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

Civil Case No.13 of 2014

BETWEEN: JAMES ANDREW REILLY and JOHN TIMOTHY SWAN
Claimants

AND: MICHAEL THOMPSON
First Defendant

AND: AMANDA LAITHWAITE
Second Defendant

AND: MATANA INVESTMENTS Ltd
Third Defendant

Hearing: ***22nd May 2017***
Before: ***Chetwynd J***

Counsel: ***Mr Reilly in person***
Mr Finnigan & Mr Malcolm for the First and Third Defendants
Second Defendant unrepresented
Mr Thornburgh in person

Decision on wasted costs

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1. Civil Case 13 of 2014 involves a Claim by Mr Reilly ("JAR") and Mr Swan ("JTS") against 3 defendants, Mr Thompson ("MT"), Ms Laithwaite ("AL") and a limited company Matana Investments Ltd ("Matana"). The claim was for breach of contract and other ancillary causes of action and sought specific performance of the contract or, in the alternative, damages in excess of 4 million Australian dollars. The Statement of claim was filed on 28th March 2014. Prior to the Claim being filed JAR and JTS lodged an urgent application. The application is dated 22nd January 2014 and was accompanied by an undertaking as to damages. An order was made by Aru J on 14th February

2. A defence was filed containing a cross claim which cross claim was later withdrawn.

3. The case revolves around a development property known as Pandanus Bay Apartments. Matana was the registered proprietor of the land upon which the development was to be built. MT and AL were the directors and shareholders of Matana. JAR and JTS were going to build the development. The commercial relationship between the parties broke down fairly early on and the breakdown led to these and other proceedings. It is not necessary to go into further details of the dispute following the breakdown in this decision.

4. All that is necessary to say is this action (i.e. CC No. 13 of 2014) was set down for a trial preparation conference [1] on 26th September 2016. At that conference Mr Thornburgh, on behalf of the Claimants JAR and JTS, told the Court [2] he had just received instructions to make an application that I recuse myself on the basis of apprehended bias. Orders were made that the Claimants were to file the application, sworn statements in support and submissions by 14th October 2016. The defendants were to file sworn statements and submissions in response by 24th October and the application would be heard by me as is required by section 38 of the Judicial Services and Courts Act [Cap 270].

5. An application ***was*** filed on 14th October together with a sworn statement by JAR. The sworn statement stated that the applicant was concerned *"about the impartial mind of the current presiding judge".*

6. On 24th October Mr Malcolm on behalf of MT and Matana filed a sworn statement in response together with submissions.

7. On 25th and 26th October I presided over a mention in criminal matter and a two day civil trial involving Mr Thornburgh and other counsel not involved in this case. What occurred in the civil case is set out in a Minute published in that case, Civil Case No. 39 of 2010, on 27th October 2016. In short, the Minute said I was not satisfied that the lawyers in CC 39 of 2010 had come to court ready for a two day trial and I adjourned the matter to another day so that they could prepare properly. The Minute was critical of all counsel in the case.

8. On 28th October the day set for the hearing of the application to recuse myself in CC13 of 2014 Mr Thornburgh said he had been instructed to amend the application. He filed the amended application together with another sworn statement which had attached to it a 6 page letter of complaint addressed to the Minister of Justice, the Chief Justice and CC'd to the Judicial Services Commission, the Chief Registrar and the Commonwealth Secretariat. Although I had been *"warned"* by an Email from Mr Thornburgh of the intention to file an amended application the detail only became known when he appeared on 28th October in Chambers along with Mr Finnigan and Mr Malcolm. I took the immediate view the hearing could not continue as Mr Thornburgh's letter was a complaint lodged with the Judicial Services Commission. I left Chambers to consult with the Chief Justice. He concurred with my view that the hearing should not continue and on returning to Chambers counsel were informed application would be heard another day and that date would be fixed in due course.

