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

Civil Appeal
Case No 19/2774 CoA/CIVA

BETWEEN: **Oliver Wikeley**
First Appellant

AND: **Jenny Louise De Vine**
Second Appellant

AND: **Trustees International Ltd**
First Respondent

AND: **Neil Andrew Slater**
Second Respondent

CORAM:	***Chief Justice Lunabek*** ***Justice J von Doussa*** ***Justice J Hansen*** ***Justice D Aru*** ***Justice V Trief***
COUNSEL:	*S Aron — Counsel for Appellants* *M Hurley — Counsel for First Respondent* *No appearance for Second Respondent*
DATE OF HEARING:	*8th November 2019*
DATE OF DECISION:	*15th November 2019*

JUDGMENT OF THE COURT

Outcome

[1] This dispute has been before the Court since 2010. As well as this appeal there have been earlier hearings of this Court dealing with the matter. As the Court said at the end of the hearing, there comes a time when continued proceedings, particularly where delay is deliberate and unjustified as here, become an abuse of the process of the Court. This is such a case, and the appeal is dismissed.

Background

[2] The second appellant and the second respondent entered into a de facto relationship some time before matters relevant to this appeal occurred. The first appellant is the son of the second appellant by an earlier relationship.

[3] The second respondent purchased a property in Captain Cook Avenue, Port Vila, where the appellants and he, and other family members, lived for some time. In 2009 the relationship between the second appellant and the second respondent came to an end. Before that date they appear to have been living between Vanuatu and Australia.

[4] When the relationship ended, the second respondent, who has taken no part in these, or earlier proceedings, transferred the property into a trust with the first respondent as trustee, and committed the property to the ANZ Bank as security for the loan. In 2010, two proceedings were issued. The first, by TIL, claimed possession of the property. This was met by a counterclaim from the second appellant, as well as a defence to the eviction order. The second claim was brought by the ANZ Bank, which sought orders against Mr Slater to enforce its security. As well, the second appellant commenced proceedings against the second respondent in the Family Court of Australia. The two earlier civil cases in Vanuatu were ultimately settled by way of a Consent Oder dated 24th October 2013. That order read:

> *"By consent the Court makes the following orders:*
>
> 1. *That the first defendant and his immediate family, servants or agents and any other person claiming through him are restrained from remaining on or continuing in occupation of the said leasehold property contained and described in Title 11/OB31/011 located at 2 Captain Cook Avenue, Port Vila.*
>
> 2. *That the Claimant has possession of the said land and premises.*
>
> 3. *That these orders shall be stayed until 1st January, 2014.*
>
> 4. *The stay order at Order 3 hereinbefore may be extended by further order of this court in the event the First Defendant presents evidence of a Notice of Appeal filed and served by Jenny De Vine to appeal the Judgment and Orders of Justice Bender including the Judgment which Justice Bender made on the 30 August, 2013 in File No.: (P) MLC3048/2010.*
>
> 5. *Liberty is reserved to the parties to restore this matter on 48 hours notice.*
>
> 6. *Each party shall bear their own costs."*

[5] The document was signed by the solicitors for TIL. Mr Silas Hakwa, acting for the appellants signed on their behalf. The order was endorsed by Fatiaki J.

[6] The first appellant failed to vacate the premises, and enforcement proceedings were taken. They had a slow and torturous history, with every possible step being taken by the first appellant to delay proceedings so he could remain in possession. In those proceedings a number of allegations were made against both the first and second respondents, and their professional advisers, relating to the transfer to the trust. It made outrageous and unproven allegations of fraud and other nefarious activity.

[7] That matter ultimately came before this Court by way of the appeal of the appellants against the dismissal of an application to stay the enforcement of the Consent Order and also the striking out of a counterclaim that had been filed.

[8] It is quite apparent that this Court, in those proceedings, spent a significant amount of time explaining to the first appellant, who at that stage appeared in person, that the only matter the Court could consider was the regularity of the Consent Order. This Court pointed out that issue was not before the Court and there was no material presented that would justify the setting aside of the Consent Order. The Court advised the appellants that the only way the Consent Order could be challenged was in separate proceedings.

