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

Civil Appeal
Case No. 23/1232 COA/CIVA

BETWEEN: **STAGE FOUR LIMITED as Trustee for the Montreal Trust**
First Appellant

AND: **BREAKAS HOLDINGS LIMITED**
Second Appellant

AND: **100% PUR FUN LIMITED (In Liquidation)**
First Respondent

AND: **BLUE GUM HOLDINGS LIMITED**
Second Respondent

AND: **THE REPUBLIC OF VANUATU**
Third Respondent

AND: **GRAND ISLE HOLDINGS LIMITED trading as PACIFIC ADVISORY MANAGEMENT**
Fourth Respondent

AND: **ANDREW PETER FIELDING**
Fifth Respondent (to counterclaim)

AND: **BDO (QLD) PTY LIMITED**
Sixth Respondent (to counterclaim)

AND: **DANE WILLIAM THORNBURGH**
Seventh Respondent (to counterclaim)

Before: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice Ronald Young
Hon. Justice Richard White
Hon. Justice Edwin Goldsbrough
Hon. Justice William Hastings

Counsel: ***A. E. Bal for the Applicants***
M. J. Hurley for the First Respondent
No appearance for 2nd, 3rd, 4th, 5th, 6th, 7th Respondents

Date of Hearing: ***Tuesday 6 February 2024***

Date of Decision: ***Friday 16 February 2024***

JUDGMENT OF THE COURT

Introduction

1. The Applicants seek leave to appeal against a judgment setting aside the entry of default judgments.

2. On 14 August 2018, the claimant at first instance ("*Pur Fun*") by its liquidator Mr Fielding, who is a member of the firm BDO (QLD) Pty Ltd ("*BDO*"), commenced proceedings in the Supreme Court against five defendants. The solicitor acting for Pur Fun at that time was Dane Thornburgh. The present Applicants, Stage Four Limited as trustee of the Montreal Trust ("Stage Four") and "*Breakas Holdings Limited*" ("*Breakas*") (together, "*the Applicants*") were the first and fifth defendants respectively. It was alleged by Pur Fun, but denied by the Applicants, that Robert John Herd is the "beneficial owner" of Stage Four and Breakas.

3. On 13 November 2018, the Applicants filed a Defence to the claim of Pur Fun and a Counter-claim against Pur Fun, Mr Fielding, BDO and Mr Thornburgh ("*the Counterclaim Defendants*"). Mr Thornburgh filed a Defence to the Counterclaim for Mr Fielding, BDO and himself on 3 September 2019 but did not name Pur Fun as one of the Counterclaim Defendants for whom the defence was filed.

4. On 16 March 2020, on the application of the Applicants, a judge in the Supreme Court, purporting to act pursuant to Rule 9.10 of the Civil Procedure Rules ("CPR"), struck out Pur Fun's claim and entered judgment for the Applications on their counterclaim by reason that Pur Fun had not taken any steps to advance the proceeding, including by filing a Response or Defence to the Applicant's Counterclaim. We will refer to this as the "Default Judgment".

5. Some 27 months later, on 9 June 2022, Pur Fun applied to have its proceeding "*restored to the active cases' list*". In doing so it sought to invoke rule 9.5 of the CPR and the Supreme Court's inherent jurisdiction. The parties referred to this application as "the Reinstatement Application" and we will do likewise.

6. The primary Judge heard the Reinstatement Application on 12 July 2022 and reserved the Court's decision. By order made on 24 October 2022, the Judge allowed the application and ordered (relevantly):

> *"[17] The Claimant's Application to Reinstate Action filed on 9 June 2022 is granted;*
>
> *[18] The orders dated 16 March 2020 are set aside."*

The parties referred to these orders as the "*Reinstatement Orders*" and the judgment in which they were made as the "*Reinstatement Decision*".

7. Between 12 July and 24 October, the Judge had, on 12 August, heard an application by the present Applicants to have the Reinstatement Application relisted so that they could present further evidence and submissions. The Judge refused that application at the hearing and said that reasons would be provided later. The Judge published those reasons on 21 October 2022.