9. On 30th January 2017 counsel were sent an Email saying the intention was to hear the application for recusal on 17th March. The question was mooted as to whether Mr Thornburgh could represent the applicants as advocate. This was on the basis he had filed a sworn statement which did not deal with merely administrative matters, it contained substantive and controversial evidence to support the application and rendered him liable to cross examination [3]. The question was raised at that early stage

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[1] See Minute dated 27th June 2016
[2] See Minute dated 26th September 2016
[3] Legal Practitioners Act - Rules of Etiquette and Conduct of Legal Practitioners Order 2011 Rule 78(3)

to allow the parties and counsel to consider the matter. There was an exchange of Emails about the date which was eventually fixed for 30th March.

10. On 13th March Mr Thornburgh filed a notice of ceasing to act for JAR and JTS. On 17th March Mr Yawha filed a notice of beginning to act for them. Mr Yawha also contacted the Court by Email to say that the application for recusal would be withdrawn. He appeared at the hearing on 30th March and confirmed the withdrawal of the application.

11. Prior to that, on 28th March the defendants filed an application for costs against the claimants and against Mr Thornburgh. Directions were given as the hearing of that application on 30th March. The hearing was fixed for 15th May but that date was later changed for the convenience of counsel. The application was eventually heard 22nd May. As can be seen by the heading of this decision MT was represented by Mr Finnigan and Mr Malcolm, AL was not represented although she was in Court and, as I understand it, was content to rely on the submissions advanced for MT, Mr Thornburgh appeared for himself but no one appeared o represent JAR and JTS.

12. Mr Yawha was contacted by telephone and he informed the court that he had not been paid for his work so far and that he had been given no instructions with regard to this case. That information was relayed to Mr Reilly who was in court. He was adamant that he had given adequate instructions to Mr Yawha, including a draft statement, and had expected him to be in Court today. This application had been fixed some 7 weeks previously and there had been ample time for JAR and JTS to resolve representation issues. It would therefore have been wrong to grant an adjournment particularly as the issue of costs, so far as the Claimants were concerned, was straight forward and was an exercise of discretion based on the premise set out in Rule 51.1(2) of the Civil Procedure Rules. The main argument was whether Mr Thornburgh should personally pay costs. He was present and was going to represent himself.

13. The Claim for costs against the Claimants was based on Rules 15.1 to 8 and Rule 15.25. It is put forward on the grounds that the application was withdrawn at the last minute. It is in the nature of a wasted costs order. As against Mr Thornburgh it is made pursuant to Rule 15.26(1). The grounds are that the grounds advanced to support the recusal applications had no prospect of success, were vexatious or mischievous or lacking in legal merit and that a reasonably competent lawyer would have advised the party not to bring the recusal applications based on those grounds.

14. Although the application for recusal was withdrawn it is still necessary to consider the detail of the applications and the grounds in order to reach a decision as to whether the requirements of Rule 15.26 have been made out. The consideration is necessary not to establish whether the application should or should not be granted but limited to whether or not the defendants have established sufficient argument to enable the Court to say the application had no prospect of success, was vexatious or mischievous or was otherwise lacking in legal merit. (See Rule 15.26 (1)(a)). The defendants will also have to establish that a reasonably competent lawyer would have advised JAR and JTS not to make it (see Rule 15.26(1)(b)). There is no question that both legs of Rule 15.26(1) have to be shown to be established.

15. The statement by JAR referred to in paragraph 5 above said that I had made adverse rulings in two other matters, "*relating to disputes arising out of my*

commercial/investment relationship with the Defendant known as civil case 198 of 2014 and Civil Case 1085 of 2015".

16. Civil Case 198 of 2014 was a mortgagee possession case commenced by BRED Bank Ltd. The Claim was against Matana and JAR and JTS applied to become Third Parties and wanted to defend the action. The application was refused and judgment was entered for possession and sale against Matana. The judgment was published on 1st September 2015. The decision has not been appealed or otherwise challenged.

