

BETWEEN: Cheng Jinqiu
Claimant

AND: Ly Nu Loung
First Defendant

AND: Millie Ogden
Second Defendant

AND: Thomas Ogden
Third Defendant

AND: Luong Fong
Fourth Defendant

AND: Bred (Vanuatu) Limited
Fifth Defendant

AND: The Republic of Vanuatu
Sixth Defendant

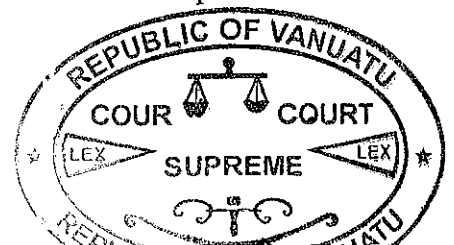
Before: *Justice Aru*

In Attendance: *Mr. R. Sugden for the Claimant*
Mr. N. Morrison for the First Defendant
Mrs. Millie Ogden Second Defendant in person
Third Defendant (no-appearance)
Fourth Defendant (no-appearance)
Mr. J. Malcolm for the Fifth Defendant

RULING

Introduction

1. Two applications were made to strike out the claim in this matter. The second defendant filed her application (the **First Application**) on 20 April 2017 and is supported by two sworn statements deposed and filed by Ms Ogden on 20 April 2017 and 7 July 2017. The fifth defendant also filed an application to strike out the claim (the **Second Application**) on 24 May 2017 supported by a sworn statement deposed and filed by a Mr Ben Seule also on the same date.



Background

2. Before the claim in this proceeding was filed, the claimant and the first and fourth defendants were involved in a number of proceedings before this Court and before the Court of Appeal, namely:-
 - Civil Case No 79 of 2015;
 - Civil Appeal Case No 922 of 2016; and
 - Civil Case No 1335 of 2016
3. The above proceedings concerned disputes over a couple of leases one of which is Lease Title No 03/0183/071. Aside from Bred Bank and the Republic of Vanuatu, all the other defendants are related to each other as family and have been involved in protracted disputes with the claimant over lease title 03/0183/071 for a number of years.
4. What led to this further proceeding being filed begun before Fatiaki J as Civil Case 1335 of 2016 (CC1335/16). The claimant Chen Jinqiu in that case was the first defendant and Ly Nu Loung the first defendant was the claimant.
5. Chen Jinqiu filed an amended defence and an amended counterclaim to the CC1335/16 claim on 8 February 2017.
6. On 17 February 2017, Fatiaki J heard and dealt with 3 applications filed by Chen Jinqiu namely:-
 - Application for leave to further amend the defence and counterclaim;
 - Application for security for costs; and
 - Application for an adjournment of the trial
7. Fatiaki J granted leave to further amend the defence and counterclaim but refused the applications for security for costs and adjournment of the trial.
8. On 2 March 2017 the current proceedings were filed but not served until sometime after the claimant discontinued his counterclaim in CC1335/16.
9. On 3 March 2017 Chen Jinqiu discontinued his counter claim in CC1335/16 by filing a notice of discontinuance.

Applications to strike

10. Dealing first with the Second Application, the relief sought is an order that the claim against the fifth defendant be struck out .It was argued that a counter claim was issued

against Bred Bank by the claimant as first defendant in CC1335/16 but discontinued on 3 March 2016. It was submitted that the claimant was now prohibited by rule 9.9 of the Civil Procedure Rules (CPR) from reviving the claim. In the alternative it was argued that the current claim is estopped by the principle of anshun estoppel as the claimant had the opportunity of having the issue determined by the Court in CC1335/16 but discontinued the claim instead therefore he is now estopped from reviving the claim in respect of the same facts and issues.

11. The First Application also seeks orders that the current claim be struck out on similar grounds that the matter was before Fatiaki J and all the related issues should have been dealt with as part of CC1335/16. The applicant relies on **Henderson v. Henderson** (1843) 67 E.R. 319 in support of her submissions.

