

**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

*Dates of Hearing:* 16 November 2020, 29 March 2021 and 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

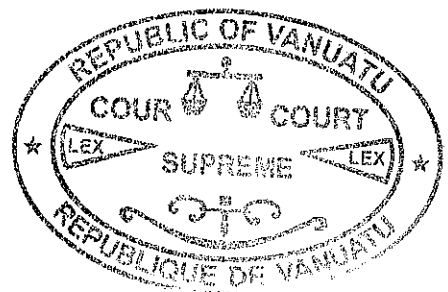
Ms J. La'au for the Third Defendant

*Date of Decision:* 28 September 2021

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**Judgment as to Security for Costs**

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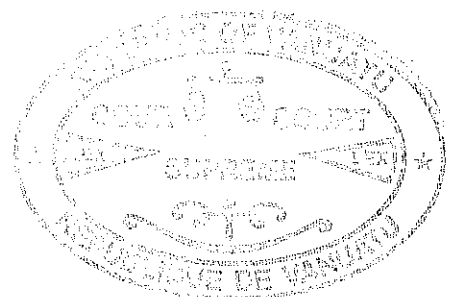


A. Introduction

1. Applications for security for costs were initially advanced by the First and Second Defendants. They were opposed by the Claimant. This aspect of the case was first considered on 16 November 2020, but was adjourned part-heard due to further information being required by the Court so that a fair determination was possible. The deferred hearing was finally concluded on 29 March 2021, with the decisions being reserved.
2. The Third Defendant was a late litigant, it not being served until considerably after the First and Second Defendants. It too sought security for costs, which application was also opposed. That application was heard on 3 September 2021, and the decision was reserved.
3. This is now the decision as to security for costs in respect of all 3 applications.

B. Background

4. The Statement of Claim was filed on 6 March 2019.
5. In short, the allegations are as follows:
  - In December 2013 Westpac Banking Corporation ("Westpac") obtained Supreme Court orders enabling 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. It was owned by Lawson Trading Limited.
  - 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 so as to wind up the affairs of the enterprise and repay Westpac its advances. This was said to be without the consent/acquiescence of Moorings Hotel or 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 both Moorings Hotel and Rumours.
6. The appointment of Mr Craig and/or Pacific Advisory by Westpac 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 off the businesses and the business assets of both entities is challenged as being unlawful and fraudulent. It is also said to be outside Westpac's legal ability to so instruct its agents. Significant damages are sought against the Defendants.
7. The Defendants have filed blanket denials to the Claim.



C. The Applications

8. Mr Craig made his application for security of costs on 21 October 2020.
9. Pacific Advisory made a similar application on 29 October 2020.
10. 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 each Defendant in the region of VT 3 to 5 million in legal fees.
11. Mr Craig 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. He suggests that the effluxion of time has resulted in the loss of relevant material and information, which would have been available had the matter been brought on in good time. He also adverts to a relevant and material fact that is not mentioned in the Claimants' material, namely that Westpac had not only obtained power of sale of certain land but also had available other forms of security to utilise in protecting its interest, namely a General Security Agreement.
12. Mr Malcolm sought VT 2 million by way of security for costs; Mr Morrison sought VT 1.5 million.
13. Westpac filed its application on 26 May 2021. It referred to the applications by the First and Second Defendants, and to the Court Judgment of 16 November 2020 requiring certain information to be provided by the Claimants, which Westpac had not received.
14. Westpac also pointed to the legal and current non-operating status of the Claimants, and what it considered was non-compliance with the Court's directions of 16 November 2020 as being indicative of why it was necessary to make an order for security for costs. It was concerned about the ability of the Claimants to pay any award of costs made against them. Westpac sought VT 3 million by way of security for its costs.

D. Submissions

15. The applications were made pursuant to Rule 15.18 of the Civil Procedure Rules ("CPR"). The rule reads as follows:

**15.18 Security for costs**

(1) On application by a defendant, the Court may order the claimant to give the security the court considers appropriate for the defendant's costs of the proceeding.

(2) The application must be made orally, unless the complexity of the case requires a written application.

16. The matters to take into account are contained in the following Rule, as follows:



### 15.19 When court may order security for costs

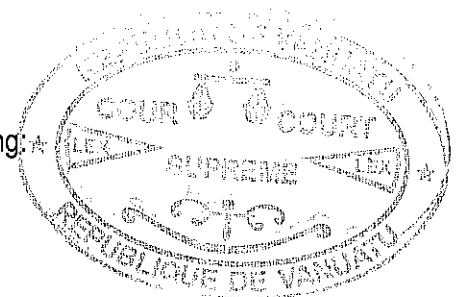
The court may order a claimant to give security for costs only if the court is satisfied that:

- (a) the claimant is a body corporate and there is reason to believe it will not be able to pay the defendant's costs if ordered to pay them; or
- (b) the claimant's address is not stated in the claim, or is not stated correctly, unless there is reason to believe this was done without intention to deceive; or
- (c) the claimant has changed address since the proceeding started and there is reason to believe this was done to avoid the consequences of the proceeding; or
- (d) the claimant is ordinarily resident outside Vanuatu; or
- (e) the claimant is about to depart Vanuatu and there is reason to believe the claimant has insufficient fixed property in Vanuatu available for enforcement to pay the defendant's costs if ordered to pay them; or
- (f) the justice of the case requires the making of the order.

