IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 19/484 SC/CIVIL

BETWEEN: **New Hebrides Mercantile Services Limited t/a Moorings Hotel**

First Claimant

Lawson Trading Limited

Second Claimant

AND: **Grand Isle Holdings Limited t/a Pacific Advisory**

First Defendant

Glen Craig

Second Defendant

Westpac Banking Corporation

Third Defendant

Date of Hearing:	3 September 2021
By:	Justice G.A. Andrée Wiltens
Counsel:	Ms L. Raikatalau for Ms M-N Ferrieux Patterson for the Claimants
	Mr J. Malcolm for the First Defendant
	Mr N. Morrison for the Second Defendant
	Ms J. La'au for the Third Defendant
Date of Decision:	27 September 2021

Judgment

A. Introduction

1. The Claimants have applied that I recuse myself from hearing this case on the basis of perceived bias. After hearing from counsel, having earlier read the supporting material provided, I declined the application and indicated that I would give my reasons in due course.

2. These are now my reasons for declining to recuse myself.

B. Law

3. Section 38 of the Judicial Services and Courts Act is the statutory basis for the application. A significant consideration is the very small legal community within Port Vila, and even Vanuatu. I accept that if the application is made out, Section 38 stipulates that the requirement to stand aside is mandatory.

4. The practising legal community is small, so of course there is interaction between bench and profession. However, more than simply interaction is required to be shown for this application to be granted on the basis of apprehension of bias.

5. The test to be applied is whether a fully informed independent and fair-minded observer knowing all the circumstances would have an apprehension of bias.

C. Discussion

6. I will attempt to set out the full circumstances so that a fair assessment might be made of what a fair-minded observer would make of the position. The first point to be made is that the other counsel involved in the case did not support the application.

7. The written application gives no clue as to the basis for the same – it merely lists in support sworn statements by various persons.

8. Emma Sam is one such name. I cannot see how her statement supports the application, and oral submissions at the hearing did not address this aspect. I set it to one side.

9. A statement by Ms Ferrieux Patterson of 30 September 2020 is next listed in support of the application. This deals with (i) an application to set aside an order mistakenly made to strike out the Claim due to no steps being taken pursuant to Rule 9.10(2)(d) of CPR, and (ii) an application to renew the Claim which had lapsed due to non-service. The strike out order was made on 3 March 2020; the application to set the order aside and renew the Claim was filed on 30 September 2020, and both applications were granted on 14 October 2020. I was responsible for the strike-out order, the setting aside of the same and the renewal order.

10. Next there is a further statement by Ms Ferrieux Patterson of 23 October 2020. That deals with issues of disclosure. It does not support the present recusal application.

11. There is then listed a sworn statement by Ernie Johnson of 24 October 2020. It deals with the history of his Claim in summary forrm, and concludes in disagreeing with some comments made by Mr Craig. This statement also does not support the recusal application.

12. Next is listed a further sworn statement by Ernie Johnson of 19 February 2021. I am unable to find this statement in the Court file.

13. There is then listed a sworn statement by Viska Muluane of 26 May 2021. She sets out the history of the litigation since her firm's involvement in July 2020; and in her statement she sought an urgent hearing of an application for Judgment by Default against the Third Defendant which had been filed on 14 April 2021. She maintained the Claimant had endured an unfair delay since March 2019. I note that the file was first under my case management from March 2020. What occurred prior to that was outside of my control. I also note that I was overseas on leave at the time the sworn statement seeking the urgent hearing was filed.

14. Next is a lengthy sworn statement by Dane Thornburgh of 21 August 2021. He states that he commenced to act for the Claimants in October 2018. He sets out the history of the litigation from then until November 2019 when he left the jurisdiction. I will now deal with what I perceive are the relevant parts of his statements to the application at hand.

15. At paragraph 22 (and obliquely repeated at paragraph 35), he impliedly criticises me for my not advising him, contacting him or requesting him to provide material relevant to the case. I repeat, the file was not under my case management until March 2020. I suggest the criticism is misplaced.

16. At paragraph 23, Mr Thornburgh states that he and other counsel, and his clients, had agitated for me to deal with the case before it was struck out. This is incorrect. By the time I received the file Mr Thornburgh was no longer in Vanuatu. Further, the striking out was the very first thing done after the file came into my docket – there cannot and was not any agitation aimed at me prior to that.