8. The Applicants sought leave from the Judge to appeal against the refusal to relist the Reinstatement Application for further hearing and against the Reinstatement Orders. In doing so, the Applicants recognised (correctly) that both decisions were interlocutory, and hence that their proposed appeals required leave (Rule 21 of the Appeal Rules).

9. By judgment delivered on 5 June 2023, the Judge refused both applications for leave to appeal.

10. Now, by application to this Court, the Applicants seek leave to appeal against:

    a) the decision not to relist Pur Fun's Reinstatement Application for further evidence and submissions (wrongly said to have been made on 21 October 2022);

    b) the decision of 24 October 2022 to "*reinstate*" the action;

    c) the decision of 5 June 2023 to refuse leave to appeal to this Court.

11. The application for leave to appeal against the refusal of leave to appeal was both unnecessary and inappropriate. Rule 21(1) of the Appeal Rules allows an applicant who has been refused leave to appeal by a primary judge to renew the application to this Court, and that is the course which the Applicants should have followed.

12. Likewise, the application for leave to appeal against the refusal to relist the Reinstatement Application for further hearing was unnecessary, as the subject matter of that application could have been relied upon by the Applicants as a ground of the application for leave to appeal against the Reinstatement Orders.

13. In proceeding in this way, the Applicants have caused delay and have added to the expense and prolixity of the litigation, including the volume of documentation provided to this Court. Practitioners should keep in mind that the purpose of the provision in Rule 21(1) for a primary judge to grant leave to appeal is to facilitate the grant of leave in those cases in which the grant is non-contentious or in which it is reasonably obvious that a grant of leave will be appropriate. When the application for leave will be contentious (as must have been obvious in this case), it should be made to this Court pursuant to Rule 21(1) and thereby avoid the expense, delay and potential embarrassment in having a primary judge consider whether his or her decision is arguably wrong. For this reason, the course adopted by the Applicants in the present case was unfortunate.

14. For the reasons which follow, we consider that leave to appeal should be refused.

Pur Fun's underlying claim

15. Mr Fielding was appointed as Provisional Liquidator of Pur Fun on 15th December 2014 and as its Liquidator on 15th December 2017. The elements of Pur Fun's claim, as disclosed in the statement of claim filed on 14th August 2018, appear to be these (we emphasise that we are summarising pleaded allegations only and not making findings of facts):

a) Mr Herd as the controlling mind of the Applicants and of the second defendant ("Blue Gum Holdings") caused funds of Pur Fun to be used in the purchase by Blue Gum Holdings of certain land and in the discharge of mortgage liabilities in respect of that land.

b) This use of Pur Fun's funds was a fraudulent misappropriation of those funds;

c) In consequence, the interest of the present Applicants and Blue Gum Holdings in the land is subject to a trust in favour of Pur Fun for not less than AUS$1,054,000;

d) The Applicants and Blue Gum Holdings were in breach of fiduciary duties owed to Pur Fun.

e) Pur Fun seeks a declaration to give effect to these claims, orders with respect to the transfer of the land and, in the alternative, damages.

16. This summary of Pur Fun's claims is necessarily somewhat general. That is a consequence of the manner in which Pur Fun's present statement of claim is pleaded, and of the fact that the particulars which it has provided of its claim are contained in documents not provided to this Court.

17. By their filed Defence, the Applicants deny the allegations of misappropriation and breach of fiduciary duty and deny Pur Fun's entitlement to relief.

The Applicants' Counterclaim

18. By their Counterclaim, the Applicants allege that the Counterclaim Defendants made the allegations of misappropriation in the statement of claim when they knew that those allegations were false and that the proceedings are an abuse of process, being brought for an ulterior purpose. By way of relief, the Applicants seek an award of damages, including exemplary damages. Again, we emphasise that this is a summary of allegations only.

19. As noted, Mr Fielding, BDO, and Mr Thornburgh have filed a Defence (in two cases, a conditional Defence,) to the Counterclaim in which they deny the allegations made by the Applicants.

20. So far as this Court has been informed, none of the remaining defendants to Pur Fun's claim (Blue Gum Holdings, the Republic of Vanuatu, and Grand Isle Holdings respectively) have filed defences to Pur Fun's claim. The claims against those defendants have not been struck out. Counsel for Pur Fun informed this Court that these defendants had been added to the claim because Pur Fun sought forms of relief which may affect them, and not for the purpose of making substantive claims.