[9] That advice translated into the proceedings we are now concerned with, which we will turn to.

[10] For the sake of completeness we note from the information placed before us that the second appellant was unsuccessful in her claim in the Australian Family Court, which she pursued with a high level of persistence. In fact, to such an extent that Court ultimately declared her to be a vexatious litigant.

These proceedings

[11] The decision of this Court in the earlier matter is dated 17th November 2017. Notwithstanding that date, these proceedings were not filed until 12th June 2018, a significant delay. The first appellant was now acting in person for both the first and second claimants. The statement of claim is a long, discursive and rambling document that seeks to set aside the Consent Order and also claims damages of VT35, 000,700.

[12] In the course of those proceedings there were a number of directions and other hearings, where it is plain further advice was given to the first appellant as to how to properly conduct the proceedings. What was made abundantly clear to him was that to challenge the Consent Order he required, at the very least, evidence from counsel who then appeared and who signed the Consent Order on behalf of the appellants, Mr Silas Hakwa.

[13] Without trolling through all of the efforts to move the case forward, it is proper we set out the minute of Andrée Wiltens J dated 17th June 2019. At that stage the first appellant still acted in person for himself and the second appellant. The minute reads:

> *"1. Mr Wikeley has filed a reply to the defence on 7 June 2019, as previously directed.*
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> *2. He has not filed any further evidence, and my assumption is that there is no further evidence he wishes to rely on, given the direction from the Court of 16 May 2019 which reads as follows:*
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> > *I made it plain to him that **ALL** his evidence was to be filed — it was not a case of filing some now and more at some future time.*
>
> *3. If that assumption is incorrect, Mr Wikeley will need to obtain leave to file any further evidence with an acceptable explanation for the inherent delay.*
>
> *4. Mr Hurley now has until 4 p.m. on 8 July 2019 to file his evidence.*
>
> *5. The next available date to hear this matter is Dumbea at 9 a.m. on 25 July 2019. It is scheduled for half a day. No further applications to file evidence were made and no further evidence were filed by the appellants."*

[14] Then, on 17th July 2019, Mr Aron became involved. We understand that he is a friend of the first appellant. Mr Aron is a member of the Attorney-General's chambers. The Attorney-General gave him permission to appear for the appellants in this appeal. He filed a notice of beginning to act on 18th July 2019. Notwithstanding that date, not until some five days later did he file an application that the fixture be adjourned to a further date and leave be granted to amend the statement of claim.

[15] The grounds advanced were:

(i) that he needed more time to fully understand the case and to properly advise the claimants on possible causes of action to set aside the Consent Order.

(ii) that the claimant needed more evidence in order to establish their case and to amend the statement of claim.

(iii) that Mr Aron had a trial listed on the same day before Aru J.

[16] The additional evidence referred to by Mr Aron could only be that of counsel who signed the Consent Order, Mr Hakwa. It is apparent that, despite the passage of time, that evidence had still not been obtained almost immediately before trial.

The judgment appealed against

[17] On 25th July counsel now appearing appeared before Andrée Wiltens J. The appellants sought an adjournment. In his judgment of 26th July the Judge recorded the background to the dispute and then referred to steps taken. The Judge, at C of his decision (*18/1638 SC/Civil*), said:

> *"Steps Taken*
>
> 1. *There is no doubt that Mr Wikeley has been hampered by not being legally represented. He has however received advice from both Justice Geoghegan on 15 March 2018 and myself subsequently. There is also no doubt that it suited Mr Wikeley to be able to remain at the property by not progressing this case – conduct in this litigation by Mr Wikeley that can be properly described as obfuscating and procrastinating abounds.*
>
> 2. *Justice Felix referred this file to my attention for case management purposes following on from Justice Geoghegan's involvement – that was apparently done on 25 March 2019. On 17 April 2019 Mr Hurley wrote to the Court seeking a conference to progress the matter.*
>
> 3. *Mr Wikeley wrote to the Court on 8 May 2019 (unbeknownst to me) suggesting a conference in September 2019 before Justice Felix – he pointed to numerous matters which he considered impeded an earlier conference being appropriate. Without first seeing Mr Wikeley's message, I scheduled a first conference for this file before me for 11am on 16 May 2019.*

