

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:* 16 November 2020 2020  
*By:* Justice G.A. Andrée Wiltens  
*Counsel:* Ms M-N Ferrieux Patterson for the Claimants  
Mr N. Morrison for the First Defendant  
Mr J. Malcolm for the Second Defendant

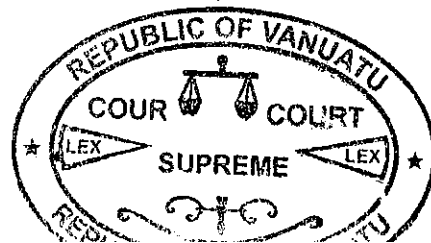
---

**Judgment**

---

A. Introduction

1. This is an application for security for costs by the defendants. It is opposed by the Claimant.



## B. Background

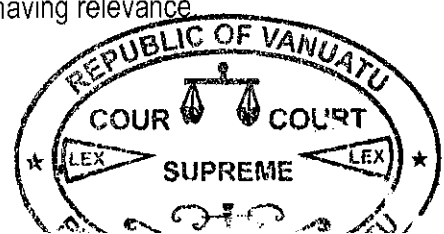
2. The Statement of Claim was filed on 6 March 2019.
3. In short, the allegations are as follows:
  - In December 2013 Westpac Banking Corporation ("Westpac") obtained Supreme Court orders entitling enforcement of advances made by Westpac to New Hebrides Mercantile Services Limited t/a Moorings Hotel ("Moorings Hotel") and secured by registered mortgage over Lease Title 11/OE21/003. Rumours Nightclub ("Rumours") had a lease from Moorings Hotel to operate a nightclub from the same premises.
  - In May 2014, Westpac engaged Grand Isle Holdings Limited t/a Pacific Advisory ("Pacific Advisory") and Mr Glen Craig ("Mr Craig") to act as managers of Moorings Hotel's assets. This was done without the consent or acquiescence of Moorings Hotel and Rumours.
  - Thereafter, purportedly in reliance on the Supreme Court orders, Mr Craig and/or Pacific Advisory closed down Rumours and proceeded to sell Lease Title 11/OE21/003, and to sell the business and business assets of Moorings Hotel and Rumours.
4. The appointment of Mr Craig and/or Pacific Advisory is challenged as being unlawful. The ability of Mr Craig and/or Pacific Advisory to take over the management of Moorings Hotel and Rumours and to sell of the businesses and the business assets of both entities is challenged as being unlawful and fraudulent. Accordingly significant damages are sought against the defendants.
5. The defendants have filed blanket denials to the Claim.

## C. The Applications

6. Mr Craig made a cross application for security of costs on 21 October 2020. Moorings Hotel made similar application on 29 October 2020. The applications are in almost identical terms and point to the fact that Moorings Hotel and Rumours have at various times been removed from the Companies Register, the fact that both entities have no current business operations or activity in Vanuatu, and finally assert that to defend the Claim will cost in the region of VT 3 to 5 million by way of legal fees.
7. Mr Craig has filed a sworn statement in support of those propositions. He also points to the delay in the instigation of the proceedings, given that the cause of action could be said to have arisen in May 2014 yet the Claim was only filed in March 2019.

## D. Submissions

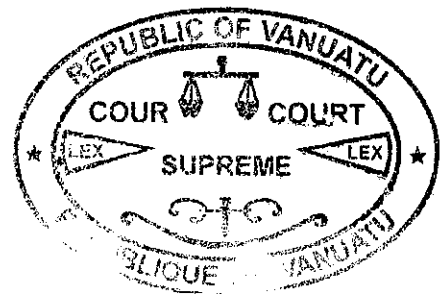
8. The applications were made under Rule 15.19 of the Civil Procedure Rules ("CPR"). Mr Morrison pointed to sub-rule (a) as being determinative; Mr Malcolm sought to avail himself of sub-rule (f). Counsel could also have pointed to sub-rule (d) as having relevance



9. Mr Malcolm orally sought an order for security for costs in the sum of VT 1.5 to 2 million. Mr Morrison did likewise. Both relied on the sworn statement of Mr Craig as evidencing that Moorings Hotel had been removed from the Companies Register in Vanuatu on some 5 occasions, and that Rumours was currently struck off the register. There was further a common concern as to the current financial status of the Claimants.
10. Ms Ferrieux Patterson refuted that much of Mr Craig's sworn statement had no relevance to the application. I agree. She maintained that the onus was on the applicants to make out their cases. I agree. Ms Ferrieux Patterson supplied authority to the effect that the threshold for the applicants to achieve is high: *Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273 and *Savenkov v Cort and Cort* Civil Case No. 226 of 2011.
11. Ms Ferrieux Patterson submitted the applications were attempting to stifle a valid and bona fide Claim and were accordingly oppressive. She maintained that there was no evidence of impecuniosity on the part of either Claimant. She further correctly pointed out that removal from the Registry could easily be rectified, and indeed had recently been in the case of Rumours by her personally.

