

BETWEEN: 100% PUR FUN LIMITED (In Liquidation)
Claimant

AND: STAGE FOUR LIMITED as trustees FOR THE
MONTREAL TRUST
First Defendant

AND: BLUE GUM HOLDINGS LTD.
Second Defendant

AND: REPUBLIC OF VANUATU
Third Defendant

AND: GRAND ISLE HOLDINGS LTD trading as
PACIFIC ADVISORY MANAGEMENT
Fourth Defendant

AND: BREAKAS HOLDINGS LIMITED
Fifth Defendant

Date of Hearing: 12 July 2022
Before: Justice V.M. Trief
In Attendance: Mr M. Hurley for the Claimant
Mr. N. Morrison for the 1st and 5th Defendants
No appearance for other parties
Date of Decision: 24 October 2022

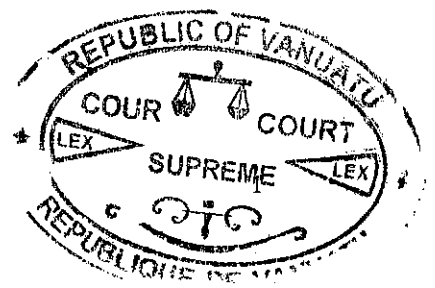
DECISION AS TO CLAIMANT'S APPLICATION TO REINSTATE ACTION

A. Introduction

1. The Claimant 100% Pur Fun Limited (in liquidation) ('100% Pur Fun')'s Claim was struck out on 16 March 2020 pursuant to rule 9.10 of the *Civil Procedure Rules* (the 'CPR').
2. This is the decision as to 100% Pur Fun's Application filed on 9 June 2022 seeking reinstatement of the Claim.

B. The Rules

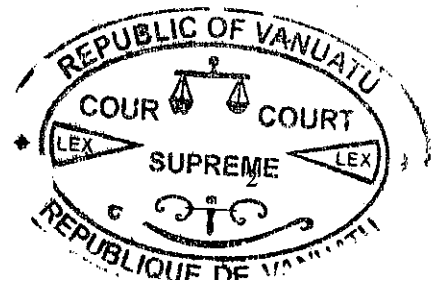
3. Rule 9.10 of the CPR provides as follows:



- 9.10 (1) *This rule applies if the claimant does not:*
- (a) *take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or*
 - (b) *comply with an order of the court made during a proceeding.*
- (2) *The court may strike out a proceeding:*
- (a) *at a conference, in the Supreme Court; or*
 - (b) *at a hearing; or*
 - (c) *as set out in subrule (3); or*
 - (d) *without notice, if there has been no step taken in the proceeding for 6 months.*
- (3) *If no steps have been taken in a proceeding for 3 months, the court may:*
- (a) *give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and*
 - (b) *if the claimant does not appear, or does not show cause, strike out the proceeding.*
- (4) *After a proceeding has been struck out, the Registrar must send a notice to the parties telling them that the proceeding has been struck out.*

C. Background

4. 100% Pur Fun had filed the following documents and taken the following steps to prosecute its Claim since 14 August 2018:
- a. On 28 June 2019 its then counsel, Dane Thornburgh, attended a conference before Justice Fatiaki;
 - b. On 26 July 2019 it filed its submissions in opposition to the First Defendant's Urgent Application to Set Aside the Orders dated 19 July 2018; and
 - c. On 3 September 2019, it filed a Defence of the First, Second and Third Defendants added by Counterclaim of the First and Fifth Defendants.
5. On 2 December 2019, the First Defendant Stage Four Limited (as trustee of the Montreal Trust) ('Stage Four') and the Fifth Defendant Breakas Holdings Limited ('Breakas') filed Application seeking the following orders:
- a. That the Claim against them be struck out pursuant to rule 9.10 of the CPR;
 - b. Judgment be entered against the Claimant in default of filing and serving a reply to the Counter Claim;
 - c. Costs; and
 - d. Any such other order that the Court deems appropriate.
6. On 3 March 2020, Mr Hurley filed his Notice of Beginning to Act.



