

BETWEEN: ACN 052 469 164 PTY LIMITED (IN LIQUIDATION)
(Formerly Known as CUSTOM SECURITY SERVICES
PTY LIMITED)
Appellant

AND: ROBERT JAMES NEWHAM
First Respondent

AND: B & P INVESTMENTS LIMITED
Second Respondent

AND: PAUL NEWHAM
Third Respondent

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice J. Mansfield
Hon. Justice J. Hansen
Hon. Justice V. M Trief
Hon Justice G. Andrée Wiltens
Hon. Justice D. Aru

Counsel: *Mr. M A Karam and M A Hurley for the Appellant*
Mr. Garry Blake for the First and Second Respondent
Mr. R. E Sugden for the Third Respondent

Date of Hearing: 15th February 2021

Date of Judgment: 19th February 2021

REASONS FOR JUDGMENT

1. This appeal arises in somewhat curious circumstances, which require a little explanation. The Appellant (conveniently called CSS) on 17 August 2017 commenced a claim in the Supreme Court (Civil Case No 2145 of 2017) against the First Respondent (RJN) and the Second Respondent (B & P). CSS did not then, or at any time after that proceeding was commenced, make any claim against the Third Respondent (PN).
2. RJN was at material times a director of both CSS and B & P. B & P is alleged to have acquired certain leases in properties in Vanuatu with funds largely supplied by CSS, as well as with mortgage funds provided by Westpac Banking Corporation (secured by mortgages). The properties enabled it to develop and run businesses, being a backpacker's accommodation facility known as the Sportsmens Hotel and Emily's Café in Port Vila. CSS said also that it had certain investment properties in Port Vila. In broad terms, it was alleged that RJN was in breach of his fiduciary and statutory duties as a director of CSS by diverting its funds including revenue from its

investments and its other resources, including by a loan account he had with CSS, to fund the acquisition and development by B & P of its properties and the operation of its businesses. CSS seeks to recover the amount of that wrongly appropriated funds. It also claims that, in the circumstances, as B & P had knowledge of RJN's wrongful conduct in those respects, its properties and businesses are subject to a constructive trust in favour of CSS. The assets of B & P have been realised, and the proceeds are held in a solicitor's trust account pending the outcome of its claims.

3. At around the same time, PN brought separate proceedings in the Supreme Court (Civil Case No 2451 of 2017) against B & P as the First Defendant and Emily Lifcal Newham as the Second Defendant. The claim against Emily Lifcal Newham was not pursued. He was also interested in the assets of B & P and subsequently in the money held by the solicitors following the realisation of its assets. He claims that he provided the funds, or largely provided the funds for its purchase of its lease assets and paid the outgoing commitments on the mortgages to Westpac. He also claims that he provided both labour and funds for the development of Emily's Café. His claim is to recover the value of those contributions, and he too asserts that B & P held its assets on trust for him to the extent of his contributions.
4. It is understandable why the Supreme Court would have directed that the two proceedings be heard together, as it did on 28 September 2017. At the same time, it was also ordered that the two proceedings be consolidated.
5. In those orders, it was also directed that the consolidated proceeding be with the Claim No 2145 of 2017, that PN be described as the Third Defendant to that proceeding. There were orders for the filing of an amended claim and defences and for PN 'to file and serve a defence and counterclaim or third party claim'.
6. That is the seed for the current appeal. For the parties acted upon those directions, including the inappropriate assumption that PN had to defend the CSS claim. There was not enough focus on the respective roles of the parties to the consolidated proceeding.
7. PN filed a defence, responding to the claim of CSS even though it made no claim against him. There was no fact alleged against him. He also made, or repeated his claim against B & P. Then he sought an order for extensive particulars of the CSS claim against RJN and B & P. Ultimately, although CSS endeavoured to provide those particulars (including through a prolonged series of third party discovery applications), it could not fully meet that request. PN then applied under Civil Procedure Rule 18.11 that the entire claim of CSS be struck out for failure to deliver the particulars sought.
8. The primary judge dismissed the claim for that asserted failure to provide particulars on 17 December 2020.
9. This is an appeal by CSS from that decision.
10. For the following reasons, the appeal must be allowed and the order of the primary judge be set aside. The matter will be remitted to the Supreme Court for case management and hearing. It is



understandable that the complex procedural history and the curious terms of the consolidation order may not have exposed to the primary judge the flaws in the strike out application of PN, however the analysis required to hear the appeal has made them clearer.

