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

Civil Appeal
Case No 3454 of 2019

BETWEEN **Republic of Vanuatu**
Appellant

AND **FR8 Logistics Limited**
Respondent

DATE OF HEARING:	***Wednesday 12th February 2020***
CORAM:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice J Hansen*** ***Hon. Justice R White*** ***Hon. Justice O Saksak*** ***Hon. Justice D Aru*** ***Hon. Justice V M Trief***
COUNSEL:	***A Bani for the Appellant*** ***M Fleming for the Respondent***
DATE OF DECISION:	***Thursday 20th February 2020***

JUDGMENT OF THE COURT

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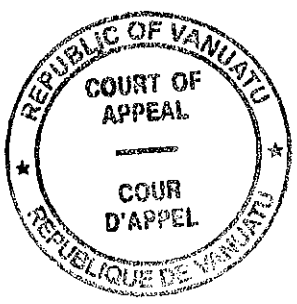
[1] The appellant appeals the judgment of Andrée Wiltens J of 3 December 2019, when he entered Summary Judgment against the appellant in the sum of VT2,723,357. The respondent filed a cross-appeal seeking the quashing of the 5 per cent interest on the judgment sum awarded by Andree Wiltens J; an order that 4 per cent interest on unpaid invoices per month be paid, or alternatively, 14 per cent interest per annum on the judgment sum; an order for costs on an indemnity basis; and an order varying the judgment in CC18/1879 an earlier action.

[2] We can deal with the last point first. While we understand the pragmatism involved in the application, no part of CC18/1879 is before this Court, and we cannot possibly deal with it in any way.



Background

[3] The Prime Minister's office arranged to import a number of vehicles and spare parts into Vanuatu for the South Pacific Mini Games in 2017. There was agreement between the Prime Minister's office and the respondent to attend to customs clearances and other incidental matters. The correct papers for all but one vehicle and spare parts were duly provided by the appellant and those vehicles were apparently uplifted without difficulty. The one remaining vehicle and the spare parts remained in storage with the respondent, and monthly invoices for the cost of storage were rendered. Ultimately, Customs seized the vehicle apparently due to the failure to pay duty, but the spare parts remain. Invoices continue to be issued for the storage of the spare parts.

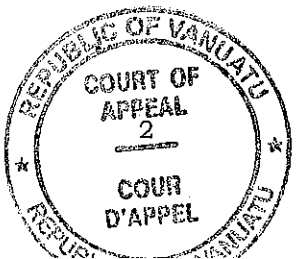
[4] In December 2019 the respondent effectively purported to exercise a warehouseman's lien on the remaining spare parts, and refused to release them. Such a refusal will count against the respondent if it seeks to claim storage charges after that date.

[5] The earlier proceedings, CC18/1879 referred to above, concerned custom clearances, storage and other incidental charges from 18 October 2017 until 11 May 2018. Fatiaki J ordered those charges to be paid by the appellant in the sum of VT 9.022311, together with interest for each unpaid invoice at 4 per cent a month, to be paid within 21 days. He further awarded 14 per cent per annum interest on the global sum awarded from 9 July 2018 until the amount awarded had been paid in full. The judgment indicated that the respondent was entitled to claim a lien on the goods and to retain possession until payment in full. In the course of those proceedings a substantial sum was paid towards what was owing. But it was well short of the full sum. Neither party appealed that decision.

[6] Following that judgment, the respondent continued to issue invoices for the cost of the storage of the goods. Those invoices led to a second summary judgment application that is the subject of this appeal.

The pleadings

[7] These pleadings were filed by the managing director of the respondent. It alleges that on 18 October 2017 the claimants supplied to the defendant, Destination Storage and Warehousing Services, at the appellant's request via the Prime Minister's office. It set out the goods stored and then listed all the outstanding storage charges. The earlier claim pleaded an agreement between the respondent and the appellant for those sorts of service, but neither pleading spells out any specific terms of the agreement.



[8] Both in the Supreme Court and this Court, the Republic maintained that the principles of *Res Judicata* and *Anshun Estoppel* prevented the claim being made. Andrée Wiltens J did not consider either principle applied, and entered judgment.

The appeal

[9] The Republic maintained its position in front of us, and at the call over we gave them notice that we considered there were some difficulties with such a defence. We repeated this caution before submissions commenced.