The entry of the default judgments

21. The Applicants sought the striking out of Pur Fun's claim pursuant to Rule 9.10 of the CPR. That rule provides (relevantly):

> ***"9.10** (1) This rule applies if the claimant does not:*

(a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or

(b) comply with an order of the court made during a proceeding.

(2) The court may strike out a proceeding:

(a) at a conference, in the Supreme Court; or

(b) at a hearing; or

(c) as set out in subrule (3); or

(d) without notice, if there has been no step taken in the proceeding for 6 months.

(3) If no steps have been taken in a proceeding for 3 months, the court may:

(a) give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and

(b) if the claimant does not appear, or does not show cause, strike out the proceeding.

(4) After a proceeding has been struck out, the Registrar must send a notice to the parties telling them that the proceeding has been struck out."

22. The Applicants did not specify in their application the Rule on which they relied in seeking default judgment on their Counter-claim. Presumably they relied on Rule 9.3 of the CPR which provides:

"Default - claim for damages

***9.3** (1) This Rule applies if the claim was for an amount of damages to be decided by the court.*

.....

(4) The court may:

(a) give judgment for the claimant for an amount to be determined; and

(b) either:

(i) determine the amount of damages; or

(ii) if there is not enough information before the court to do this, fix a date for a conference or hearing to determine the amount of damages.

.....

(6) The claimant must serve on the defendant:

(a) a copy of the judgment; and

(b) if a conference is to be held to determine the amount of damages, a notice stating the date fixed for the conference."

23. In entering the default judgment on 16th March 2020, the Judge said:

> *"HAVING read the filed Application by the First and Fifth Defendants, and [the] Sworn statement of Robert John Herd in support, and having considered the said Application and Sworn statement AND NOTING that the Claimant has neither filed a Response or Defence to the First and Fifth Defendants' Defence and Counterclaim filed on 30 November 2018, AND that the Claimant has not taken any steps to advance these proceedings since the filing and service of the Claim on or about 14 August 2018, the Court ORDERS that:*
>
> 1. *The Claimant's Claim is struck out pursuant to r.9.10 of the CPR;*
> 2. *Judgment be entered for the First and Fifth Defendants against the Claimant in default of filing and serving a Defence to the Counterclaim;*
> 3. *Cost for the First and Fifth Defendants against the claimant to be taxed if not agreed.*

24. Although the Minute of the Judge's order recorded the names of counsel for the parties, it was common ground (or at least non-contentious) that the Judge had entered the Default Judgment without notice to, and in the absence of, the parties, and that the recorded names were of the practitioners acting in the litigation generally, as the Judge believed them to be. The Judge was wrong in thinking that Mr Thornburgh continued to be counsel for Pur Fun at the time. That has a significance to which we will return.

25. We will refer to the matters on which the Judge relied in making the Reinstatement Orders as we address the application for leave to appeal.

Applications for leave to appeal – the approach

26. Generally, when considering whether an applicant should be granted leave to appeal, this Court considers whether there is sufficient reason to doubt the correctness of the decision of the primary judge so as to warrant the matter being reconsidered by this Court and whether, assuming the judgment in question to be wrong, the applicant will suffer substantial injustice if the decision stands.

The power of the Supreme Court to set aside default judgments

27. At different times, the Applicants have contended that the Supreme Court lacks jurisdiction and power altogether to set aside the striking out of claims or defences made in consequence of a default by a party in complying with the CPR. They have contended that the setting aside of default judgments in these circumstances is inconsistent with the principle of finality of judgments, going so far, at some times, to suggest that the entry of default judgments renders a court *functus officio,* that is, completes the Court's function altogether.

