IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No. 20/2529 CoA/CIVA

BETWEEN: **Alexandros Gouras**
Appellant

AND: **NACA Limited**
First Respondent

AND: **Nicholas Atherinos**
Second Respondent

AND: **Astrobel Limited**
Third Respondent

AND: **Kalpokor Kalsakau**
Fourth Respondent

Date of Hearing: ***12 November 2020***

Before: ***Justice V. Lunabek***
Justice J. Mansfield
Justice R. Young
Justice D. Aru
Justice G. Andrée Wiltens
Justice V. M. Trief

Counsel: ***Mr Jeffrey Levine with Mr John Malcolm for the Appellant***
Mr Jerry Boe for the First, Third and Fourth Respondents
Mr Mark J. Hurley for the Second Respondent

Date of Decision: ***20 November 2020***

JUDGMENT

Introduction

1. This appeal seeks to restore to the trial list in the Supreme Court the claim of Alexandros Gouras (Gouras) against the four respondents (who were the defendants to his claim). His claim was summarily dismissed on the application of each of the respondents in the Supreme Court claim on 2 September 2020.

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2. In the Supreme Court, the judge accepted the Supreme Court had inherent jurisdiction to strike out the claim as "*frivolous, vexatious and an abuse of process*" [the wording used in the summary dismissal applications], if the contention was made out. That followed the decision in *Iririki Island Holdings v Ascension* [2007] VUCA 13 (*Iririki Holdings*) at [17] to [19].

3. The judge said at [16] that the appropriate test to apply is to determine whether the claimant's case "*... is so clearly untenable that it cannot possibly succeed on the available evidence before the Court*". There was some criticism of that manner of expression, as it inserts into the test as expressed in *Iririki Holdings* the reference to the evidence. Counsel for the appellant said that that involved a wrong statement of the law. It is not necessary to resolve that issue. There may be a special case in which such a strike out application is made in part on the reliance on some evidence. On the other hand, clearly such applications cannot be resolved by any form of balancing of competing evidence, or by a rehearsal of the evidence proposed for the trial. That appears to be what happened here.

4. The judge then at [22] directed his attention to the "*pleadings in light of the available evidence*". He concluded that the statement of claim was bad from the start, and observed that Gouras had not deposed to any evidence, and had relied on his father's evidence which, the judge said "*was not enough*".

5. For the reasons below, we do not agree that the claim should have been summarily dismissed. The appeal is allowed and the orders made on 2 September 2020 are set aside. The matter is remitted to the Supreme Court for hearing. We consider that the costs of this appeal should be costs in the cause in the Supreme Court.

<u>The nature of the claim in the Supreme Court</u>

6. The existing Statement of Claim is barely adequate. Counsel for Gouras acknowledged that, and accepted that an application would have to be made for leave to file and serve an Amended Statement of Claim. That should have been done at the time of the argument on the strike out applications, so that the judge would have been better informed of the nature of the claim.

7. However, there is sufficient to understand the fundamental nature of the claim.

8. Gouras had invested a considerable sum of money by a loan to a Dominique Dinh for a business enterprise, and had secured the investment by a mortgage granted over certain leasehold land. The mortgage had been transferred to the first respondent NACA Limited (NACA), to be held by NACA as trustee for Gouras, or a Superannuation Fund for which he was responsible. The enterprise did not succeed, and the monies secured by the mortgage for the benefit of Gouras became payable. Gouras arranged for NACA to exercise rights under the mortgage to sell the leased land, and it did so. However, NACA did not account to him for the benefits received by the realisation of the security, but misapplied them. The other respondents Nicolas Atherinos (Atherinos), Astrolabe Limited (Astrolabe)

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and Kalpokor Kalsakau (Kalsakau) are said to be the directors of NACA at material times, and aware of and party to its misapplication of the proceeds of realisation of the leased land under the mortgage.

9. The fundamental claim is that NACA as trustee for Gouras or his interests had failed to account for the proceeds of the realisation of the secured asset under the mortgage, and that the other three respondents were complicit in its failure to do so.

10. It is not necessary to refer to the defences filed in response.

The strike out applications

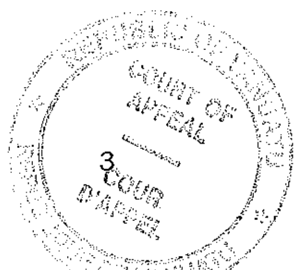
11. The application by Atherinos was supported by his sworn statement.