Submissions

[10] Ms Bani, for the appellant, submitted that both *Res Judicata* and *Anshun Estoppel* applied. She maintained that the same goods were involved. The same services, i.e. storage, were supplied. The causes of action and the pleadings were the same, and the proceedings could have been included in the original claim. Such a proposition, of course, involving contracts of this sort, must envisage some kind of rolling amendment to the original pleadings. It was unclear to the Court how this could be ultimately brought to hearing unless the goods were somehow released.

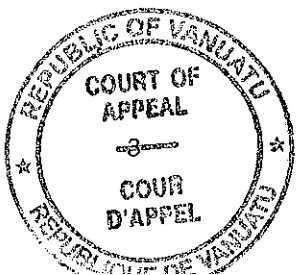
[11] Mr Fleming referred us to a number of authorities, for which we are grateful. We will refer to them below. Essentially,he submitted that neither principle applied and Andrée Wiltens J was correct to so find.

[12] As to the cross-appeal, he said the 4 per cent per month interest was included on each invoice and was a term of the contract between the Prime Minister's office and the respondent. Accordingly, he said the order of 5 per cent interest in the judgment should be quashed and set aside, and substituted with either 4 per cent interest per month on the unpaid invoices, or, alternatively 14 per cent interest on the judgment sum until payment.

[13] He submitted the respondent was entitled to costs on an indemnity basis because the argument based on *Res Judicata* and *Anshun Estoppel* had no chance whatever of success.

Discussion

[14] We repeat that in the course of the call over this Court placed Ms Bani on notice that her arguments based on *Res Judicata* and *Anshun Estoppel* faced formidable hurdles. Notwithstanding that, she persisted with the argument when the matter was substantively heard. We repeated our warning at the beginning of her submissions.



[15] The best course is to turn first to the authorities that were helpfully supplied to us by Mr Fleming. The starting point is the decision of *Henderson v Henderson* [1843] EngR 917; (1843) 3 Hare 100 (67 ER 313), where Sir Wigram VC at 115 stated:

> *... 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, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases...*

[16] Both proceedings here relied on breach of contract. But, significantly, what was sought was payment of sums due for quite distinct and different periods. As Mr Fleming submitted, the invoices pleaded in the second case could not properly have been brought before the Court in the earlier proceedings. Furthermore, it is clear the facts relied on in the earlier case are not the same facts relied on and required to be proved in the second case. The time period is quite different.

[17] Further reliance was made by the appellant on the decision in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45, in which the critical issue before the High Court of Australia was whether the matter fell within the extended principle in *Henderson*. It was a case based on the failure of the appellant authority to raise in its claim for a contractual indemnity right from the crane company (Anshun Proprietary Limited) that it knew about when the first proceedings involving the injured person were brought on and determined. The Court stated the law to be:

> *34. However in Yat Tung (1975) AC 581 the adoption of the principle in Henderson ... was taken too far. Lord Kilbrandon spoke of it becoming "an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings" (1975) AC, at p 590 . As we have seen, this statement is not supported by authority...*
>
> *...*
>
> *37. In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. ...*
>
> *38. It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment.*

[18] In a separate judgment, Brennan J stated:

> *16. ... The rule does not preclude litigation seeking a remedy to which a party is entitled in virtue of a different right from that which was first put in suit provided that the facts*

which support the right sued upon in the second action are not the same facts as those supporting the right which passed into the first judgment...

17. If cause of action is taken to mean the facts which support a right to judgment, the rule of res judicata bars an action for relief founded upon the same facts as those upon which an earlier judgment was recovered...

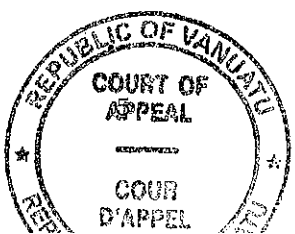
[19] The reasoning in that case is in accord with *Bradford and Bingley Building Society v Seddon* [1999] 1 WLR 1482. In that decision at 1492, Auld LJ stated:

> *"In my judgment, mere re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. ...* ***that the doctrine should not be "circumscribed by unnecessarily restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims...*** *(our emphasis).*

[20] In this case it is accepted that the same goods were in storage (except to the extent that the minibus was ultimately uplifted by Customs) throughout. The claim was for breach of contract. But critically, and obviously, the facts were not the same. The fact of storage was; the fact of the contract was; but the time period claimed for storage provided was completely different. It is nonsensical to suggest, as Ms Bani did, that the facts were exactly the same in both proceedings.

