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

Civil Appeal
Case No. 15/31 CoA/CIVA

BETWEEN: PAUL DE MONTGOLFIER
Appellant

AND: JEAN FRANÇOIS NGUYEN
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Mary Sey
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Mr. R. Sugden for the Appellant*
Mr. D. Yawha for the Respondent

Date of Hearing: *12 April 2016*

Date of Judgment: *15 April 2016*

JUDGMENT

1. On 8th August 2015 the Supreme Court decided two interlocutory applications brought by the Appellant who was the respondent in proceedings in the Supreme Court. One application was to strike out the proceedings on the ground that they disclose no reasonable cause of action and are an abuse of process, or alternatively on the ground that the claim is statute barred.

2. The other application was for security of costs. An order for security against the respondent was made and that order is not challenged.

3. The order dismissing the application to strike out the proceedings is an interlocutory order. Leave to appeal to this court is required. An application for leave made to the Supreme Court has not been heard. This Court is now asked to give leave. Important to the potential success of that application must be the merits of the proposed appeal which we shall first consider.

4. The Supreme Court proceedings stem from a long running matrimonial dispute between the Respondent and his former wife. The Respondent left the family home in November 2005. In December 2005 the Appellant was asked by the

Respondent to draw up a Matrimonial Settlement Agreement (the Agreement) concerning maintenance for the children of the marriage and the distribution of the matrimonial assets. The Respondent instructed the Appellant that he and his wife had agreed the terms including that French law should be applied to their matrimonial property rights.

5. The Appellant drew up the Agreement stipulating that French law was to be applied based on a common property regime. The Agreement was signed on 11th January 2006. The Respondent and his wife were later divorced and lengthy and contested court proceedings soon followed concerning the division of the matrimonial property and other issues concerning maintenance.

6. After the proceedings in the Supreme Court over the division of matrimonial property were concluded the Respondent brought the proceedings now under challenge claiming damages from the Appellant. The Respondent pleads that in breach of contract and negligently the Appellant failed to explain what the common property regime in French law meant, or what its implications to the Respondent would be. Only after his wife brought her proceedings did the Respondent became aware that French law would require that a notary public in French law would be required to do a valuation or assessment of their property and do a proper division between them even if against the Respondent's will. The statement of claim pleads that by reason of the Appellant's failure to properly advise the Respondent as to the relevant French law "*the claimant (the respondent) battled lengthy and costly litigation with his ex-wife since 2007 to 2013 for misconstruing the agreement and also paying in addition further costs of the defendant (appellant) for doing the matrimonial division*". The Respondent pleads that he "*expended huge cost and damage*" as a result of the ensuing matrimonial litigation, particulars of monetary amounts paid by him being pleaded.

7. In support of the assertion that the Respondent's proceedings failed to disclose a cause of action the Appellant deposed:

> "*2. I have never practiced as a solicitor in Vanuatu or held myself out as qualified to do so but have carried on business as a business consultant having knowledge of French law.*
>
> *3. When the claimant engaged my services he had already reached agreement with his wife and had decided that French law should be the law of that agreement. He did not seek my advice on these matters but only asked me to draw up the agreement in accordance with his instructions which I did.*
>
> *4. The claimant did not ask me to do anything else for him after 11 January, 2006 and I was eventually appointed by Order of the court to carry out the division of assets under the agreement in accordance with French law. I was not appointed as a Notaire but as a court appointed expert.*"

And further:

"*15. On 30.05.06, the claimant came to see me with his lawyers, after his divorce I believe, to obtain a clear explanation of how his matrimonial regime was going to be liquidated. I explained in detail the process as outlined in my memos remitted to Court in the case. The claimant and his lawyer were fully explained what the next steps would be. In French law, the parties in such a situation can appoint an expert and then decide taking into account the positions of the parties. The petitioner, the claimant's ex-wife started a legal action on 03.01.07*".

No cause of action disclosed

8. Based on these facts the Appellant advances several arguments to show that there is no cause of action, or alternatively so little prospect of success that it is an abuse of process to allow the proceedings to continue. These arguments include:

   (a) That if the Respondent incurred expense defending the matrimonial proceedings without getting advice on the merits of the wife's claim his ill-informed decision to do so was his own fault;

   (b) Alternatively, if he defended the proceedings after getting legal advice, he did so not because of his misconstruction of the Agreement but because of that advice;

   (c) The losses pleaded were not losses that were due to the Respondent's misconstruction of the agreement, but were monies that he was obliged to pay for other reasons including for the preparation of the Agreement, costs that had been ordered against him, and monies ordered to be paid to adjust the division of property between himself and his former wife;

   (d) The Appellant was instructed from the outset that the Respondent and his wife had reached agreement as to the terms of their separation and the Appellant's role was simply to record those terms in the written agreement, which he did. In those circumstances he had no duty to advise on the interpretation of the Agreement;

   (e) If an agreement between the husband and wife over division of matrimonial property was to achieve what the Appellant intended, that is to curtail the wife's matrimonial property rights, under French law the wife would require independent legal advice before signing. If the Respondent had been so advised, which by implication he now says he should have been, and had his former wife obtained independent advice, it is fanciful to assert that she would then have signed the Agreement. In other words the Agreement could never have achieved what the Respondent asserts it was intended to achieve.

9. The judge below was not satisfied that these various matters were beyond argument. He considered there were matters that needed to be heard at trial with all the evidence placed before the Court for consideration. On this basis he declined to strike out the claim.

