IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil

Case No. 24/1472 SC/CIVIL

BETWEEN: GEORGE BOAR
Freshwota 5 Area, Port Vila
Claimant

AND: KEN MOLIVATOL, EPHRAIM MOLVATOL, ANDREW MOLVATOL Executors of the Estate of Deceased Zebedee Molvatol (also known as Zebedee Tari or Zebedee Tarvui)
Port Vila
First Defendants

AND: CAILLARD KADDOUR (VANUATU) LIMITED
Second Defendant

Before: Justice M A MacKenzie

Distribution: Claimant – in person

First Defendant – unrepresented

Second Defendant - unrepresented

JUDGMENT

Introduction

1. Mr Boar seeks a default judgment for a fixed amount, being VT 6,417,000, because neither the First Defendant nor Second Defendant filed a defence within the time required by the Civil Procedure Rules ("CPR"). For reasons which follow, I decline to enter judgment by default and the claim is struck out.

Relevant background

2. Mr George Boar was engaged to provide legal services to Zebedee Molvatol in relation to a judicial review proceeding some years ago. The parties entered into a costs agreement dated 24 February 2016. The costs agreement is set out at paragraphs 2

and 3 of the agreement[1]. Mr Boar required VT 50,000 upon opening the file, and his hourly rate was VT 20,000. Further, Mr Molvatol agreed to pay a "*commission*" of VT 5 million to Mr Boar in the event that he received a payment of VT 29,533,245 from the Vanuatu Government.

3. On 2 July 2017, Mr Boar rendered an fees invoice for VT 728,000.[2] However, Mr Molvatal refused to pay the fees invoice and the VT 5 million commission.

4. Therefore, on 14 July 2017, Mr Boar filed a claim in the Supreme Court seeking Judgment for a fixed amount in the sum of VT 5,728,000, together with interest at 10% and costs.[3]

5. The claim was served on Mr Molvatol on 20 July 2017. Mr Molvatol did not file a defence within the time required by the CPR. So Mr Boar sought judgment by default for a fixed amount.

6. On 4 October 2017, the Court entered judgment against Mr Molvatol in the sum of VT 6,317,000, together with costs of VT 100,000. The judgment sum included interest of VT 572,000 (at the rate of 10%). Aside from whether 10% was an appropriate interest rate, the calculation of interest is incorrect, as pursuant to rule 9.2 CPR, a Claimant is entitled to interest at a rate fixed by the Court "*from the date of filing the claim*".

7. Despite judgment being entered, Mr Molvatol did not pay the judgment sum. Mr Boar then sought an enforcement order. The enforcement file shows that enforcement conferences were adjourned on a number of occasions between 11 June 2018 and 22 April 2020.[4]

8. On 22 April 2020, the Deputy Master recorded that the Judgment Creditor was absent and unrepresented, and Counsel for the Judgment Debtor was absent without excuse. The Deputy Master then removed the matter from the list and closed the file.

9. Subsequently, Mr Molvatol passed away and on 27 October 2021, Ken Molvatol, Ephraim Molivatol and Andrew Molivatol were appointed executors of his estate.

10. On 15 May 2024, Mr Boar filed a claim ("the current claim") against the executor of the estate of Mr Molvatol (the First Defendants) and a real estate company Caillard Kaddour (Vanuatu) Limited (the Second Defendant) seeking judgment in the sum of VT 6,417,000, being the sum ordered pursuant to the default judgment of 4 October 2017.

---

[1] *Annexure A of Mr Boar's swom statement dated 17 July 2017*
[2] *Annexure B of Mr Boar's swom statement dated 17 July 2017*
[3] *Civil Case No. 1801 of 2017*
[4] *Enforcement Case No. 3372 of 2017*

11. In the current claim, Mr Boar is seeking to enforce the judgment obtained on 4 October 2017.

12. Neither of the Defendants filed a defence to the current claim. As a result, Mr Boar seeks a default judgment. There is no doubt that the First Defendants and the Second Defendant were served with the claim in August 2024.

Consideration

13. Mr Boar filed submissions in support of the default judgment on 10 September 2024.

14. Mr Boar failed to address in his submissions just how judgment could be entered in against the second Defendant, who was not a party to the costs agreement entered into between Mr Boar and the late Mr Molvatol. There is no privity of contract. The claim against the second Defendant is totally misconceived.

15. But more fundamentally, the current claim is misconceived. Mr Boar is seeking to enforce a judgment he has already obtained. As the Court of Appeal recently said in *Pakea Limited v Wendy* Bourdet [2024] VUCA 61 (at 24), there is no common law cause of action for enforcement of a judgment.