11. First, as indicated above, PN had no right to put in issue by a defence the matters alleged by CSS in its claims against RJN and B & P. He did not at any stage have any allegations made against him and CSS did not make any claim against him. The description of him as the Third Defendant, for the purposes of the consolidation order, did not change that.
12. Consequently, he had no entitlement to seek particulars of the allegations made against RJN and B & P. It is somewhat surprising that CSS nevertheless proceeded to endeavour to provide them. Neither RJN nor B & P sought those particulars, so it may be inferred that they each understood the nature of the case alleged against them.
13. Next, there was not in fact any order that CSS provide the requested particulars, so there could have been no failure to comply with such an order. The only order relied on is that made by the then managing judge on 6 February 2020 that 'The First Defendant is to provide particulars to the claimant and the Second Defendant before the next return date.'
14. That order is under a heading which refers to both the separate Supreme Court actions, but then has PN as the Claimant and B & P and Emily Lifcal Newham as the First and Second Defendants. In its terms, in the context, the order is directed to B & P. In any event, it cannot be an order directed to CSS because it was never a defendant in either of the two separate proceedings or the consolidated proceeding. B & P was the Second Defendant in each of the CSS claim and the consolidated proceeding, and the First defendant only in the initial claim by PN and in his "Claim" as part of his purported defence to the amended claim of CSS after the consolidation. The conduct of the parties cannot convert an order in clear terms into a different order.
15. It is also clear that neither RJN nor B & P sought particulars of the claim of CSS against them, and they did not (and could not) have complained about the asserted failure of CSS to meet the request for particulars of PN. It was acknowledged by counsel for PN that he did not have (and could not have received) instructions from RJN and B & P to make the application on which the primary judge made the dismissal order. They were separately represented. Even if there were proper grounds for such an order to be made on the application of PN, that could only have dismissed the CSS proceedings against PN. That observation highlights the earlier reason for allowing the appeal – there was no claim against PN to dismiss.
16. Finally, we briefly mention in any event, the complexity of the argument of PN on the merits of his application. He accepted that he could not in any event use the application to get the proposed evidence of CSS at this stage of the claim. The evidence of CSS showed the extensive efforts it had made to secure from third parties, principally the banking records of the several parties, so as to respond fully to the request of PN. The point had been reached that (putting aside the matters already referred to) the requested particulars had not fully been proved, although much had been provided, and CSS through its legal representatives had deposed that it could not provide any more particulars. That would, in the normal course, call for a balancing of the respective interests

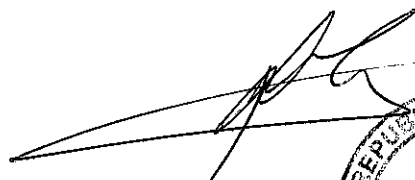


of CSS and of PN before a decision were made by the Court as to whether to dismiss the claim against PN or to allow the matter to proceed with the particularity provided.

17. The submission of PN to the primary judge was not to that effect. It was asserted that CSS' conduct involved 'contumelious' disregard for the (wrongly assumed) order of the Court. Consequently, we would in any event have set aside the dismissal order because it is apparent that the discretion of the primary judge was based upon a state of affairs which plainly did not exist. The criteria for setting aside the exercise of the primary judge's discretion would be made out. The reasons for the decision adopt the epithet 'contumelious' in relation to the conduct of CSS when that was plainly not the case. There was no discussion of the balancing of interests which would have been required had PN been entitled to apply to dismiss the claim against him.
18. Accordingly, the appeal is allowed. The orders of the primary judge made on 17 December 2020 are set aside. The consolidated proceeding is remitted to the Supreme Court for further case management and hearing.
19. The costs of the appeal should follow the event as between CSS and PN. We order that PN pay to CSS costs of the appeal fixed at VT 80,000. We make no order for the costs of RJN and B & P of the appeal, as they each were prepared to benefit from the application of PN at first instance, and largely took little role in the hearing of the appeal.

DATED at Port Vila this 19th day of February, 2021

BY THE COURT


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**Hon. Chief Justice
Vincent Lunabek**