17. Civil Case 1085 of 2016 involved Beachfront Development Ltd as Claimant and JAR and JTS as defendants. Beachfront Ltd was subject to a winding up order made by Harrop J in June 2015. The Liquidator of the company initiated the claim against JAR and JTS as former directors of the company. A Default Judgment was entered against JAR and JTS and their application to the Court was for an order to set aside that judgment. The default judgment was not set aside. The decision on that application was handed down on 23rd May 2016. It has not been appealed or otherwise challenged.

18. The statement In support of the application for recusal also said I had been seen leaving the office of Geoffrey Gee and Partners. JAR went on in that statement to say he had, *"...observed his* (meaning my) *demeanour to be suspicious as he looked left and right as though to check no one recognised him..."*

19. This ground, namely that *"the judge"* had been seen leaving the offices of Geoffrey Gee and Co (Mr Malcolm is a Legal Practitioner with Geoffrey Gee and Co) acting in a furtive manner, can only be seen as a mischievous and vexatious allegation. As has been pointed out in sworn statements in opposition to the recusal application, the offices of Geoffrey Gee and Co are on the second floor of a building. Mr Reilly does not explain how he came to see *"the judge"* on the second floor entering and leaving the office. He does not say where he was although the implication is he was on the road passing the building. If that was the case he would not have been able to see who was leaving the office on the second floor. The entrance is simply not visible from outside the building. It is a spurious allegation easily made with no evidence to support it. As is also pointed out in the sworn statements in opposition, Mr Thornburgh is well acquainted with the offices concerned as he worked at Geoffrey Gee and Co for several years and he would have been aware of layout of the building. As an experienced litigator Mr Thornburgh should have realised how mischievous the allegation was yet he allowed it to be set out in a sworn statement and he based his submissions on what was in the statement. Based on mere innuendo Mr Thornburgh sought to show there was some kind of meeting or relationship between me and Mr Malcolm.

20. To further bolster this argument Mr Thornburgh also bases his submissions on a salacious proposition that judges (including me) had been *"entertained"* at the residence of opposing counsel. The circumstances were mentioned in a "*Facebook post*" which alluded to *"the relationship of the judge and Mr Malcolm following Malcolm's hosting the Appeal Court Judges at his residence*". As Mr Malcolm explains in his statement, the Court of Appeal function was something which had taken place on numerous occasions over a period of perhaps 15 years. The nature of the function is described by Mr Malcolm as an informal social meeting of practitioners, judges and others involved in the law. There is nothing sinister, suspicious or remotely improper in such functions. Again Mr Thornburgh would have known that having been invited to the one alluded to and having attended others of a like nature in the past.

21. These allegations of impropriety were gratuitous and mischievous. They were premised on pure supposition and the flimsiest of evidence. Even if the evidence of JAR could be given any credence it does not, except for some base accusation I looked furtive, establish I went to the offices of Geoffrey Gee and Co for any improper reason or that I had some kind of relationship with Mr Malcolm giving rise to apprehended bias. There is also no evidence to remotely suggest that at the Court of Appeal function I met with Mr Malcolm other than as a guest to a social function. Mr Thornburgh would have known this.

22. Next it was said by JAR that I had been criticised by the President of the Turks and Caicos Court of Appeal and that I was also criticised by a lawyer concerning my unfair and unequal treatment of him in regard to legal aid payments. These remarks relate to the time when I held office as the Registrar of the Supreme Court of Turks and Caicos, that is, before I arrived in this jurisdiction.