28. At the hearing however, counsel accepted that the Supreme Court does have power to set aside a default judgment, noting that Rule 9.5 of the CPR provides expressly for the setting aside of such judgments obtained against defendants. That acceptance by counsel was appropriate. It is

beyond argument that the Supreme Court, being a superior court of record, has an inherent jurisdiction to set aside its own orders: *Taylor v Taylor* [1979] HCA 38; (1979) 143 CLR 1 at 7. See also Cairns "Australian Civil Procedure" (6th Ed) at 381 - 383. The existence of the Supreme Court's inherent jurisdiction is confirmed by s.65 of the Judicial Services and Courts Act. The true position is as stated by Cairns at 370:

> *"A default judgment, while not the product of a trial, confers the same rights as a judgment given after at trial. However, a default judgment may be set aside and is a final judgment only in the sense that the court has not exercised its discretion to set it aside. It therefore lacks the certainty of a judgment given as the result of a hearing or of the exercise of judicial discretion."*

29. Accordingly, the primary Judge was correct to accept (at [11]) that the Supreme Court has jurisdiction to set aside its own orders, including a default judgment.

30. The principles governing the exercise of a court's inherent jurisdiction to set aside its own orders are well developed in other jurisdictions. There is no reason why those same principles should not be applied in relation to the Supreme Court and, in any event, rule 9.5 applies to certain default judgments obtained against defendants.

31. A party may have an irregularly entered default judgment set aside as of right (*ex debito justitiae)* regardless of a defence on the merits: Cairns at 383. Further, even when a default judgment has been regularly entered, the inherent jurisdiction of the Supreme Court (as distinct from the power in Rule 9.5 of the CPR) to set it aside is unfettered (subject of course to the requirement for the Court to act judicially).

The striking out of Pur Fun's claim was irregular

32. As already noted, in entering the Default Judgment, the Judge recorded an understanding that Pur Fun had "not taken any steps to advance these proceedings since the filing and service of the claim on or about 14 August 2018".

33. In the Reinstatement Decision, the Judge recognised that this understanding of the matter was wrong because Pur Fun had, by its former lawyer Mr Thornburgh, taken some steps. He had on 28 June 2019 attended a conference before Fatiaki J (who then had the management of the action in the Court) and, on 26 July 2019, had filed submissions in response to Stage Four's application to set aside freezing orders apparently made on 19 July 2018 (neither those submissions nor the freezing order were in in the papers provided to this Court). Moreover, it was Pur Fun's lawyer, Mr Thornburgh, who had filed the Defence to Counterclaim of Mr Fielding, BDO and himself on 3 September 2019.

34. The Applicants did not challenge the correctness of the Judge's findings in the Reinstatement Decision concerning the actions taken by Pur Fun's former solicitor, Mr Thornburgh, on 28 June and 26 July 2019.

35. The Judge's mistaken view that Pur Fun had not taken any steps to advance the proceeding since the filing and service of the claim on 14 August 2018 may well have been induced by the

Applicants themselves. They had made an incorrect assertion to that effect in their application seeking the striking out. Mr Herd made a like assertion in its affidavit of 2 December 2019 supporting the application to strike out.

36. Be that as it may, the Judge's mistaken view about the lack of action by Pur Fun since the commencement of the proceedings meant by itself that the strike out order had not been regularly made. As noted earlier, a default judgment obtained in these circumstances may be set aside without the necessity for further proof by the applying party.

37. There are further matters indicating the irregularity of the strike out. The authority of the Supreme Court to proceed under rule 9.10 is enlivened in two circumstances. The first is when a claimant does not take the steps in a proceeding *required by the CPR* to ensure the proceeding continues. The second is when a claimant does not comply with an order of the Court made during a proceeding. The second circumstance need not be addressed further presently because there was no suggestion that Pur Fun had failed to comply with any order of the Court.

38. As to the first, it is pertinent that the Judge did not record in the recital to the Default Judgment that Pur Fun had not taken steps in the proceeding *required by the CPR* to ensure the proceeding continued. Instead, the Judge recorded that Pur Fun "*has not taken any steps to advance these proceedings since the filing and service of the claim*". That suggests that the Judge relied upon the perceived inactivity of Pur Fun in pursuing the claim, as distinct from considering whether it had failed to take a step *required* by the CPR. The Judge did refer to Pur Fun's failure to file a Response or Defence to the Applicants' Defence and Counterclaim but, while those failures could, in some circumstances, have warranted the entry of a default judgment on the Counterclaim, they could not have authorised the striking out of Pur Fun's own claim.