Response

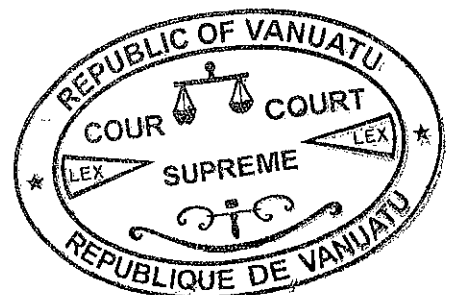
12. The claimant's submissions in response were that there were special circumstances why the rule in **Henderson v Henderson** did not apply and these being: the claimant was forced to go to trial in CC1335/16 when his counterclaim was not ready and that CC1335/16 was an old case. It was argued that the anshun principle did not apply as the current claim could not have been pursued in any previous proceeding. It was further submitted that when the counterclaim was discontinued in CC1335/16 it was not intended to abandon the claim.

Discussions

13. Rule 9.9 of CPR provides:-

"9.9 Discontinuing proceeding

- (1) *The claimant may discontinue his or her claim at any time and for any reason.*
- (2) *To discontinue, the claimant must:*
 - (a) *file a Notice of Discontinuance in Form 18; and*
 - (b) *serve the notice on all other parties.*
- (3) *If there are several defendants:*
 - (a) *the claimant may discontinue against one or some only; and*
 - (b) *the claimant's claim continues in force against the others.*
- (4) *If the claimant discontinues:*
 - (a) *the claimant may not revive the claim; and*
 - (b) *a defendant's counterclaim continues in force; and*

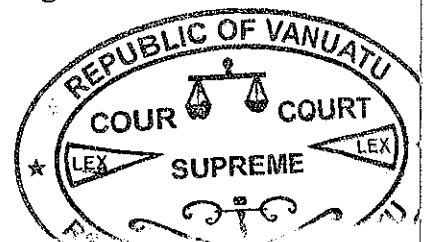


(c) the party against whom the claimant discontinued may apply to the court for costs against the claimant.

14. In relation to the second Application, Mr. Malcolm argued that the claim has been discontinued against BRED bank and therefore cannot be revived. Rule 9.9 3) and 4) provide that if there are several defendants "*the claimant may discontinue against one party*" and if he does so, the claim may not be revived.
15. The Notice of Discontinuance of Counterclaim filed on 3 March 2017 states that:-

" The first defendant, CHEN JINGIU, wholly discontinues his counterclaim against the claimant/first counter defendant, LUONG FONG, second counter defendant, BRED(Vanuatu)Limited, Third Counter defendant and the Government of the Republic of Vanuatu second defendant/Fourth counter defendant..."
16. In the notice the claimant also gave four grounds for discontinuing the claim .I am not sure what the reasoning is behind the giving of grounds for discontinuance .I can only assume that it was intended to provide some basis at a later stage to revive the claim as the claimant has now done. Rule 9.9 does not require the giving grounds to discontinue. Filing of the notice of discontinuance is all that is required.
17. I am firmly of the view that the effect of rule 9.9 3) and 4) is that if the claim is discontinued against a party, it may not be revived. That is what the claimant has done in relation to BRED (Vanuatu) Limited therefore the claim cannot now be revived as it has been discontinued.
18. Ms Ogden in arguing the First Application also makes the same submission that this claim is a revival of the counterclaim in CC1335/16 which has been discontinued, once discontinued it cannot be revived. She argued that all the issues were properly before Fatiaki J and the Claimant should not be allowed to relitigate those issues.
19. The Court in **Henderson v. Henderson** said that:-

"... when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward... The plea of res judicata applies, except in special cases ... to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
20. The current proceedings were filed before the discontinuance occurred. However it was never served. It was incumbent upon the claimant to inform the parties before Fatiaki J of the related proceeding as the disputes had been ongoing since 2015.



Nothing happened until after the counter claim was discontinued. This proceeding re-agitates more or less the same issues raised in the counterclaim.

21. There are no special circumstances in my view why the claimant should be allowed to re litigate the issues as he had the opportunity to bring forward his whole case before Fatiaki J. Both applications to strike out are granted and the claim is struck out. Regarding the issue of costs, Ms Ogden was self-represented and given the circumstances of this case I make no order as to costs.

DATED at Port Vila this 11 day of September, 2018

BY THE COURT

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D. Aru
Judge