10. We agree with that decision. Each of the matters advanced by the Appellant raise substantial points which, if correct, could well be fatal to the Respondent's claim. Difficult questions of causation are raised. The points give reason to doubt the strength of the Respondent's case, but that is not enough to warrant the summary dismissal of the proceedings. Only after the trial Court has heard detailed evidence about the instructions that were given to the Appellant by the Respondent, about the scope of those instructions, about the French law, about what advice should have been given about the common property regime, about what advice the Respondent received before defending his former wife's claim, and about what his former wife would have agreed to had she been independently advised, could the Court finally determine these issues.

The Limitation of Actions Act

11. The relevant limitation period for a claim for damage, either for breach of contract or in tort (negligence) is six years: Limitation of Actions Act, section 3.

12. The primary argument of the Appellant is that the alleged failure to give advice constitutes both the breach of contract and the negligence pleaded against the Appellant. The consequence of that failure happened, and whatever loss followed, crystallised on 11th January 2006 when the agreement was executed. The proceedings in the Supreme Court were not commenced until 26th August 2013, much more than six years later.

13. It may be accepted that a cause of action for breach of contract is complete when the breach occurs, and here that was not later than 11th January 2006. However the claim is also based in negligence, and the cause of action in negligence is not complete until actual damage is suffered or is reasonably capable of being ascertained.

14. In substance the Respondent's claim is one for economic loss suffered through reliance on a professional adviser. Claims of this kind are notoriously controversial and have exercised the Courts for a long time. Often loss caused by relying on the advice given does not become apparent until many years after the advice and the work of the professional advisors is finished. The issues canvassed in many of the older decisions is whether the loss accrued immediately when the professional service was negligently performed, or only

later when damage caused by relying on the advice emerged. Authorities now strongly favour the second of these situations but the second situation itself poses yet other difficult questions, namely when in the course of on-going complex commercial or real life events does actual loss emerge.

15. These legal difficulties were discussed in detail by the High Court of Australia in Wardley Australia Limited v. Western Australia (1992) 109 ALR 247. At page 254-5 at the commencement of their discussion on the law the majority of the Court said:

> "*When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in this general sense has not universally been equated with the legal concept of "loss or damage". And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of undercompensation or overcompensation, the risk of the former being the greater.*"

16. The policy considerations identified in this passage are important and show why the law should adopt the requirement that the happening of actual damage is the event that completes the cause of action.

17. The High Court discussed decisions that at first sight appear to lend support for the view that damage occurred when the faulty professional service was rendered, but concluded that these cases could be explained because of particular features of the legal interest that was said to have been damaged. At page 258 the majority said:

> "*If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred*".

18. For the reasons of policy earlier identified we consider that this Court should follow the decision in Wardley v. Western Australia.

19. The judgments of all members of the Court in that case establish that the disadvantageous character or effect of an agreement entered into on negligent advice cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent. It is only then that damage happens to complete the cause of action. The question when loss is suffered or can reasonably be ascertained is a question of fact to be judged objectively on the evidence led before the Court: see also: Karedis Enterprises v. Antoniou (1995) 137 ALR 544 and "*Limitation of Actions*" by Peter Haniford, 3rd Edition, 2011.

20. In the Court below the judge in rejecting the submission that the Respondent's claim is statute-barred has accepted that the critical date is not when the Agreement was signed, and he has looked for a later event that evidences the happening of loss. The judge considered loss did not happen until 2nd July 2009 when Dawson J. in a ruling in the matrimonial proceedings referred to the Agreement, and an allegation that it was badly drafted. We cannot accept that the recital by a judge of an allegation made in the pleadings or a sworn statement establishes the date when loss was suffered or became reasonably ascertainable. Many possible dates when loss was in fact suffered or became reasonably ascertainable could be argued. The Appellant could contend (which he has not yet done) that it was when the matrimonial proceedings were served on the Respondent in 2007, or when the Respondent was later served with a separate application for division of matrimonial property in accordance with French law. These events probably occurred outside the six year time limit, although this is not clear. On the other hand the Respondent contend that the loss did not occur until much later when he was ajudged liable by the Court to make payments.

21. It is not possible at this stage to determine whether the claim or claims pursued by the Respondents are statute-barred. That can only be done when a basis for liability is established, and all the evidence is before the Court. Only then can it be decided when, in the circumstances of this case, the cause of action established against the Respondent crystallised on the happening of damage.

22. Although for different reasons, we agree with the decision of the judge below not to strike out the claim for being out of time.

23. It is important in cases like this where economic loss is the subject of the claim that parties heed the observations of the High Court in Wardley v. West Australia, at page 259:

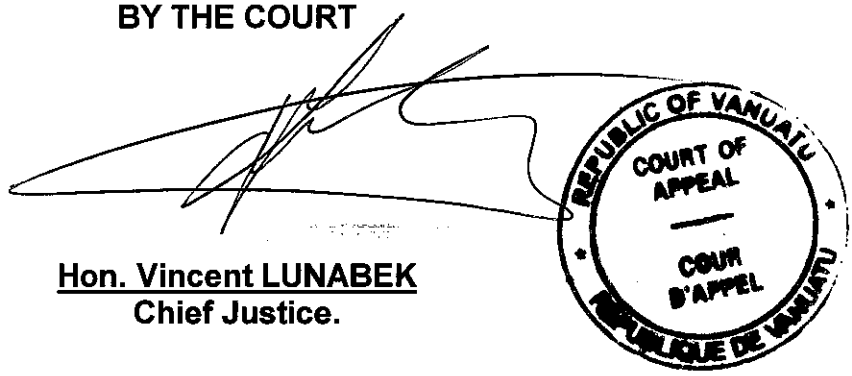
> "*We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage*

sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question".

24. For the above reasons, there is no substance in the proposed appeal to this Court. For that reason leave to appeal is refused. The Appellant must pay the Respondent's costs of the proceedings in this Court which we fix at VT50,000.

DATED at Port Vila, this 15th day of April, 2016.

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice.