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

Civil Appeal
Case No. 21/115 COA/CIVA

IN RE: A LEGAL PRACTITIONER

AND IN THE MATTER OF: THE LEGAL PRACTITIONERS ACT [CAP 119]

BETWEEN: ROBERT EDGAR SUGDEN
Appellant

AND: VANUATU LAW COUNCIL DISCIPLINARY COMMITTEE

Respondent

Coram:	***Hon. Justice J. Mansfield*** ***Hon. Justice D. Aru***
Counsel:	***Mr. M Hurley for the Appellant*** ***Mr. G Blake for the Respondent***
Date of Hearing:	***09 & 17 February 2021***
Date of Judgment:	***19 February 2021***

JUDGMENT

Introduction

1. The Appellant is a legal practitioner of long standing.

2. In December 2016 he was asked to act for a party in proceedings then in the Supreme Court which were well progressed towards the hearing. He returned from a holiday to Vanuatu after Christmas that year in late January, and he accepted instructions to act for that client. He filed a Notice of Commencing to Act on 3 February 2017. He was aware that the matter was listed for hearing in the period 7-10 March 2017.

3. He then applied for the hearing to be adjourned, and separately for leave to amend his client's defence and counterclaim. On 17 February 2017 Fatiaki J gave leave to amend the pleadings but refused the adjournment of the hearing.

4. On 2 March 2017, the Appellant on behalf of his client filed a new civil claim (Civil Claim No 453 of 2017), which reflected the claims in the counterclaim to be heard that day. [We note that the fresh claim did not involve precisely the same parties as the defendants to the counterclaim in the proceedings about to be heard, and was not in precisely the same terms. It has separately been decided that it was in essence the same claim as the existing counterclaim. There is no submission on this appeal that that is incorrect]. Th Appellant also filed a Notice of Discontinuance of the existing counterclaim. At the trial, he informed the trial judge that the counterclaim had been discontinued, but did not inform the judge that he had instituted the fresh proceeding. Nor by that time did he serve the defendants to the counterclaim with the fresh proceeding.

5. Consequently, the trial proceeded without the counterclaim, and in due course judgment was delivered.

6. When the fresh claim was served, the defendants successfully applied for it to be dismissed as an abuse of the process of the Court. Because it raised the same claim as that which had been discontinued. That application succeeded. An appeal to the Court of Appeal was unsuccessful: **Chen Jinqui v Ly Nu Loung** [2019] VUCA 13.

7. In the course of its reasons for decision, the Court of Appeal said at [63]-[65]:

> *"[63] We accept the use of the Court's inherent jurisdiction to strike out for abuse is discretionary, and used cautiously in exceptional cases. This is an exceptional case not least because Mr Sugden has been quite candid as to what he did. We are satisfied the conceded facts clearly establish abuse. We can do no better than reiterate the submission of Mr Malcolm at page 5.*
>
> *The abuse in this case:*
> *1. was deliberate;*
> *2. by an experienced solicitor;*
> *3. to obtain a different judge;*
> *4. without notice to other counsel;*
> *5. it was deceptive in the extreme.*
>
> *We would add to that list it was an attempt to judge shop.*
>
> *[64] It is hard to think of a more blatant abuse of the Court's process although we acknowledge Mr Sugden's candour. In the circumstances, the Judge was right to strike out the Claim in its entirety. The appeal is dismissed.*
>
> *[65] The hearing was reconvened to allow counsel to make submissions as to cost. In the normal course of events the conceded facts could well have warranted consideration of an order that Mr Sugden personally pay the costs. We note, however, that none of the other parties sought such an order. There is nothing to suggest that Mr Sugden acted other than on instructions. We have already commented on Mr Sugden's candour. In those circumstances we will not make an order that Mr Sugden personally pay the costs. However, Mr Sugden is a senior practitioner who is well aware of the Civil Procedure Rules. In breach of his professional obligations he improperly manipulated the Rules. In those circumstances we think it appropriate to refer this judgment to the Law Council."*

8. The Secretary of the Vanuatu Law Council then referred those comments to the Respondent as a formal complaint. The Respondent conducted a hearing. On 30 October 2019, it made its Ruling. In doing so, it referred to Rules 73 and 74 of the Rules of Etiquette and Conduct of Legal Practitioners (the Rules), which provide:

> ***"PART 13 LAWYERS AS OFFICERS OF COURT***
>
> ***73 Officers of the Court***
> *The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.*
>
> ***74 Duty of fidelity to court***

A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court."