39. Pur Fun's omission to file a Reply to the Applicants' Defence was not a failure to take a step *required* by the CPR to ensure the proceeding continued. Rule 4.6(2) specifies only that, if a claimant wishes to allege further relevant facts after the Defence has been filed and served, the claimant must file and serve a reply. Rule 4.7 specifies matters which should be pleaded in the reply. Pur Fun's omission to file a Reply may have presented difficulties for it at trial, but it was not a step "*required by [the CPR] to ensure the proceeding continues*".

40. Furthermore, Rule 9.10(2)(d) authorised the Judge to strike out Pur Fun's claim *without notice to it* only if there had been "*no step taken in the proceeding for 6 months*". There is an ambiguity in the word "*step*" in Rule 9.10(2)(d). Is it a reference to a step of the kind referred to in Rule 9.10(1)(a), that is, a step *required* by the CPR, or does it have a meaning like "*activity*", that is, that no action had been taken by the claimant in the proceeding for 6 months? We are inclined to think that the latter is the preferable construction but the present case does not require the resolution of that issue. If it be the former meaning, then, for the reasons already given, it was not the case that no step *required* by the CPR had been taken. If it is the latter meaning, then there had been a step, that is, the filing by Mr Hurley of a Notice of Beginning to Act for Pur Fun, as required by Rule 18.8 of the CPR, on 3 March 2020, only 13 days before the Default Judgment was entered.

41. Accordingly, for this reason too, the striking out of Pur Fun's claim was irregular, as the Judge should not have made the order without notice to the parties.

The entry of judgment on the counterclaim was irregular

42. Although not saying so expressly, it seems that the Judge treated the application for the entry of default judgment on the Counterclaim as made, in effect, under Rule 9.3. We have set out relevant portions of that rule earlier in this judgment.

43. As is apparent, rule 9.3 did not authorise the Judge to enter a default judgment on the Counterclaim *without notice to Pur Fun* that that course of action was being considered. The Judge should instead have listed a conference for the hearing of the Applicants' application for default judgment. The fact that default judgment was entered on the Counterclaim, without any prior notice to Pur Fun, is a matter, by itself, making the entry of the default judgment on the Counterclaim irregular.

44. There is another matter. As the Applicants' Counterclaim was for damages, rule 9.3(4) authorised the Supreme Court, in the absence of a Response or a Defence to Counterclaim, to give judgment for the present Applicants "*for an amount to be determined*" and either to determine the amount of the damages or to fix a date for a hearing to determine their amount. The Judge did neither of these things in the Default Judgment. Instead, as previously noted, "judgment", not "*judgment for an amount to be determined*", was entered and the Judge did not fix a date for hearing to determine the amount of damages.

45. For these reasons, the Default Judgment entered on the Counterclaim was irregular and Pur Fun was entitled, as of right and regardless of a defence on the merits, to have it set aside: *Anlaby v Praetorius* (1888) 20 QBD 764; *Hughes v Justin* (1894) 1 QB 667.

46. These conclusions make it unnecessary to consider all of the remaining matters on which the Applicants sought to rely at the hearing of their application for leave to appeal. We will however address some particular matters because the Applicants seemed to suggest that these disentitled Pur Fun from having the Default Judgment set aside.

Alleged error in the Reinstatement Decision

47. In the Reinstatement Decision, the Judge said at [12]: "*the Orders dated 16th March 2020 were clearly incorrect in stating that the Claimant had not filed a Response or a Defence to Stage Four and Breakers' Counterclaim. Despite being clumsily titled, the requisite Defence was filed on 3 September 2019*".

48. The Applicants contended that the Judge had been wrong in this understanding of the position because the Defence to Counterclaim filed on 3 September 2019 was a defence of Mr Fielding, BDO, and Mr Thornburgh only, and not of Pur Fun. It was said that this error warranted a grant of leave to appeal.

49. We accept that, on its face, the Defence filed on 3rd September 2019 was not a defence of Pur Fun: it was instead expressed to be a defence to the Counterclaim by only Mr Fielding, BDO and Mr Thornburgh himself. However, it was evident that the Defence was filed by Mr Thornburgh who was Pur Fun's own solicitor in the proceedings. That circumstance suggested that there could not be any conflict between Pur Fun and Mr Thornburgh or any difference in their respective positions.