[21] This is a case, except for one matter we will turn to, where different facts had to be proved in the second proceedings (i.e. different dates) and the claim could not readily and sensibly be included in the previous proceedings. To suggest that is the absurdity of some form of rolling amendment that we mentioned earlier that would truly be an abuse of the Court's process.

[22] There is one exception, and that is a submission made by Ms Bani that there is an overlap of invoices in the two proceedings. These are said to relate to the invoices for May and June of 2018. However, by reference to the numbers of the invoices, (referred to us by Mr Fleming) those claimed for that period in the first proceeding are quite different, and for different amounts, than those claimed in the second proceedings. We do accept that those May/June 2018 invoices in the second proceeding could have been pleaded in the first proceedings, and could possibly have given rise to *Res Judicata* or *Anshun Estoppel*. However, the problem faced by the appellant is that the matter was never pleaded in this way, was never raised before the Judge below, and only surfaced in the course of the hearing of the appeal. This meant that the respondent did not have the opportunity to adduce the further evidence to which its counsel referred on the appeal. The unfairness involved means it is now too late to raise that particular point.



[23] It follows that the appeal is completely without merit and should never have been pursued. Particularly by the Republic, who ought to be a model litigant. The Court is still bemused as to the reasons why these invoices were never paid. No satisfactory explanation of any sort has been proffered by the respondent.

The cross-appeal

[24] We have no doubt that it is permissible for a business in the position of the respondent to charge interest for late payment. The difficulty in this case is that Andrée Wiltens J found there was no evidence to make the 4 per cent per month for late payment a term of the contract. In that he was correct. While accepting the pleadings in both cases were prepared by a lay person, before there is an entitlement to such interest it must be a term of the contract. There is no evidence it was ever made a term of the contract by agreement. This is alleged to be an oral contract, yet there is nothing to support that the 4 per cent per invoice per month for late payment was agreed as a term between the contracting representatives of the appellant and respondent.

[25] It does not become a term simply by including it in the later invoices issued as a consequence of the agreement. It is not enough to simply say that each invoice carried such a notation. We would, however, say we do not accept the allegation of the appellant that these were simply printed in later specifically on these particular invoices, as they are clearly part of a standard form invoice of the respondent. To include it as term in these circumstances where standard form invoices were used would require, at the very least, clear evidence that the agreed contract was on the respondent's standard terms and conditions.

[26] As Andrée Wiltens J noted there was no such evidence. The Judge was right to dismiss that claim and award 5% interest on the judgment sum.

[27] It follows that the appeal and the cross-appeal are dismissed.

Costs

[28] Mr Fleming pointed to the fact that numerous offers had been made by both the respondent and his office in an attempt to resolve this matter. There appears to have been no response to these very reasonable offers by the appellant. Still no acceptable reason has been advanced for non-payment. Mr Fleming also highlighted the warning given by the Court at both the call over and at the commencement of the substantive hearing. He sought indemnity costs on that basis and tendered a bill for VT1,349,140, which itemised work that was done in relation to this appeal since he was instructed. He stressed that the bill included nothing involving the Supreme Court case or the earlier civil matter.

[29] Ms Bani submitted that a normal award of costs would be appropriate.

[30] We are quite satisfied that indemnity costs should be awarded in this case. The Republic's approach in this matter has not been that of a model citizen or litigant. It had a clear contractual obligation which it refused to honour, and gave no satisfactory reason for that. In this litigation, the Republic was far from a model litigant, insisting on running what in law was a defence that had no chance of success by any measure. A cursory examination by a junior lawyer of the authorities and applying them to the facts would have readily established this.

[31] The appeal and cross appeal will be dismissed. In the circumstances, we award indemnity costs of VT500,000. There will be no costs on the cross-appeal.

Orders:

1. **The appeal is dismissed.**

2. **The cross appeal is dismissed.**

3. **The appellant is to pay the respondent indemnity costs of VT500,000**

Dated at Port Vila this 20th day of February 2020.

BY COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

The Hon Chief Justice Vincent Lunabek