12. The first matter raised concerned the status of NACA. Gouras pleaded that it is an international company incorporated under the International Companies Act [CAP 222]. It was removed from the Register of International Companies on about 20 April 2020. The judge at [19] described the pleading as bad for that reason. The second matter concerned that status of Atherinos. He said he had never been a director of NACA, as Astrolabe was its sole director. He said he had no knowledge of the relevant actions by NACA, or of the circumstances of the initial loan secured by the mortgage, or of any amounts said to be owed by NACA to Gouras. He annexed substantial documentation from searches of the relevant registers.

13. The application by NACA, Astrolabe and Kalsakau was similar, supported by a sworn statement of Kalsakau of 19 June 2020, and three sworn statements of Daniel Agius on behalf of Astrolabe of 19 June 2020, 17 July 2020, and 27 August 2020.

14. The matters raised also concerned the status of NACA, and in addition NACA said it was not the trustee for Gouras or his interests. Those respondents also put in issue, supported by the material in the sworn statements, that there was any structure involving a trust for the benefit of Gouras or his interests. It was submitted at the hearing of the strike out application in the Supreme Court that the sworn statement of Athanasios Gouras (AG), the father of Gouras, could not be relied on by Gouras to resist the strike out application as he was not the claimant. The submissions involved extensive reference to the documentary material and to relevant statutory provisions. They included submissions touching on the weight to be given to certain evidence.

15. Gouras had filed a sworn statement of AG, on its face addressing facts within the knowledge of AG, responding to the material relied on by the respondents.



The decision in the Supreme Court

16. It appears that the judge accepted that the sworn statement of AG could not be relied on to show a disputed set of facts. It was said that it was first appropriate to think about the pleadings in the light of the available evidence. The conclusion was reached at [22] that the pleading of the claim was bad from the start. Then it was observed that Gouras had not deposed to any evidence, and the evidence of AG, his father, was said simply to be "*not enough*".

17. The judge at first instance also noted that Gouras through his lawyers had filed an amended statement claim on 19 August 2020, shortly before the hearing of the strike out applications, but that he did not rely on it because no leave to file it had been sought or given; see Civil Procedure Rules, Rule 4.11. Counsel for Gouras on this appeal accepted that there was no amended claim. He said that it was nevertheless an indication that Gouras did wish to amend the claim, and that an opportunity to apply to do so should have been explored with his counsel at the time.

Consideration

18. In our view it was erroneous to treat the claim as bad because NACA was deregistered at the time of the hearing of the strike out applications. That occurred after the relevant events, and evidence of its actions and communications could have been given in any event. Its deregistration after the relevant events would not have precluded the other respondents from being found liable for its defaults if their complicity were proved. In any event, the circumstances of its deregistration were not explored. The respondents could not avoid liability (assuming the allegations against them were proved), simply by the device of deregistration of NACA after the relevant events. In addition, there is provision which would enable an application to be made for NACA to be restored to the register, for the purposes of continuing to be a party to the proceeding. Restoration on conditions is not an uncommon thing to occur.

19. It was also erroneous to have regarded the sworn statement of AG as not relevant. We have noted that the content of his statement is apparently within his knowledge, and so admissible at the hearing, and it is directly relevant to the claim. Had the judge at first instance considered it, we are confident that it would have been apparent that there are significant factual claims which are able to be supported by evidence, and secondly that there are significant disputed issues which would need to be addressed and resolved at a trial. It is not useful to spell them out in detail.

20. For those two reasons, it emerges that the primary judge erred in the ruling to summarily dismiss the claim. The appeal is allowed. The judgment of the Supreme Court of 2 September 2020 is set aside. The matter is remitted to the Supreme Court for hearing. The costs of the appeal are to be costs in the cause in the Supreme Court.

21. We have made that costs order because it is apparent that Gouras should have been in the position of identifying to the Court at the hearing, if not before, the final terms of his proposed amended claim, so that the Court would have been able to assess whether there was – in practical terms – simply no realistic hope of the claim succeeding in the circumstances.

22. There is a final observation to be made. The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the Court on such applications to hear a 'mini-trial' or to make a decision based on contested factual material. So care should be taken to ensure that any such applications are meaningful and cost effective. That observation is not intended to be critical of counsel or the parties in this particular matter.

Dated at Port Vila, this 20th day of November, 2020.

BY THE COURT

Hon. Vincent Lunabek
Chief Justice