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

Civil Case No. 38 of 2007

BETWEEN: GUY BENARD
Claimant

AND: THE GOVERNMENT OF THE REPUBLIC OF VANUATU
Defendant

Coram:	***Justice D. V. Fatiaki***
Counsel:	*Mr. Benard – in person* *Mr. J. Ngwele for the Defendant*
Date of Decision:	*26 October 2010*

REASONS FOR DECISION

1. On 10 June 2010 I orally dismissed a defence application to strike out the claim in this matter on the dual basis that there was no reasonable cause of action and, in any event, the action was time barred under the **Limitation Act [CAP. 212]**. On that occasion I said I would provide reasons which I do so now.

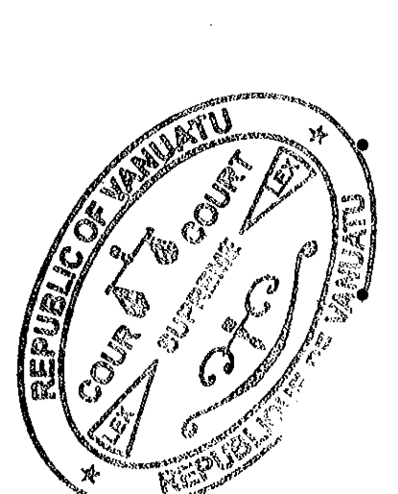
2. The action has a long and chequered history which may be briefly outlined as follows:

   - On 24 March 2000 the Claimant's home was searched and numerous personal items were seized by the Police including antique arms and a large quantity of elephant tasks (the seized items). A record of search listing the seized items was provided at the time;

   - On 27 June 2000 the Claimant was charged with several offences before the Magistrates Court including a charge of Illegal Importation of Elephant Tusks contrary to section 9 of the **International Trade Flora and Fauna Act No. 36 of 1989**;

   - On 8 March 2001 the Claimant was acquitted by the Magistrate's Court and the prosecution were given the usual 14 days to appeal the decision. No appeal was filed in the matter.

   - On 18 April 2007 the Claimant filed a claim in the Supreme Court seeking compensation and damages for the missing items;



- On 10 July 2007 a defence was filed and on 12 July 2007 an application to strike out the claim was filed with a supporting sworn statement;

- Since then the Clamant has tried to retrieve his personal effects seized by the Police with little success and culminating in a formal letter of complaint to the Police Commissioner dated 23 October 2007;

- On 6 November 2007 the Police replied to the Claimant advising him that they have managed to locate 5 antique swords which had "*suffered corrosion*" and confirming that "*all other items mentioned in the search warrant are missing.*"

- The matter then effectively went to sleep for 2 years including the Defendant's strike-out application, until a conference notice was issued by the Court listing the matter on 24 November 2009 for the purpose of reconstructing the file which presumably had been burnt in the Supreme Court building fire.

- A second conference notice unusually listed for the same date required the parties "*to advise as to the current status of the matter and to show cause why the proceeding should not be struck out pursuant to Rule 9.10 (3) (a)*";

- On 26 November 2009 the Acting Master struck out the action pursuant to Rule 9.10 (2) (a) because no step had been taken in the proceeding for 6 months. The Claimant was personally notified on 6 January 2010;

- On 8 January 2010 the Claimant filed an urgent application to set aside the Master's order striking out the proceedings. The application was vigorously opposed;

- On 22 January 2010 the Claimant filed a sworn statement in support of his urgent application and a brief written submission;

- On 5 May 2010 the Master's order was set aside at a conference hearing and the Defendant's 2007 application to strike out the claim was fixed for argument on 10 June 2010 submissions were ordered from both parties and these were provided to the Court;

3. So much then for the chronology of the action. I turn next to consider the Defendant's submissions in support of its application to strike out the claim.

4. At the outset defence counsel accepted that he was not suggesting that the Court had failed in its duty to actively manage the case under **Rule 1.4**

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of the Civil Procedure Rules nor was he directly relying on **Rule 9.10(1)**, rather, he referred to **Rule 9.10(2)** as indicating the different occasions when a court can strike out a proceeding.

5. Defence counsel commenced his substantive submission by asserting that if the claim asserted a proper cause of action (which was denied) then it necessarily was time-bared by operation of Section 3 of the **Limitation Act** in that the seizure of the items occurred in June 2000 and the claim was filed in April 2007 which is 10 months outside the 6 year limitation period provided for an action founded on tort.

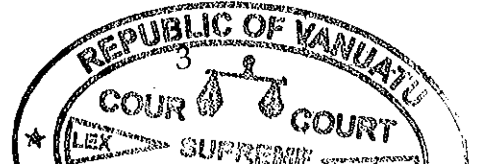
6. To the Court's question: "***When do you say the Claimant's cause of action accrued?***", defence counsel referred to the respective dates when the searches and seizures occurred ie. 24 & 26 June 2000 as being the earliest dates when the cause of action accrued and, to the judgment of the Magistrate's Court on 8 March 2001 as the last possible date. Both dates counsel submits are still outside the 6 years limitation period.

7. I am satisfied however that there is no merit in the limitation submission. The items were seized pursuant to search warrants that authorized the Police to enter, search and seize from the Claimant's home, a list of suspicious items including firearms, and elephant tusks and "***<u>TO DETAIN SUCH</u> things with reasonable care being taken for their preservation until the conclusion of legal proceedings***". The relevant legal proceedings did not conclude in my opinion, until <u>after</u> the 14 day appeal period had expired after the delivery of the Magistrate's Court judgment acquitting the Claimant ie. 22 March 2007 (I accept this date is still outside the limitation period).

