey and Mr Griffin were restored to their positions as directors, and subsequent documents filed by them in the proceedings illustrate that they are continuing to act in those roles.

17. On 22nd February 2018 the respondent filed his application to strike out the counterclaim on grounds which included the failure of the appellant to comply with earlier orders of the Court as to the filing of additional sworn statements. The respondent sought to serve this application both on 6th and then 14th March 2018 by sending copies by email to iCount and Mr Daniel Agius who is a director of iCount. Whether or not this was good service, it at least gave them a notice of the application. At this time the appellant still had no lawyer on the record. Had the appellant been concerned to prosecute its counterclaim it is surprising that it did not ensure that there was a lawyer on the record to do so, and, further, to take steps to resist the strike out application.

18. On 3rd August 2018 the Court fixed a conference date for 15th October 2018 and the notice of that conference was served on the appellant's registered office by the Sheriff on 16th August 2018. At least the appellant and its directors should have realized that a conference on 15th October 2018 would include on its agenda consideration of the respondent's strike out application.

19. By 15th October 2018 there was still no lawyer on the record for the appellant. No one appeared that day on the appellant's behalf. On the oral application of the respondent an order for substituted service of documents on the appellant was made on the ground that the respondent had earlier been threatened when attempting to serve documents on the appellant at its registered office. The Court ordered that any document to be served on the appellant if emailed to any one of four specified addresses would be deemed effective service on the appellant. The email addresses were those of iCount, Mr Agius at iCount and the official email address of Astrolabe Limited and, so it was intended that of Mr Griffin. Unfortunately due to typographical errors there were mistakes in the email address for Mr Griffin such that anything sent to the address stated in the order would not reach him – as indeed turned out to be the case.

20. On 16th October 2018 the respondent by email sought to serve his strike out application in accordance with the substitution order by emailing copies to each

of the specified addresses. The emails bore a statement "*By order of the Court this email is deemed effective service*". It is reasonably clear that by that time the appellant and its directors were not aware of the orders for substitute service, and that Mr Griffin did not receive the email. Mr Agius did receive it and replied on 17th October 2018 informing the respondent that on instructions from the directors Mr Harvey and Mr Griffin iCount and Mr Agius "*were not authorized to accept service of the application to strike out*". It may therefore be assumed that Mr Harvey and Mr Griffin were well aware of the respondent's strike out application.

21. Quite apart from the order for substituted service, of which the appellant and its directors were then unaware, the respondent's email plainly alerted the directors to the respondent's intention to proceed with its strike out application, and moreover, the email service was in reality service of the proceedings on the registered office. Still the appellant did not instruct a lawyer to appear on the court record to defend its interest.

22. Mr Griffin however contacted the acting registrar of the court on 25th October 2018 saying that he had attended some earlier conference listings only to be told that they had been cancelled, and he therefore asked the registrar to notify him directly of any future court hearings, and gave his telephone and email contacts. On 30th October 2018 the acting registrar forwarded to Mr Griffin a notice of conference with a listing on 17th December 2018.

23. On 26th November at the respondent's request the Supreme Court directed that his strike out application be listed at 2pm on 3rd December 2018 and issued a notice of conference accordingly. The respondent was directed to serve the direction which he did on 28 November 2018 by emailing it to each of the four addresses stated in the substitution order. It is not suggested that the email and attachment were not received by the addressees whose email addresses were correct, but they were not received by Mr Griffin. The acting registrar did not send any separate notification to Mr Griffin concerning the new listing.

24. When the application came on for hearing on 3rd December 2018 there was no appearance of anyone for the appellant.

25. Before the hearing commenced, the personal assistant to the judge telephoned Mr Griffin and said to him that he was supposed to be at court. Mr Griffin said that he was elsewhere. He had not been advised as to the court appointment, and said he would send an email to the judge's secretary. Surprisingly, he did not ask what the appointment was about, nor did he ask to have the matter adjourned. He did send an email immediately apologizing to the Court and asking "*please advise what action I must now take*". It is not known when this email came to the attention of the judge, but even if it did so immediately, it again failed to ask for an adjournment.

26. The Court proceeded to make the orders striking out the counterclaim in the absence of a representative of the appellant.

27. In seeking to set aside this order the appellant argues that this is a case where the two personal directors were unaware of the listing. The respondent had made no attempt to serve Mr Harvey (he was in New Zealand) and had not effectively served Mr Griffin. Mr Griffin was in Vanuatu and had he be given more notice could have appeared. It is also argued that Mr Griffin was misled by the advice from the acting registrar that the next court listing would be on 17th December 2018. That however is not an argument of substance as Court listings can be changed and additional ones fixed.