9. The Respondent then continued:

> *"34. Mr Sugden accepted he was in breach of his obligation under Rule 74.*
>
> *35. The Committee considered Mr Sugden's actions to be deliberate and calculated. The Committee did not consider his actions could be seen as a mere mistake. Regardless whether within the Rules or not, the fact remained that there was a decision, deliberately made, with full knowledge of the consequences, to not properly advise the Court or counsel as to what was actually transpiring.*
>
> *36. We equated that course of conduct with professional misconduct."*

10. The Respondent suspended the Appellant from the practice of the law in Vanuatu for four months from the date of its decision. That order was stayed, save for the Appellant not being allowed to take on new clients for almost the whole period from its order, after the Appellant appealed to the Supreme Court from that decision.

11. The Appellant's appeal to the Supreme Court was dismissed, save for the period of suspension being reduced to three months: **Sugden v Vanuatu Law Council Disciplinary Committee** [2021] VUSC 5.

12. This is an appeal by the Appellant from that decision. The Respondent has cross appealed to assert that the primary judge erred in reducing the period of suspension to three months.

The Contentions

13. The primary factual conduct of the Appellant was not in dispute. That is the conduct referred to in the Court of Appeal decision, by which the Appellant had acted (on instructions) so as to remove the counterclaim from the matters to be decided on the hearing on 7 March 2017l but to preserve in separate and fresh proceedings the counterclaim as a new claim.

14. The Appellant through his counsel addressed separately the three grounds of appeal, although there was substantial overlap between grounds B and C as expressed in the Amended Notice of Appeal. They involved the contention that the Respondent had no proper foundation for its finding that the Appellant had acted dishonestly contrary to Rule 74 of the Rules set out above, and that the Respondent had not accorded the Appellant natural justice because he had not been put on notice that the hearing might address issues raised by Rule 74.

15. Put at its most explicit, the submission underlying those two grounds of appeal was that the Respondent could only inquire into whether the Appellant had improperly manipulated the Civil Procedure Rules of the Supreme Court (the expression used in para [65] of the Court of Appeal decision set out above), but could not further inquire into whether he had done so in a way which involved him misleading the Court.

16. The other ground of appeal was that the judge who chaired the Respondent for the hearing and decision of the Respondent had also been a member of the Court of Appeal in the decision which said that the Appellant's conduct should be referred to the Respondent, and so should not have

participated in the processes of the Respondent at all but should have recused himself from its hearing and decision making.

17. The cross-appeal raised the short argument that there was no proper basis for the primary judge in the Supreme Court to have reduced the period of suspension once it had been decided that there was no reviewable flaw in the decision of the Respondent about the Appellant's contravention of Rule 74 of the Rules.

Consideration of the appeal

18. The complaint to the Respondent by the Vanuatu Law Council simply referred to the judgment of the Court of Appeal, and noted the finding at [65] that the Appellant had breached his professional obligations by improperly manipulating the Civil Procedure Rules, so the judgment of the Court of Appeal was referred to the Law Council. No reference was made specifically to any particular Rule of the Rules, in particular to Rules 73 or 74.

19. The Appellant wrote to the Respondent on 31 July 2019, asking whether he was charged under section 2 or 3 of 'Cap 119', being the Legal Practitioners Act, together with the relevant subsection, and how he is said to have manipulated the Civil Procedure Rules. The letter commented that the Court of Appeal findings about his conduct were made in relation to the appeal which it was hearing, and so he had not had the opportunity to defend himself. As the findings in large measure were made on the candid acknowledgement of the Appellant to the Court of Appeal (and were not said to have been incorrect at any point), it is not clear now what the Appellant was really seeking.

20. The response from the Respondent was first that it was not understood how sections 2 or 3 of the Legal Practitioners Act were relevant. Section 2 established the composition of the Law Council, and section 3 deals with the circumstances in which a member of the Law Council vacates that office.

