

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 19/2646 SC/CIVL

BETWEEN: Honore Natapu
Claimant

AND: Vanuatu Agriculture
Development Bank (VADB)
Defendant

Date of Hearing: 24 June 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mr A. Bal and Mr A. Nalpini
Defendant – Mr A. Kalmet
Date of Decision: 7 August 2020

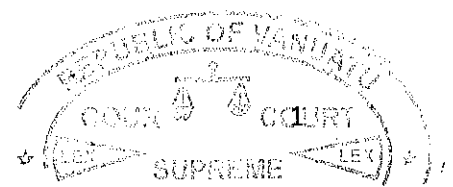
JUDGMENT

A. Introduction

1. This matter proceeded by way of hearing of the Strike Out application on the ground that the claim is statute barred.

B. Background

2. On 8 April 2013, the Defendant Vanuatu Agriculture Development Bank ('VADB') confiscated a fibreglass boat it held pursuant to a security interest under a loan agreement with its customer Jacob Malau.
3. On 11 April 2013, the Claimant Honore Natapu by letter to the VADB claimed ownership of the confiscated boat.
4. On 30 April 2013, the VADB responded to Mr Natapu's letter rejecting the claim.
5. On 11 May 2013, public notice of tender for the seized boat was advertised.



6. On 25 June 2013, Mr Natapu made a criminal complaint to the police against Mr Malau for forgery and theft.
7. On 28 June 2013, the VADB sold the boat to the successful bidder.
8. Mr Malau pleaded guilty to forgery and offence resembling theft and on 18 June 2018, was sentenced in Criminal Case 18/970 to 22 months imprisonment, suspended for 2 years. The Court made restitution orders for Mr Malau to repay Mr Natapu VT1,180,000.
9. On 1 October 2019, Mr Natapu filed the Claim alleging negligence by VADB in entering into a loan agreement with Mr Malau that was secured by Mr Natapu's boat and seeking damages.

C. The Law

10. Subsection 1(2) of the *Limitation Act* [CAP. 212] (the 'Act') provides:

1. ...
 - (2) *A person shall be deemed to claim through another person, if he became entitled by, through, under, or by the act of that other person to the right claimed:*

Provided that a person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be deemed to claim through the appointer.

(my emphasis)

11. Paragraph 3(1)(a) of the Act provides:

3. (1) *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*

- (a) *actions founded on simple contract or on tort;*

12. Section 14 of the Act provides:

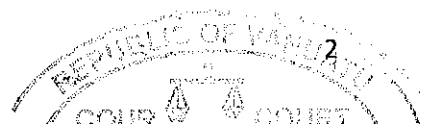
14. *Where, in the case of any action for which a period of limitation is prescribed by this Act, either –*

- (a) *the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*
- (b) *the right of action is concealed by the fraud of any such person; or*
- (c) *the action is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which

- (i) *in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time*



of the purchase know or have reason to believe that any fraud has been committed; or

- (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

D. Discussion

13. Mr Natapu's Claim is for negligence. Paragraph 3(1)(a) of the Act provides that the limitation period for claims in tort is 6 years.
14. Mr Kalmet submitted that the Claim was filed more than 6 years from when the VADB seized and sold the fibreglass boat and from when Mr Natapu's first letter to VADB was made claiming ownership of the seized fibreglass boat. He submitted that the Claim in so far as it relies on the tort of negligence, is statute barred by virtue of para. 3(1)(a) of the Act. He submitted that the cause of action arose on 11 April 2013 when Mr Natapu wrote to the VADB asserting his ownership of the boat. The latest it accrued was on 30 April 2013 when the VADB rejected Mr Natapu's claim of ownership. From either date, the action is statute barred. I agree. The Claim was filed after 6 years after both dates referred to.
15. Mr Kalmet submitted further that there is no provision for leave or in the Act for the Court to allow the Claim to continue, citing *NBV v Cullwick* [2002] VUCA 39. The issue in *NBV* was whether s. 15 of the Act could apply to the limitation period prescribed in the *Employment Act*. That authority does not assist me.
16. Finally, Mr Kalmet submitted that while criminal proceedings were on foot against Mr Malau, it was open to Mr Natapu to commence civil proceedings but that did not occur.
17. Mr Nalpini opposed the strike out application. First, he submitted that the limitation period in para. 3(1)(a) of the Act only applies if the Claimant had not pursued alternative legal remedy within the 6 year period provided. He said that Mr Natapu did so by his complaint to the police and the criminal proceedings against Mr Malau. He invited the Court to find that the criminal case was 'action' within the meaning of para. 3(1)(a) of the Act. This submission ignores the wording of para. 3(1)(a) – 'actions **founded on simple contract or on tort**' (my emphasis). A criminal proceeding is not an action founded on simple contract or on tort. I roundly reject this submission.
18. Mr Nalpini submitted that a strike-out would not be in accordance with the overriding objectives of the *Civil Procedure Rules* and relied on *Newman v Ah Tong* [2007] VUSC 102. I pointed out to Mr Nalpini that the effect of his submission would be for the Rules to trump an Act of Parliament. He could not argue otherwise.
19. Finally, Mr Nalpini relied on para. 14(b) of the Act as the basis for postponement of the limitation period in s. 3 of the Act:

14. Where, in the case of any action for which a period of limitation is prescribed by this Act, either –



(a) ***the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or***

(b) ***the right of action is concealed by the fraud of any such person; or***

....
the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

... (my emphasis)

20. Mr Nalpini agreed that there had not been any fraud by the VADB, and that Mr Malau was not VADB's agent. He relied on the words "any person through whom he claims" in para. 14(b) for his submission that Mr Natapu's right of action was concealed by Mr Malau therefore the period of limitation shall not begin to run until Mr Natapu discovered the fraud with the outcome of Criminal Case 18/970.

21. I fail to see how Mr Natapu's right of action in tort (negligence) was concealed by the fraud of Mr Malau or any other person. Mr Natapu's police complaint against Mr Malau alleged forgery and theft. Mr Malau pleaded guilty to forgery and offence resembling theft. He has not been found by any Court to have committed fraud. Mr Natapu's claim in negligence against VADB was not dependent on the outcome of the criminal proceeding against Mr Malau. It accrued in 2013 when either Mr Natapu asserted his claim of ownership of the boat, or when the VADB rejected that claim. Mr Natapu does not claim in any way through Mr Malau for his claim in negligence against the VADB. Paragraph 14(b) of the Act has no application in this matter. I reject Mr Nalpini's submissions to this effect.

22. In conclusion, there is no merit to the submissions made on Mr Natapu's behalf opposing the Strike Out application. Mr Natapu's Claim is for negligence. A 6 year limitation period applies. There is no provision in the Act under which the Court may grant an extension of the limitation period. Mr Natapu's claim is statute barred and must be struck out.

23. Mr Kalmet sought costs of VT70,000. Mr Nalpini agreed with that quantum.

E. Result and Decision

24. The Defendant's Application to strike out part of the claim is **granted**.

25. The Defendant is to pay the Claimant's costs of the application and proceeding of VT70,000 within 21 days.

DATED at Lakatoro, Malekula this 7th day of August 2020

BY THE COURT

.....
VM Trief
Viran Molisa Trief
Judge