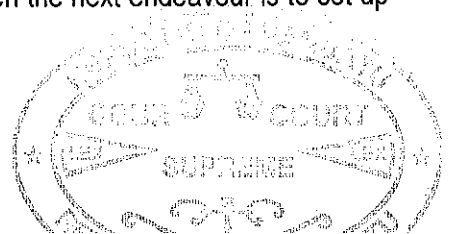
17. Mr Morrison pointed to sub-rule (a) as being determinative; Mr Malcolm sought to avail himself of sub-rule (f). Ms La'au did not specify which part of the rule she relied on. Her main contention was the failure by the Claimants to address the issues raised in the Court's judgment of 16 November 2021, which she maintained demonstrated their impecuniosity.
18. All counsel were concerned that Moorings Hotel had been removed from the Companies Register in Vanuatu on some 5 occasions, and that Rumours was only very recently re-instated to the register. There was a common concern as to the current financial status of the Claimants.

#### E. Discussion

19. I accept that the onus was on the Defendants to make out their applications. The threshold for the applicants 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.
20. Counsel for the Claimants submitted that the applications were an attempt to stifle a valid and bona fide Claim, and were accordingly oppressive. It was submitted that there was no direct evidence of impecuniosity on the part of either Claimant.
21. In the judgment of 16 November 2020, the Claimants were required to supply evidence covering the following relevant points:
  - 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.
22. Pacific Advisory and Mr Craig were required to establish the following:



- Itemised quotes for the costs of legal fees anticipated arising from defending the Claim; and
  - If it is to be relied on by either, some explanation of what prejudice has been caused as a result of the late commencement of the Claim.
23. In this regard, there is only the additional material filed by Justin Johnson for the Court to consider.
24. The first point to make is that an order should only be made if the grounds are made out.
25. In terms of the Claimants' prospects of success, it is impossible to make any useful assessment at this stage. While there may be some traction in the present allegations, there is clearly also significant scope for the defence to advance telling counter arguments. The Claim seems to not take into account other powers Westpac could avail themselves of under the General Security Agreement, and if Westpac was able to employ other powers, then so were the other Defendants. This aspect of the case does not rule out an order.
26. Based on the material presently before the Court, the Claim appears to be a genuine Claim. However, the evidence relied on, for and against the Claim, has yet to be received and accordingly no final conclusion as to this aspect is possible. If the Claim is genuine, that would militate against an order being made.
27. No financial records for the Claimants have been provided, and there is no explanation for the lack of the same. Mr Johnson's sworn statement is to the effect that Moorings Hotel had insufficient funds to meet all its creditors and has ceased trading. Further, Lawson Trading Limited ceased trading in 2017. It still owes some VT 3 million to former staff. It is clear that the Claimants would have no immediately available funds if their Claim does not succeed. This aspect fits squarely under Rule 15.19(a) in support of making an order.
28. It is not possible at this stage to ascertain if the position of the Claimants was caused by the Defendants' conduct. What is clear is that in 2014 the businesses had fallen on hard times and were having difficulties paying their debts at the time Westpac sought to perfect their security. This also does not mitigate against an order, and adds weight to the need for an order to be made.
29. The position of the corporate entities which comprise the Claimants is financially dire. However, Mr Johnson appears to be standing behind the companies for the purposes of this litigation. His financial position is that he now operates what he describes as a successful Real Estate business. If an order for security for costs is made, it is clear that Mr Johnson will have to meet that. There is nothing to suggest that he cannot do so. Accordingly, I do not see the imposition of an order as stifling the proceeding. This consideration also does not prohibit an order.
30. The delay in commencing the Claim has been adverted to by Justin Johnson. He stated that following the collapse of the business operations of the Claimants in Vanuatu he returned to Australia and re-grouped financially. It was only when he had accumulated sufficient funds that he could commence to address the dispute. There is no other evidence to support these statements, just his bare assertions. It is difficult to accept that all Mr Johnson's assets were tied up in one entity. It is also difficult to accept impecuniosity when the next endeavour is to set up



a Real Estate Agency which becomes successful in short order. The explanation appears, in my view, to be rather short on detail. Further, there will be issues regarding availability of relevant evidence due to the passage of time, as well as the effects of that on memories. These considerations mean it will be more difficult for the Claim to succeed, and therefore more likely that costs may be awarded. This therefore supports the making of an order.

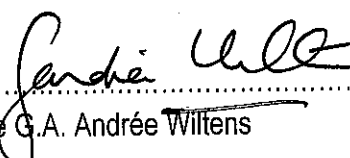
31. The explanation is limited to Mr Johnson's position, not that of the Claimants. If he were to offer a personal guarantee then what he has related would be relevant, but the position of the corporate entities is quite different to that of Mr Johnson.
32. There is no matter of public importance in this Claim. If it were, the likelihood of an award would be slim.
33. There is no claim of prejudice due to delay beyond the implication of the same in Mr Craig's sworn statement in which he suggests the material remaining in his possession is but a small part of what he once had available. As stated above, this means the chance of success must be diminished and therefore the prospect of a costs order increased. This supports the making of an order.
34. Mr Craig has provided a quote by Mr Malcolm for his expected legal costs. Mr Morrison and Ms La'au have not done so, and have merely adopted the same general figures. The amount in question appears to be reasonable for the work that this Claim will entail. It is a significant outlay by potentially not liable individuals/entities.

F. Decision

35. Taking all the above considerations into account I consider that the Claimants should provide security for costs in this matter.
36. I set the appropriate amount at VT 2 million for each Defendant. I see no reason to differentiate between the Defendants in this regard – each will be paying the same and therefore each stands to lose the same if their costs cannot be recouped from the Claimants.
37. That sum is to be paid into the Vanuatu Supreme Court Trust Account prior to any further steps being taken by counsel for the Claimants towards pursuing this litigation.

**Dated at Port Vila this 28th day of September 2021**

**BY THE COURT**

  
Justice G.A. Andrée Wiltens