4. *On 13 May 2019 Mr Wikeley wrote acknowledging receipt of the conference notification and indicating that he might be in Australia then tending to his ill and destitute mother.*

5. *On 16 May 2019, in light of Mr Wikeley's indication that he was unable to attend the conference, and given Mr Hurley's other commitments that day, I agreed to move the conference forward to 10am to accommodate Mr Hurley. Mr Wikeley was not then present. I made directions that Mr Wikeley complete the pleadings by filing and serving a response to Mr Hurley's defence (as had previously been directed by Justice Felix but not complied with) and that Mr Wikeley file any further evidence he intended to rely on to support his case by 4pm 7 June 2019.*

6. *Mr Wikeley duly attended the conference at 11am. I explained to him what had occurred earlier. He readily agreed that he needed to attend to the two matters raised in my directions. He did not agree with the time-tabling, raising issues with difficulties in getting clear instructions from his mother who was in poor health. He referred to a memorandum he had previously filed setting out at extreme lengths those difficulties. Having read the memorandum in preparation for the conference, Mr Wikeley was not advancing anything new. I re-iterated that he needed to give this case priority and to deal with the actual issues, which I adverted to in much the same way as Justice Geoghegan had in his file note of 15 March 2018. In particular, I told Mr Wikeley that he needed to get a statement from his previous counsel Mr Silas Hakwa to support the application.*

7. *I scheduled a further conference for 8am on 17 June 2019 to ensure compliance with my directions, and to attempt to set the case down for hearing.*

8. *On Sunday 16 June 2019, Mr Wikeley sought to delay the conference. I received his email after the conference had concluded the following morning. I noted that he had filed a response to Mr Hurley's defence, but that he had filed no further evidence. I recorded that I accordingly inferred he did not rely on other evidence, but that if that assumption was incorrect he would require leave to file further evidence with an acceptable explanation for delay. I directed Mr Hurley to file his evidence and scheduled the matter for trial."*

[18] This clearly articulates the unexplained and plainly unreasonable delay. Further the Judge found that Mr Wikeley saw the tactic of instructing Mr Aron as yet another delaying mechanism.

[19] The Judge went on to identify that, to succeed, the appellants needed to explain the delay between the date of the Consent Order and their application to set it aside. However, rather than explain the delay, the Judge pointed out that the statement of claim referred to alleged unlawful and unfair acts and many other irrelevancies on the part of the second respondent. He referred to authority that set out the requirements to set aside a Consent Order, concluded that the delay was unsatisfactorily explained, that there was still no evidence from counsel who signed the Consent Order on behalf of the appellants', and no effort to address the prejudice to the respondents. He dismissed the application to set aside the consent order and awarded costs.

The appeal

[20] First Mr Aron argued that the Judge should have granted the adjournment and that the exercise of his discretion to refuse was wrong. He submitted that any delay could be cured by costs, and the claim could proceed with suitable amendment.

[21] He also submitted that the dismissal of the claim was incorrect, relying on *In re Estate of Kalment* [2014] VUCA 21.

[22] Mr Hurley's written submissions canvased the very significant delays that have occurred throughout these and the earlier proceedings, and submitted that there had been ample time to obtain evidence from Mr Hakwa and the Judge was correct to dismiss the claim.