23. Mr Thornburgh then again oversteps the mark by suggesting in his submissions, *"The judge is seen to have a tainted history with regards to his conduct as a judicial officer and the same does lead to any observer to have a reasonable concern about his credibility as a Judge".* This oblique reference to what is in Mr Reilly's sworn statement about events in the Turks and Caicos Islands seems to be an attempt by Mr Thornburgh to show bias in this case by referring to comments about the level of legal aid allowed in a foreign jurisdiction. Had he dug just a little deeper into the newspaper reports he would have discovered that the rates at which legal aid was to be paid had been set before I took up the post of Registrar and were approved by the Turks and Caicos Islands Court of Appeal. As to the comments about transcription, he could have found, as Mr Malcolm did, reports as to why that state of affairs arose. Any reasonably competent counsel would not rely on allegations against a judge which did not have any logical or local connection to the proceedings in which there was said to be bias or an apprehension of bias. No reasonably competent counsel would rely on matters where he or she was not or could not be confident the "allegations" told the whole story. No reasonable person would believe hearsay reports found on the internet told the whole story. There is a difference in relying on properly reported legal proceedings and scurrilous articles seeking to further a particular viewpoint. Any reasonably competent counsel would see the difference.

24. Another matter raised by JAR was in relation to a complaint he says had been raised by his lawyers (Mr Thornburgh) about Mr Finnigan having entered Vanuatu as a tourist and then working as a Legal Practitioner. The complaint was in a letter dated 29th September 2015 addressed to the Chief Registrar. JAR states that I ignored his and JTS's objections to Mr Finnigan appearing in conferences or hearings. I play no part in the admission of overseas counsel. The letter to the Chief Registrar was written on some unnamed client's ,"*...initial instructions...to determine if Mr Finnigan is registered as a Legal Practitioner in the Republic of Vanuatu".* The letter goes on to state that the client wants , *"...to apply to the Supreme Court for a Judicial Review of any admissions of Mr Finnigan...".* There is no evidence produced to me which would give me any reason or authority to stop Mr Finnigan appearing as a Legal Practitioner. There is simply no evidence of any Judicial Review proceedings let alone any evidence about a decision made by a judge in Judicial Review proceedings. To suggest that me doing nothing in such circumstances shows bias against JAR and JTS is little short of ludicrous. Any reasonably competent counsel would see that.

25. As to the other matters referred to and relied on by Mr Thornburgh in his submissions and in particular the civil case described in detail in his sworn statement, there has been no appeal lodged against or challenge made to the decision reached nor has there been any application for recusal in the case. In fact, the case has subsequently been tried by me.

26. I regret to say that I have no real hesitation in finding that the application as advanced had no prospect of success. It was vexatious and mischievous and was lacking in legal merit. I say that I regret having come to that decision because there is also no doubt in my mind that a reasonably competent counsel would have reached the same conclusion and would have advised his client(s) not to have pursued the application. I have previously found Mr Thornburgh to be a competent and able lawyer and am puzzled as to why he argued the matter. I can only think that for some reason he has allowed his obvious animosity towards Geoffrey Gee and Co, and in particular Mr Malcolm, to cloud his judgment in this case. I dare say he was partly driven to make the application by a determined client as well but he is experienced enough to know when to say no so such clients.

27. The costs of the application and the amended application for recusal fall to be paid by the Claimants JAR and JTS. The principal reason is the general rule (as set out in Rule 15.1) is that the costs of proceedings are payable by the party who is not successful in those proceedings. The Claimants withdrew the applications before they were heard and so were clearly not successful. However, the applications were not withdrawn at an early stage and the other parties have incurred considerable costs. As indicated above I am satisfied the applications had no real prospect of success for the reasons set out above. Mr Thornburgh should have advised his clients not to proceed but chose not to. It must have been apparent to him as a reasonably competent counsel the application was pointless and bound to fail He will pay a contribution of 40 percent of the costs personally.

28. The costs of the application are claimed at VT 2,493,088. I have made a slight deduction in the claim by Mr Finnigan in respect of research. As far as I am aware research is never an element of costs. Apart from that, there is no real dispute about the amount of costs incurred as set out in Mr Malcolm's sworn statement. Accordingly the costs shall be paid as to VT 1,495,852 by Mr Reilly and Mr Swan and as to VT 997,235 by Mr Thornburgh. Those costs are to be paid forthwith. I will ask the Master to arrange an Enforcement Conference at her convenience to ascertain how payment is to be made.

DATED at Port Vila this 30th May 2017
BY THE COURT

DAVID CHETWYND
Judge

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