28. The email of 28th November sent to Mr Agius was received by him as was the email to the registered office at iCount. The email was forwarded to Mr Agius who was at that time in Bangkok for medical tests. He has deposed in his sworn statement that "*I received emails by my mobile telephone whilst I am overseas. However due to undergoing medical tests whilst in Thailand I overlooked Mr Mass' email of 28th November 2018 ... in any event I would have taken the position that I was bound by the appellant's directors' previous instructions ... not to accept service of documents*".

29. On 17th December 2018 the appellant instructed a lawyer to file notice of commencing to act, and on 3rd January 2019 the notice of appeal against the strike out order was filed.

30. In the meantime on 17th December 2018 the respondent filed an application for summary judgment on his claim. That application has been answered by a sworn statement from Mr Harvey contesting the allegations made in the statement of claim. That sworn statement is relevant to the present proceedings as it does not assert a desire on the part of the appellant to press the counterclaim. Mr Griffin however has deposed that the appellant is keen to prosecute its counterclaim, but beyond that general statement says nothing about its merits. The possible merits of the counterclaim are also relevant to this application. Merits, if any, are not apparent from the pleadings that have been struck out, or from Mr Harvey's recent sworn statement which, like the defence, is directed to challenging assertions made by the respondent in support of his claim. The strike out order does not, of course, prevent the appellant from continuing with that defence. The counterclaim merely read:

"*COUNTERCLAIM*

The defendant claims that it is actually the claimant who owes him money and has caused loss to him:

(a) Financial loss in the purchase and shipment of machinery to Vanuatu;

(b) *Financial loss in the non-assemble of the machinery for the production of coconut;*

(c) *Financial loss in the damage of the machinery resulting in the non-production of coconut oil;*

(d) *He has suffered stressful and mental depression.*"

31. Counsel now instructed by the appellant frankly conceded before this court that the counterclaim as pleaded failed to articulate a meaningful claim, but argued that if the counterclaim was reinstated it could be amended to properly plead a claim that the appellant had suffered loss through the actions of the respondents in or about the Velit Bay property.

Discussion

32. As we stated at the outset of this judgment the appellant seeks to call in aid the remarks of the Court of Appeal in Fujitsu. A liberal approach to excusing non-attendance, and non-compliance generally with court rules and their technicalities is justified where a party to the proceedings would otherwise be denied a fair opportunity to put the case relied upon to advance or resist the claim. Every case is likely to be different, but where in all the circumstances the party in default has had a reasonable opportunity to advance its case, and the other party has given the defaulting party reasonable opportunity to do so before seeking to rely on strict form, the substantial justice of the matter is likely to favour the application of the rules according to their strict requirements. In our opinion this is such a case.

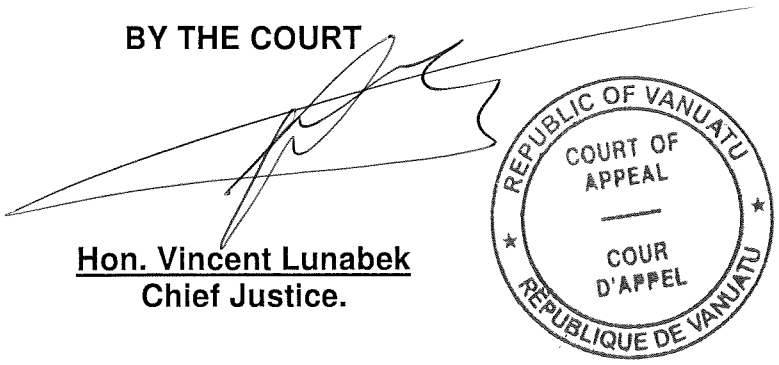
33. The appellant has not at any stage evidenced a positive intention to prosecute the counterclaim against the respondent, and when the respondent brought to the appellant's attention that he was making an application to strike out the counterclaim (as long ago as March 2018) the appellant took no steps in the proceedings to protects its position. In particular it did not instruct a lawyer to appear on the court record. On the contrary it did nothing in the proceedings and actively obstructed steps taken by the respondent to have his application served. It is the appellant's obstructive attitude to the prosecution of the respondent's claim, most clearly evidenced by its failure to instruct a lawyer to represent it who could have accepted service of court documents and who could have appeared at the hearings on 15th October 2018 and 3rd December 2018, which has led to the making of the order now under appeal.

34. In our opinion in accordance with the overriding objective of the court rules the substantial justice of this matter requires that the appellant's appeal be dismissed.

35. Accordingly the order of the court is that appeal be dismissed and that the appellant pay the respondent's out of pocket expenses in connection with the appeal.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.