17. At paragraph 37, Mr Thornburgh states: "...the Court and Wiltens J just refuses to deal with any application by the Claimants...". The evidence contradicts this statement – see the response to the application to set aside the striking order which was heard and dealt with favourably to the Claimants within 15 days.

18. At paragraph 71 of the statement, Mr Thornburgh commences to assert apprehended and actual bias (even though the application does not assert this) on my part, largely stemming from his appearances before the Vanuatu Law Council Disciplinary Committee of which I was Chair. At paragraph 76 he refers to the decision of the Disciplinary Committee being "...handed down" by me. The Committee made the decision, not me.

19. At paragraph 84 and following, Mr Thornburgh complains about my reminding him that his right to practise was on hold while the issue of his appeal from the Disciplinary Committee decision

was being dealt with. I consider that part of my obligations to the profession – it was nothing personal. He then uses hearsay to further malign my character and professionalism. It is a very personal attack, the nature of which is entirely disputed and which is quite unrelated to this case.

20. At paragraphs 94 and following, he is critical of my socialising with fellow New Zealanders at a social gathering held under the auspices of the New Zealand High Commission. I wonder what Mr Thornburgh would have to say if he knew that I regularly play tennis with a member of the profession, occasionally play golf with members of the profession, and even have dinner engagements with members of the profession at my home and at theirs? No right-thinking member of the community would consider such conduct objectionable or suspicious.

21. At paragraphs 104 – 105, Mr Thornburgh is critical of my striking out the case and refusing to hear the second application by default. He has also criticised my allowing Mr Craig and Westpac more time without making them pay costs. He is entitled to his opinion, albeit that it is plainly incorrect as I was overseas at the time, not refusing to deal with the application. Westpac had by then indicated their intention to defend the case – in that circumstance it is inappropriate to order judgment by default. The application for judgement by default was an unnecessary step for the Claimant; and the Courts will not grant costs in respect of unnecessary steps taken by a litigant. I suggest the criticisms are misplaced.

22. At paragraph 106, Mr Thornburgh states: "The applications for default judgment were either not heard or delayed without reason on 24.05.19 to 14.04.20." I repeat, I first received the file in March 2020.

23. Paragraph 108 displays paranoia. Despite his views, not everything I do relates to Mr Thornburgh.

24. Finally, listed in support of the application is a sworn statement by Ernie Johnson of 30 September 2021. He explains the delay in commencing this case was due to his needing to re-group financially. Once that was done, he considers the case to have been unduly prolonged to date. The delays have caused additional legal costs for him. He is critical of the fact the Court declined to deal with the case on the basis of determining a preliminary point before going further. He is also critical of the application for judgment by default being declined.

25. There has been delay in the progressing of this Claim. The Court is not immune from criticism in this regard, but I would suggest that relates to the period before March 2020. In terms of delay after the matter was given to me, I make the following points. I received the file in early March 2021. By Minute of 3 March 2021, I recorded that I had located no proof of service, which meant the Claim was of no effect. I also found that no steps had been taken to progress the Claim and according struck out the Claim. However, there was proof of service, and I was therefore wrong to strike out the Claim, as acknowledged by the subsequent setting aside of that order.

26. I note the application to correct the position was not filed until 6, almost 7, further months had elapsed, namely on 30 September 2020. In the intervening period, nothing occurred in relation

to the matter. The application was promptly heard and determined on 26 October 2020. Other time-tabling orders were made at the same time, requiring defences to be filed by 13 November 2020. The applications for security for costs by the First and Second Defendants was set down for hearing on 16 November 2020.

27. The applications were part-heard, with a continuation required after further information had been obtained by 15 January 2021. The continued hearing was scheduled for 1 February 2021. In December 2020, Ms Ferrieux Patterson sought to defer the hearing as she would be overseas. Accordingly, the information was now to be provided by 19 February 2021, with the hearing moved to 2 March 2021. In the meantime, applications to renew the Claim and for substituted service were received and promptly dealt with, in favour of the Claimants. On 1 March 2021, there was a further application by the Claimants' counsel to again defer the continuation of the part-heard applications for security for costs. The matter was again deferred to 29 March 2021, when it finally concluded. Having heard argument, I reserved my decision.