21. The Appellant was directed to the Legal Practitioners (Disciplinary Procedure) Rules, and to the question whether the Appellant was guilty of either 'professional misconduct' or the lesser 'unprofessional conduct'. That can be taken to be or include a reference to Rules 73 and 74 of the Rules, set out above. The Appellant's submission that there was no suggestion that his conduct might involve deliberate conduct and conduct which misled or deceived the Court cannot be taken from that part of the response.

22. The response then relevantly adds:

> *'Finally the Court of Appeal's comments in paragraph of the judgment should be read in context by looking at the entire judgment. The exact nature of the allegation is easily comprehensible once that is done.'*

23. That made apparent that the Respondent was not confining its inquiry to the words of [65] of the Court of Appeal judgment but to their context in the whole judgment, including [63]. Reference may therefore also be made to [21] of that judgment where the Court of Appeal said the, after the refusal of the adjournment:

> *"21. What followed can only be described as a concerted and deliberate course of action by Mr Sugden, utilising the rules of civil procedure, to avoid the consequence of the Judge's decision refusing the adjournment. Indeed, Mr Sugden admitted as much in papers he filed with this Court, and submitted that the overall justice to his client required such a course of action be taken."*

24. Shortly before the hearing of the Respondent the Appellant submitted a document entitled 'Memorandum.'. He introduces that document by saying that he is accused of improperly manipulating the Civil Procedure Rules and thereby being in breach of my professional obligations.

25. He acknowledged the primary fact, and says he acted in the best interests of his clients as the counterclaim could not have been ready for the trial on 7 March 2017, and so his use of the Civil Procedure Rules was to ensure the counterclaim could be heard when the client had fully prepared for it. The sequence of the steps he took was, he accepted, in using the Civil Procedure Rules in a way which would avoid the application of Rule 9.9(4) but get behind the refusal of the order refusing the adjournment. But for the sequence of the fresh claim followed by the discontinuance of the existing counterclaim, that Rule would have prevented the revival of the counterclaim.

26. It is important to note, therefore, that when the trial judge was informed on 7 March 2017 that the counterclaim had been discontinued, the judge and the opposing parties were not informed of the fresh claim (being the same effectively as the counterclaim).

27. The Appellant, in that Memorandum acknowledged that he had acted improperly in making use of the Civil Procedure Rules in that way. It also acknowledges that the action taken was not within the spirit of the Civil Procedure Rules and that failure to inform the judge at that time of the procedural device under the Civil Procedure Rules was improper. That extensive response in [10] of the Memorandum is what the Appellant then calls 'the main thrust' of the complaint against him.

28. The Memorandum then goes on to assert some matters of fact not addressed by the Court of Appeal. They all deal with matters which would be relevant to the question of the appropriate penalty in the light of the conduct which the Appellant acknowledged.

29. There is, in our view, no real foundation for the contention that the Appellant was entitled to assume that the inquiry of the Respondent would be confined in some artificial way to the manipulation of the Civil Procedure Rules, removed from the reasons for doing so and the awareness (acknowledged by the Appellant in the Memorandum that it was wrong not to have informed the judge at the hearing on 7 March 2017 of what had been done.

30. The judge and the other parties were understandably left with the understanding from being informed of the discontinuance of the counterclaim that it could not be revived and that the claim based on the allegations in the counterclaim was no longer being pursued. That was not a correct understanding because of the prior institution of the fresh proceedings making the same claims.

31. The fact that was the nature of the conduct to be considered by the Respondent, and that it might involve the deliberate misleading or deception of the Supreme Court, necessarily followed from the judgment of the Court of Appeal, and the references to which reference has been made. The Memorandum addresses that issue. The response to his letter of 31 July 2019 makes that clear. It necessarily, therefore, required the Respondent to have regard to the Rules, and in particular Rules 73 and 74.

32. The records of the hearing of the Respondent (the noted transcript and the Presiding Judge's notes where the Appellant was asked about his state of mind when he reported the discontinuance of the counterclaim were not unfair, nor irrelevant. The Appellant's response, was in accordance with what he had said in his Memorandum.

33. In our view, the primary judge from whose decision this appeal is brought did not fall into error as asserted in Ground A and C of the Amended Notice of Appeal, and in the submissions on his behalf.