50. Moreover, it is not readily apparent that, with respect to the Defence to the Counterclaim, there could be any relevant difference between a defence of Pur Fun, on the one hand, and the defence of Mr Fielding and BDO, on the other. That is because Mr Fielding was in control of Pur Fun and had caused it to commence the proceedings containing the allegations about which the Applicants complained.

51. In those circumstances, the Defence of these three defendants to the Counterclaim was, for practical purposes, also a defence of Pur Fun. The fact that the Counterclaim did not actually name Pur Fun as a responding party appears to have been an error in form rather than of substance. It is understandable therefore that the Judge described the filed Defence to Counterclaim as "clumsily titled" and had regard to the reality of the pleading and not just its form. Accordingly this is not a matter warranting a grant of leave of leave to appeal.

Issues of delay

52. The Judge considered that Pur Fun had provided an adequate explanation for the lapse of time between 16 March 2020 when the Default Judgment was entered and the making of the Reinstatement Application on 9 June 2022.

53. The Applicants were critical of that finding and critical of the adequacy of the Judge's reasons concerning the issue of delay.

54. The matters to which the Judge referred on this issue were these:

    (a) Mr Hurley, who had on 3 March 2020 filed a Notice of Beginning to Act for Pur Fun, had been unaware of the Default Judgment until 24 February 2021 when informed of that fact by the Chief Registrar of the Supreme Court;

    (b) On learning of the Default Judgment, Mr Hurley had given notice to the Applicants promptly (on 3 March 2021) of Pur Fun's intention to apply to reinstate the claim;

    (c) Thereafter, Mr Hurley had worked with his client in relation to a reinstatement application, including obtaining a signed undertaking as to damages to support the restraining orders made by Fatiaki J on 13 September 2019;

    (d) Mr Fielding, who was giving instructions, had sought advice from Mr Hurley, as well as independent advice as to his position as liquidator;

(e) Mr Fielding has provided the signed undertaking as to damages on 19 May 2022 and Mr Hurley had filed it on 31 May 2022;

(f) Pur Fun had filed the Reinstatement Application on 9 June 2022.

55. It is apparent, that in making these findings, the Judge had accepted the evidence of Mr Hurley contained in his affidavits of 23 June and 11 July 2022.

56. The time which elapsed between 16 March 2020 and 9 June 2022 is greater than one would expect in circumstances like the present. Given the delay, one would ordinarily expect that the Court would be provided with detailed evidence explaining it. The Applicants are correct in pointing out that there was no evidence of any particular steps having been taken between 13 April and 30 September 2021 and again between 16 December 2021 and 19 May 2022 and that some of Mr Hurley's evidence was generalised.

57. However, there are mitigatory circumstances to which the Judge was entitled to have regard. One matter leading to Mr Hurley being unaware of the entry of the Default Judgment was that the Chief Registrar of the Supreme Court had not, as required by rule 9.10(4) of the CPR, sent notice to the parties telling them that the claim had been struck out. It also seems that the present Applicants did not, as required by rule 9.3(6), serve on Pur Fun a copy of the default orders relating to the judgment on their Counterclaim. Nor did the Applicants seek a conference in the Supreme Court for the determination of the amount of damages, as contemplated by Rule 9.3(6). The explanation for that inactivity appears to be that the Applicants, like Pur Fun, were unaware of the orders made on 16 March 2020 until being copied in on the Chief Registrar's email to Mr Hurley on 24 February 2021.

58. It also seems that Fatiaki J, who had had the management of the proceedings in the Supreme Court, did not, after 28 June 2019, list another conference.

59. Mr Hurley deposed that he had been aware, when first instructed in February 2020, that Fatiaki J had left Vanuatu (it seems in late 2019) and that, as was the case with several other matters which had been managed by Fatiaki J, he had been awaiting a notice of conference before another judge. Not receiving such a notification he had, on 24 February 2021 requested the Chief Registrar to allocate the file to another judge "*as soon as possible and thereafter a notice of conference listed so that the matter can be pursued*".