8. The release of the seized items however is **<u>not</u>** automatic upon an acquittal or at the expiration of the appeal period. In this regard **Section 58 (3)** of the **Criminal Procedure Code** makes it clear that even if no appeal is filed, the return of the items seized under a search warrant to the person from whom it was taken is dependant upon a direction from the Court. How such a direction is to be obtained is not clear from the section but presumably both the prosecution and the Claimant can seek such a direction from the Court.

9. Be that as it may on 28 May 2001 the Claimant wrote to the Sheriff seeking to recover the items and defence counsel accepts that if this letter is taken to be the date when the cause of action "*accrued*" then the claim was not time-barred.

10. The Limitation Act does not define what is a "***cause of action***" or when it "***accrues***" I am satisfied however that the Claimant's cause of action which seeks damages and compensation for missing personal items seized by the police pursuant to valid search warrants in 2000 did **<u>not</u>** finally accrue until <u>after</u> the police admitted that the seized items were missing and that was only communicated to the Claimant in the Police



Commander South's letter of 6 November 2007. Up till that point in time the Claimant did not definitely know that his seized personal items would not be returned by the police or were unrecoverable. Alternatively, the Claimants cause of action first accrued when he wrote to the Sheriff seeking the return of the items on 28 May 2001. Needless to say both of these dates places the claim well within any applicable limitation period.

11. I am not unmindful of defence counsel's submission which seeks to closely examine the statement of claim with a view to exposing its various short-comings in pleading a cause of action or in seeking an appropriate remedy but, the Court cannot ignore the undisputed fact that at all relevant times including at the time of filing the claim, the Claimant has always acted in person. In a similar circumstance in **Newman v. Ah Tong** [2007] VUSC 102 Tuohy J. said inter alia in refusing to strike out the claim in that case:

> "*The Court is conscious that the Claimant is not a lawyer and the Court would not wish to see his claim struck out simply because it would not be in accordance with the over-riding objective of the Civil Procedure Rules set out in Rule 1.2 that is "to enable the Court to deal with cases justly".* (**see also:** the case of Neil Nimoho v. Telecom [2010] VUSC 89).

12. I am also mindful of **Rule 4.11(2)** which permits the amendment of a claim "*with the leave of the Court at any stage of the proceeding*". (my underlining). In other words even at this late stage, the Court may allow the claim to be amended to correct any deficiency in it.

13. Needless to say I am not satisfied that the existing claim, as pleaded, is so clearly untenable that it cannot possibly succeed even if amended.

14. Next, defence counsel referred to the pre-claim delay before proceedings were commenced and counsel submitted that a trial now, 10 years after the event, so-to-speak, could no longer be fair and would be oppressive. In short it would constitute an abuse of process. How that might be so is not entirely clear from the submission but, in any event, I do not agree.

15. The submission has a superficial appeal given the particular circumstances of this claim which would be based primarily on clearly identifiable documentary evidence including search warrants; records of search; a Magistrate's Court judgment; correspondence exchanged between the Claimant and the police and the Claimant and government officials; and evidence of purchase/ownership as well as valuation evidence of the missing seized items.

16. I am also mindful that the court file in this claim had to be "*reconstructed*" during its early stages and, further, the Defendant's written application to strike out the claim for which the defendant bears the onus of progressing, has existed since July 2007 and was never listed for hearing until when the Claimant sought to challenge the Master's order striking out the claim. Needless to say the existence of a strike out application has a dampening

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effect on the progress of any proceeding whilst it remains extant and the Defendant must bear some responsibility for that.

17. For the foregoing reasons the Defendant's application to strike out the claim was dismissed and costs were ordered in favour of the Claimant.

18. Since the hearing of this application to strike there has been some activity on the Claimant's and the Defendant's part in progressing the matter including discovery and interrogatories as well as further "*without prejudice*" correspondence exchanged by the parties with a view to settling the matter. Unfortunately that has not eventuated.

19. I am also aware that the Defendant filed on 20 June 2010 an application for leave to appeal against the dismissal of its application to strike out the claim on the following two grounds:

> "*1. The primary judge misdirected himself as to the commencement of the applicable limitation period; and*
>
> *2. The primary judge erred in awarding costs to the claimant being unrepresented.*"

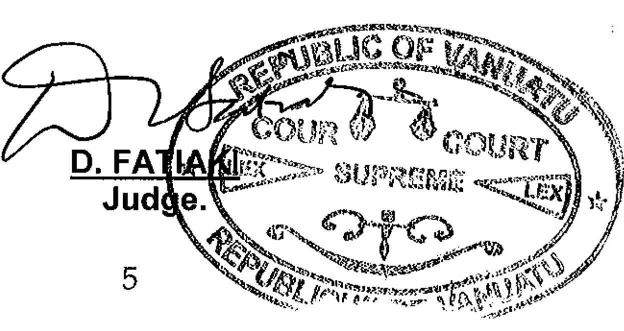
20. As to (1) I have now produced my reasons for the oral dismissal, and, as for (2) I draw counsel's attention to **Rule 15.1(2)** and **Rule 15.6(1)** of the Civil Procedure Rules which does **not** differentiate between costs and disbursements or between a represented and unrepresented party. I am not aware whether the Claimant has pursued the order for costs in his favour but I accept that **Rule 15.4(b)** precludes the recovery (as opposed to the ordering) of costs by a party acting in person who can only recover disbursements.

21. In light of the foregoing I adjourn the Defendant's application for leave to appeal and now that the Court's reasons have been provided, I grant the Defendant liberty to amend its Notice and grounds of appeal to be filed and served by 29 October 2010.

22. This case is adjourned for further conference and consideration on 29 October 2010 at 8.30 a.m.

DATED at Port Vila, this 26th day of October, 2010.

BY THE COURT



D. FATIAKI
Judge.