Discussion

[23] As we noted, Mr Aron relied on *In re Estate of Kalment*, where it was stated:

> *"37. At the commencement of the hearing of the appeal counsel for Family Kalment sought to place before the Court information, including oral evidence from Mrs. Nari, about the circumstances in which she signed the acknowledgment. If those circumstances were relevant to the outcome of this appeal, sworn statements should have been filed from all of those people whose evidence was to be relied on. This would likely have led to the Court of Appeal referring the matter of consent back to the Supreme Court so a single judge could hear the relevant witnesses. In a case like this where an issue of consent arises there is likely to be cross-examination of the appellant's witnesses, and possibly evidence in reply from the respondents. The trial judge would have to make findings of fact whether counsel who gave the consent acted within the authority of the clients at the relevant point in time when counsel purported to give consent: Harvey v. Phillips [1956] HCA 27; [1956] 95 CLR 235."*

[24] That, of course, clearly states the legal position in relation to what must be proved to set aside a Consent Order. But it does not assist Mr Aron in addressing the delay in this matter.

[25] First, in a case such as this, the person seeking to set aside a Consent Order must grant a waiver so their communications with their earlier counsel are not subject to legal professional privilege. Justice demands that, as it enables the other side to speak directly to that counsel and perhaps, where necessary, take a statement and adduce evidence from that counsel. This has never been done in this case. The second point is that the evidence has to be filed in some form for the Court to see it. There was more than enough time to approach Mr Hakwa, give the waiver and obtain that evidence. The appellants have been advised many times of the need to do this. Rather, over a lengthy period of time they have failed to carry out this most fundamental step.

[26] Mr Aron seemed to see the relevant delay to be that in the period from when he was instructed to act. He also seemed to think the only relevant injustice was what the appellants might suffer. If that was indeed his submission, it is entirely incorrect. The Court must look at the overall delay in the matter and must take into account the justice and prejudice to all parties.

[27] In this case the delay was so significant the Judge was right to refuse the adjournment. Especially in circumstances where by the trial date still no evidence had been obtained from Mr Hakwa. Given the appalling delay, the Judge was also right to dismiss the claim to set aside the Consent Order. Furthermore it is clear that TIL could not be adequately compensated for any prejudice by a costs order. The reality here is that they have been kept out of possession since at least 1 January 2014, a period of nearly 6 years.

[28] We consider the Judge's finding in relation to the actions of the first appellant to be inevitable. The first appellant has used the Court processes throughout the original proceedings and these proceedings to avoid vacating the premises. The Court cannot condone this abuse of its processes.

[29] The first appellant is perhaps fortunate he did not face a claim for mesne profits. He should be grateful for TIL agreeing a month for him to move out. It is longer than this Court would have been minded to grant.

[30] Accordingly, the appeal is dismissed and there will be an order in the following terms:

(i) The appellants shall deliver up possession of the property in Title 11/OB31/011 located at 2 Captain Cook Avenue, Port Vila by not later than ***4 p.m. on 6 December 2019***.

(ii) The appellants' family, servants or agents shall not damage or otherwise interfere with the subject property, and shall preserve it in its current state, fair wear and tear excepted.

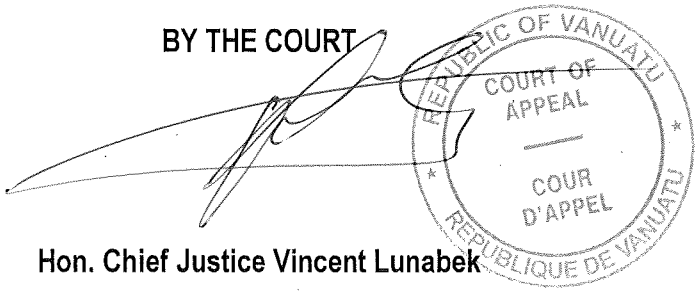
(iii) If the appellants breach either orders (i) or (ii), an enforcement warrant for the subject property shall be issued forthwith.

(iv) Costs to the first respondent, to be taxed by the Master in the absence of agreement, on an indemnity basis.

[31] Mr Wikeley needs to understand, and Mr Aron should clearly explain this to him, that any breaches of the above orders will almost certainly amount to a contempt of Court.

Dated at Port Vila this 15th day of November, 2019

BY THE COURT



Hon. Chief Justice Vincent Lunabek