E. Discussion

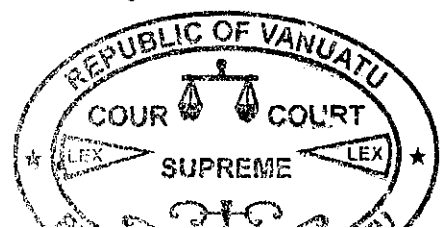
12. Counsel were unnecessarily animated in presenting their submission – that did not assist the Court in any way - or further the application by Mr Craig or the opposition to the applications by Moorings Hotel and Rumours. By way of example, exaggerating the prospects of success of the Claim and likewise Mr Craig's cast iron defence did not assist the Court. More restrained and considered submissions were called for.
13. CPR Rule 15.20 sets out what it is the Court may have regard to, which includes:
  - The prospects of success of the proceeding;
  - Whether the proceeding is genuine;
  - For Rule 15.19(a) the corporation's finances;
  - Whether the claimant's lack of means is because of the defendants' conduct;
  - Whether the order would be oppressive or would stifle the proceeding;
  - Whether the proceeding involves a matter of public importance;
  - Whether the claimants' delay in starting the proceeding has prejudiced the defendants; the costs of the proceeding.
14. As Ms Ferrieux Patterson submitted, there is no evidence as to the financial standing of either Claimant. She maintained that the applicants were responsible to demonstrate impecuniosity on the part of the Claimants, and the fact that they had not done so meant the applications ought to be declined.



15. Mr Morrison challenged that position. He questioned how a defendant could know or establish such matters with any exactitude, other than by hearsay evidence. He submitted that where an application is made in reliance on Rule 15.19(a) the onus of proof reverses.
16. The Court has some information to assist in this decision.
17. It is impossible at this stage, as no evidence has been filed, to assess with any precision what the prospects of success are. The inflated statements by Ms Ferrieux Patterson and Mr Malcolm merely reflect their personal confidence in the final outcome. I am not prepared to accept those statements.
18. Based on the material currently before the Court the Claim appears to be a genuine, if very late, Claim. Before that could be finally determined however, the evidence relied on for and against the Claim is required. In the meantime, an explanation for the delay would go some way to assisting to assess this aspect.
19. There is no material before the Court as to the finances of either Claimant. To be able to properly consider the applications, the Claimants have the obligation of putting that information before the Court. The applicants cannot do so – they are not privy to such information. The Claimants have it, and are able to supply it. I consider this a reverse onus situation.
20. Without the financial information it is not possible to consider whether an order for costs would be oppressive.
21. There is no matter of public importance in this Claim.
22. The delay in commencing the Claim is unexplained. Ordinarily, any delay involves prejudice. The extent of prejudice in this case is difficult to assess at this point in time. It is a balancing exercise in every case to determine whether the delay is so prejudicial that a Claim should be stayed. In order to undertake that the Court must have information available. The absence of such information lies at the feet of counsel.
23. Mr Craig has stated that he considers he and PA will be faced with legal costs of somewhere between VT 3 and 5 Million to defend the case. Mr Morrison and Mr Malcolm have confirmed that orally in seeking lesser sums as security for costs.

F. Decision

24. This matter requires the following aspects to be addressed by evidence:
  - The current financial positions of Moorings Hotel and Rumours, namely their assets, liabilities and contingent liabilities, by way of proper accounting records;
  - The current legal status of both Claimants in Vanuatu;
  - An explanation for the delay in commencing the Claim;
  - Itemised quotes for the costs of legal fees anticipated arising from defending the Claim for both Mr Glen and PA; and



- If it is to be relied on by either applicant, some explanation of what prejudice has been caused as a result of the late commencement of the Claim.

25. This information is to be prepared, filed and served by 15 January 2021.

26. The matter will be the subject of a continued hearing at 2pm on 1 February 2021. The hearing will be in Chambers.

Dated at Port Vila this 26th day of November 2020  
BY THE COURT

*Gardie Wiltens*  
Justice G.A. Andrée Wiltens