28. The point I am seeking to make is that the delays in progressing the Claim since March 2020 can be explained by a lack of urgency by counsel for the Claimants followed by several requests to defer matters, and the fact that a number of preliminary issues require resolution before the matter can be dealt with substantively.

29. It is necessary also to refer to a preliminary issue raised by the Claimants counsel by way of application to hear a preliminary issue pursuant to Rule 12.4 of the Civil Procedure Code. This was filed on 23 February 2021 and heard on 29 March 2021. The purpose behind this procedure is to reduce the length of proceedings. However, in my view, the determination of the 2 issues put forward would not obviate the need for a trial. There remain factual disparities between what the Claimants allege and what the Defendants contend. I therefore saw no merit in the application. I note the decision has not been appealed. I suggest that criticism of the decision holds little substance.

30. The Claimants filed an application for judgment by default against the Third Defendant on 14 April 2021; and again, on 10 May 2021. Mr Nalyal filed a Notice of Commencing to Act for the Third Defendant on 19 April 2021, which notice was accompanied by a letter stating that any application for judgment by default would be defended.

31. It should be noted that I left Vanuatu on 10 May 2021 and only returned to work post-quarantine on 19 July 2021.

32. A Conference was held on 27 July 2021. At the Conference, Ms Raikatalau withdrew the applications for judgment by default, as the Third Defendant had filed a Defence on 23 July 2021. This was the first opportunity to consider the matter following the filing of the first application for judgment by default and Mr Nalyal's commencing to act. Although the Claimants see this as deliberate delay on my part, it is plainly not.

33. At the Conference, I disallowed Ms Raikatalau's application for costs in respect of her failed application for judgment by default. Not only had her application failed, she had other more cost-effective avenues open to her to press the Third Defendant to file a Defence promptly. There is criticism also of this, although I again note that no appeal has eventuated.

34. I add for completeness, that the Third Defendant has also sought security for costs. This was to be heard on 24 August 2021, but there was another request by the Claimants' counsel for an adjournment. This aspect of the case is also now the subject of a reserved decision.

35. Of particular relevance to the current application, Mr Johnson states that he has been advised by Mr Thornburgh and unidentified others that there is "...more than a professional relationship with the legal team..." representing the 3 defendants. He has seen photographs of myself, Mr Craig and his wife at the New Zealand High Commission drinks. That concerns him.

36. I respond as follows: Mr Craig's wife is not one of the defence "team". The reality is that three different firms act for the Defendants. I do not know what special relationship I am supposed to have with any of the counsel involved. I consider that a fully informed independent and fair-minded person would not be swayed by the clearly incorrect pejorative statements by Mr Thornburgh which have clearly affected Mr Johnson's views.

37. Mr Johnson is concerned about the delays and what he regards as excessive and unnecessary applications for security for costs, states he lost confidence in the willingness of the Court and me to manage the case in a timely and fair manner. He concludes that there appears to be bias against him, his son and their companies. I have attempted to explain the delays since March 2020. They do not in my view indicate a bias against Mr Johnson. I make no comment as yet regarding the security for costs applications as the decision has yet to be published.

38. The reality that I perceive is that Mr Johnson's position has been greatly impacted by what he has heard from Mr Thornburgh. However, had Mr Johnson known the circumstances as outlined above and not been influenced by Mr Thornburgh I am sure he would see things differently.

D. <u>Decision</u>

39. I decline to recuse myself from this matter.

40. I do however have 2 additional issues to address.

41. Firstly, between the hearing of this application of the publishing of this decision, counsel for the Claimants has leet it be known to the other counsel acting and me, that regardless of the reasons yet to be received, there will be an appeal filed against tis decision.

42. It is inappropriate for counsel to act in this way as it is disrespectful to the Court. It is also arrogant and attempts to exert improper pressure on the Court.

43. Secondly, applications for recusal on the basis of apprehended bias should never resort to quite unnecessary personal malignment. It is the duty of counsel to ensure that sworn statements do not stray into such inappropriate allegations, a duty that was not well complied with in this case.

Dated at Port Vila this 27th day of September 2021
BY THE COURT

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Justice G.A. Andrée Wiltens