16. The doctrine of merger applies. In *Pakea v Bourdet,* the Court of Appeal noted the helpful discussion of the doctrine of merger in *Zavarco PLC v Nasir* [2020] EWHC 629 (at 23):

> 23. There is a helpful discussion of the doctrine of merger in an English case, *Zavarco PLc v Nasir* [2020] EWHC 629:
>
> *"Merger – the law*
>
> 12. *Before getting into the legal theory, it is worth setting out the easy example which illustrates merger. If a claimant has a cause of action which gives them a legal right to a sum of money from a defendant (e.g., a claim for breach of contract), then before judgment is given, the claimant's legal right is that which the law provides for as arising from the cause of action. The parties may disagree about the merits of the claimant's right and go to trial. Assuming the claimant wins the trial, they will obtain a judgment ordering the defendant to pay them that sum of money. The claimant now has a legal right to the money from the defendant, based on the judgment itself. This new legal right is different from the old one. For example, the way the limitation rules apply differs and the accrual of interest may well be different too. If you think about it, the claimant cannot still have their old legal right to the sum of money for breach of contract, otherwise they would now have two rights and might end up with a right to double recovery. So, the idea is that the old right,*

or cause of action, has merged into the new right, the judgment. Whether "merger" is the best metaphorical description of this idea does not matter. It makes sense.

13. *Merger is similar to but not the same as other doctrines which come into play when a party or a dispute comes back to a court a second time after a previous decision. They include res judicata, issue estoppel and the rule in* ***Henderson v Henderson****. In* ***Virgin Atlantic Airways v Zodiac Seats*** [2013] UKSC 46, [2014] AC 160 *Lord Sumption deals with this at paragraph 17. He said as follows:*

"17. Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle.

The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings.

Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336.

Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare [1844] EngR 1042; (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34.

Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of

Taxation [1921] HCA 56; (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198.

Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson [1843] EngR 917; (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones.

Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

17. In this case, the default judgment dated 4 October 2017 determined the cause of action for payment of VT 5,728,000 outstanding under the costs agreement and the fees invoice rendered on 2 July 2017. The right to payment as per the agreement and the fees invoice has merged into the new right, the default judgment dated 4 October 2017. As explained in the *Zavarco* case, the doctrine of merger treats a cause of action as extinguished once judgment has been given upon it, and the Claimant's sole right as being a right upon the judgment.

18. Given the matters set out above, I decline to enter judgment by default. For the same reasons, the claim is struck out.

19. I make the following points.

20. The jurisdiction to strike out a proceeding should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties to reach a definite conclusion.

21. The relevant principles are discussed by the Court of Appeal in *Hocten v Wang* [2021] VUCA 53. The Court of Appeal said (at paragraphs 11-13);

"11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims, causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was

recognised by this Court in Noel v Champagne Beach Working Committee [2006] VUCA 18.

12. The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and McNeely v Vaai [2019 WSCA 12). *A pleading will be struck out:*

a) if there is no reasonably arguable cause of action;

b) the claim is frivolous or vexatious;

c) it is otherwise an abuse of the process of the court.

13. The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed".

22. I have considered whether Mr Boar should have been afforded a right to be heard before striking out the claim. Further submissions as to whether the claim ought to be struck out would not assist, given *Pakea Limited v Bourdet* which held that there is no common law cause of action for enforcement of a judgment. As explained at paragraph 17 above, the default judgment of 4 October 2017 determined the cause of action. The right to payment as per the agreement and the fees invoice has merged into the new right, the default judgment dated 4 October 2017.

23. Further, as noted above, there is no cause of action against the Second Defendant who was not a party to the costs agreement. Mr Boar ought to have known that.

24. Mr Boar's remedy is to continue within enforcement action. It is perhaps surprising that the enforcement case was closed when the judgment sum remained unpaid. A review of the enforcement file indicates that on 21 May 2019, Mr Molvatol was ordered to pay VT 50,000 per month to Mr Boar commencing 31 May 2019, but failed to do so.

25. It is open to Mr Boar to seek orders under rule 3.10 CPR substituting the executors of the estate as a party.

26. There is one final observation as to quantum, which will not be an issue, unless there is an application to set aside the default judgment. The amount claimed in the original

claim was high because of the "commission" agreement. In that regard the Court of Appeal's observation in *Harrison v Shin* [2024] VUCA 27 may be apt and relevant. It is unnecessary to say anything further about that at this juncture.

Result

27. For the reasons set out above, I make the following orders:

    1. The request for default judgment for a fixed sum of VT 6,417.000 is declined.

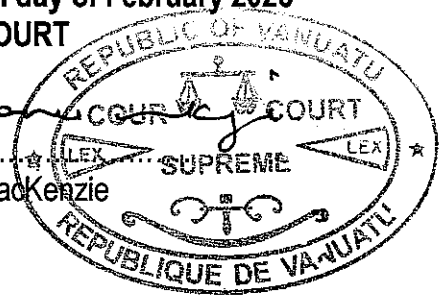
    2. The claim filed on 15 May 2024 is struck out.

    3. It is open to Mr Boar to seek to reopen enforcement case No. 3372 of 2017.

    4. The Sheriff in Santo is to serve the executors of the estate of Mr Molvatol with a copy of this judgment and file a proof of service.

    5. The file is now closed.

DATED at Port Vila this 14th day of February 2025
BY THE COURT



.....
Justice M A MacKenzie