60. We consider that it is also appropriate to have regard to the particular position of Mr Fielding as liquidator of Pur Fun. The provision of an undertaking as to damages is a significant matter for a liquidator, as it is commonly the case that creditors of the liquidated company have to fund the costs of the litigation and provide a basis on which an undertaking as to damages can properly be given. It is understandable that in these circumstances liquidators and creditors seek advice, including legal advice, and that the provision and consideration of the advice can take time. It can be inferred that this was so in the present case, especially given the contemporaneity between the filing of the undertaking as to damages and the filing of the reinstatement application.

61. When these matters are taken into account, together with Pur Fun's entitlement to have the default orders set aside as of right, the Applicants' criticisms lose much of their force. We conclude that, while the delays have been lengthy, the Applicants have not shown a sufficient basis on which to doubt the correctness of the Judge's conclusion or the adequacy of the Judge's reasons, to warrant a grant of leave to appeal to this Court.

The refusal to relist the reinstatement application for further hearing

62. This aspect of the application for leave to appeal can be dealt with quite shortly. The Judge's refusal to relist the matter for further hearing involved an exercise of discretion so that this Court would interfere with it only in accordance with the usual appellate principles concerning such appeals: *House v The King* (1936) 55 CLR 499 at 504 - 505. The Applicants did not show a basis upon which those principles could be applied in their favour presently.

63. It must be remembered that the proper administration of justice requires parties to present *all* their evidence and submissions at the hearing allocated for that purpose. Were it otherwise and successive hearings permitted, the proper administration of justice would be compromised, extra expense and delay would be caused and there would be unfairness to the other parties. For that reason, applications to reopen a hearing after judgment has been reserved should be exceptional.

64. In the present case, the Judge considered with some care the matters which the Applicants wished to agitate at the proposed hearing. We consider that no arguable error has been shown and, in any event, the principles to which we have just referred point strongly against this being a proper basis on which to grant leave to appeal.

Prejudice to the Applicants

65. The assertions made by the Applicants as to the prejudice which the Reinstatement Orders have caused them were generalised. There was reference in the Appeal Books to cautions obtained by Pur Fun remaining over certain land, but those cautions were not provided to the Judge or to this Court. Nor is there material concerning the circumstances in which they were lodged. The Applicants have not pointed to steps taken by them since 16 March 2020 which have resulted in a material alteration of their position. This is particularly pertinent given that they had the whole of the period between 16 March 2020 and 9 June 2022 in which to take action, if so advised.

66. We also note that the Applicants have not pursued their Counterclaim against Mr Fielding, BDO and Mr Thornburgh, even though they were entitled to do so. It is still open to them to do so.

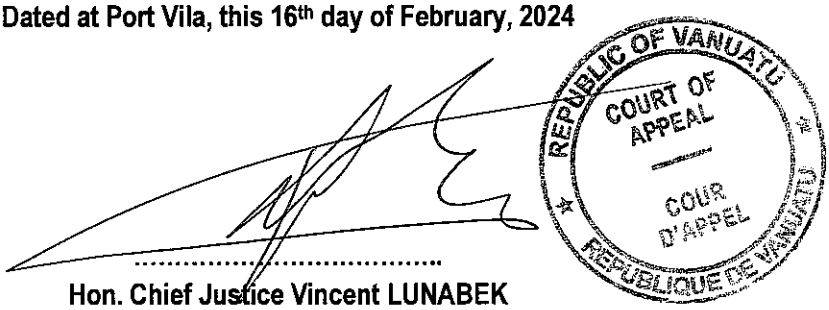
67. The fact that the Applicants now face the prospect of resumed litigation is not sufficient, by itself, or in combination with other matters, to warrant the grant of leave to appeal.

Conclusion

68. For the reasons set out above, the Applicants have not shown that a grant of leave to appeal is appropriate. Their application is dismissed.

69. The Applicants should have recognised that many of the matters on which they have relied were not realistically likely to succeed and, as noted at the commencement of these reasons, the course they have adopted was, in two significant respects, inappropriate. The Applicants are to pay Pur Fun's costs of and incidental to the application to appeal fixed at VT200,000.

Dated at Port Vila, this 16th day of February, 2024



.....

Hon. Chief Justice Vincent LUNABEK