34. The other ground of appeal concerned the proposition that the Presiding Judge in the hearing by the Respondent should have recused himself from the hearing because he was a member of the Court of Appeal which made the adverse comments about his conduct in its judgment. It is said that that recusal should have occurred, even though the Appellant did not request it and that there is no scope for the Appellant to have been able to waive the apparent conflict which existed.

35. We respectfully agree with the decision of the primary Judge.

36. The applicable principles are clear: See **Dickason v Edwards** (1910) 10 CLR 243; **Isbester v Knox City Council** [2015] HCA 20. The primary Judge correctly found at [54] that the position of the Presiding Judge as a member of the Court of Appeal in the circumstance gave rise to a reasonable apprehension of bias. Counsel for the Respondent accepted that. It is clear that such an apprehension of bias could not be raised after the event, if the conduct of the relevant party waived the concern about possible bias. The waiver must be clear and unequivocal: **Local bail (UK) Ltd v Bayfield Properties and others** [2000] EWCA Civ 3004. In the circumstances that the Appellant is a legal practitioner, that he was aware of the facts which give rise to the reasonable apprehension of bias, and that he did not object to the Presiding Judge of the Respondent hearing the proceeding, we agree with the primary judge that the Appellant waiver the right to object to the participation of the Presiding Judge in the hearing of the Respondent.

37. The Appellant submitted that there may be cases where recusal should apply even where there is no objection to the relevant decision maker taking part in the process. There may be such cases. That is particularly so where the judicial officer concerned has a real and personal interest in the outcome of the proceeding. This is not such a case.

38. For those reasons, the appeal is dismissed.

Consideration of the cross-appeal

40 The Respondent submitted on the basis of the decisions in, for instance, **Family Boetara v Molsakel** [2018] VUCA 28 especially at [12], that the imposition of a penalty in a matter such as this is a discretionary matter, and consequently there should be no adjustment of the penalty unless the well-known criteria for disturbing the exercise of a discretion on an appeal are made out. The criteria are as set out in **House v R** [1936] HCA 40. It was then said that such criteria were not made out when the primary judge made his order reducing the period of suspension.

41. There are obviously rare cases involving conduct such as the present, and which would provide a basis to apply a consistency of sentencing. We do not regard the decision of the Respondent in **Re Timakata** [2018] VULCDC 3 as providing such a foundation for reviewing the sentence. The facts are far removed from the present.

42. Nevertheless, in our view, it was open to the primary judge to reach his conclusion to reduce the term of suspension having regard to the Appellant's long experience as a legal practitioner, the fact that he had no personal benefit to gain from his wrongful conduct, the fact that he was candid before the Court of Appeal and the Committee, his personal history, the fact that he is unlikely to commit further breaches of the character of the conduct on which the Respondent imposed a period of suspension, and the seriousness of the conduct, it was an appropriate case to reduce the penalty. It might be inferred that the Appellant did not have a sufficient understanding of the

seriousness of his failure to fully inform the judge at the trial on 7 March 2017 of the manipulative device of the Civil Procedure Rules is demonstrated by the fact that he acted for the appellants in the appeal to the Court of Appeal when the conduct in question was commented upon. He obviously now has that understanding.

43. We are of the view that the decision of the primary judge is not shown to have been made by reason of an error in principle. Consequently, the cross appeal also fails.

Orders

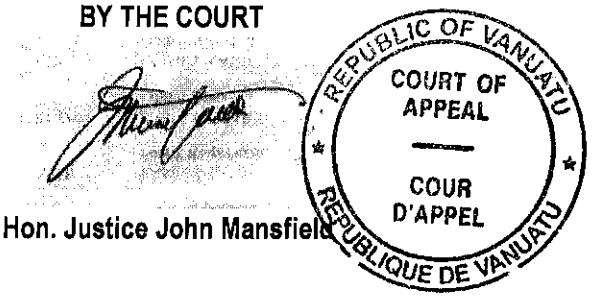
44. The appeal is dismissed.

45. The cross appeal is dismissed.

46. As both the appeal and the cross appeal are dismissed, there is no order of the costs of the appeal or the cross appeal.

DATED at Port Vila this 19th day of February, 2021

BY THE COURT



Hon. Justice John Mansfield