7. On 16 March 2020, the Court struck out the Claim pursuant to rule 9.10 of the CPR, ordered that judgment be entered for the Stage Four and Breakas in default of filing and service of a Defence to the Counter Claim, and ordered costs in their favour to be taxed if not agreed.
8. The preamble to the Orders stated:

HAVING read the filed Application by the First and Fifth Defendants, and Sworn statement of Robert John Herd in support, and having considered the said Application and Sworn statement AND NOTING that the Claimant has neither filed a Response or Defence to the First and Fifth Defendants' Defence and Counterclaim filed on 30 November 2018 AND that the Claimant has not taken any steps to advance these proceedings since the filing and service of the Claim on or about 14 August 2018.

D. The Application

9. The grounds for 100% Pur Fun's Application to Reinstate Action, supported by the Sworn statements of Andrew Fielding (the liquidator of 100% Pur Fun), Guy Edgecombe and Charles David Connop Haines, and the Sworn statement and Further sworn statement of Mr Hurley, are as follows:
 - a. The Claim was struck out on the basis that 100% Pur Fun had not filed a Response or Defence to Stage Four and Breakas' Defence and Counter Claim filed on 23 November 2018, but it had filed a Defence on 3 September 2019;
 - b. The Chief Registrar did not send a notice as required by rule 9.10(4) of the CPR to inform 100% Pur Fun that the proceeding had been struck out;
 - c. Having not received any notice of the listing of the proceeding since the filing of his Notice of Beginning to Act, as a result of Mr Hurley's enquiries with the Court Registry, he was advised for the first time by the Chief Registrar, by email on 24 February 2021, of the existence of the 16 March 2020 Orders;
 - d. As a result, on 3 March 2021, Mr Hurley wrote to Stage Four and Breakas' lawyer Mr Morrison pointing out the steps that 100% Pur Fun had taken since 14 August 2018 and requesting that he seek instructions that the Orders be vacated and the matter be reinstated to the list;
 - e. No written response was received from Mr Morrison;
 - f. There are cautions lodged over lots 1 to 5 and 32 of SP0005, the subject of 100% Pur Fun's Claim.
 - g. A solicitor's demand dated 12 April 2021 was received demanding that the cautions lodged over lots 1 to 5 and 32 of SP0005 (the 'cautions'), the subject of the Claim, be immediately withdrawn;
 - h. By letter dated 13 April 2021, Mr Hurley responded that he was instructed to file an application that the Orders be set aside and for the proceeding to be reinstated and on that basis, he was instructed to maintain the lodgement of the cautions based on the causes of action pleaded in this matter;
 - i. Since 11 March 2021, Mr Hurley has been seeking from 100% Pur Fun's liquidator, Andrew Fielding, the signed undertaking as to damages required by para. 26 of Fatiaki J's Decision dated 13 September 2019;



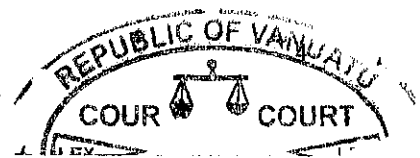
- j. In turn, on 30 September 2021, prior to signing the undertaking as to damages, Mr Fielding sought from Mr Hurley some advice and explanation regarding prospects and strategy and further steps. Mr Hurley provided his detailed response on 16 December 2021;
- k. Mr Fielding also engaged his own independent legal advice prior to signing the undertaking as to damages.
- l. On 19 May 2022, Mr Hurley received Mr Fielding's signed undertaking as to damages and it was filed on 31 May 2022;
- m. By Claim filed on 13 May 2022 in Civil Case No. 22/951 against Mr Hurley, Stage Four is seeking orders for amongst other things, that the cautions be removed and damages of AUD\$350,016.50, interest and costs be awarded in its favour;
- n. 100% Pur Fun says that it will be prejudiced if it does not have the opportunity to prosecute its Claim, Fatiaki J having already formed the view by the making of restraining orders on 18 July 2018 and by Decision dated 13 September 2019 that those orders ought to continue to trial on the basis that 100% Pur Fun has a serious question to be tried; and
- o. In addition, if the Orders are not set aside, Mr Hurley's defence of CC 22/951 will be prejudiced.

E. Submissions in Response to the Application

- 10. Mr Morrison relied on the submissions filed on 8 July 2022, the unfiled Submissions in Reply and unfiled Sworn statement of Robert John Herd (the latter two filed on 12 July 2022 after the hearing). He submitted that the Court did not have jurisdiction to set aside the strike-out of the Claim and the default judgment on the Counter Claim. He pointed to the delay in applying for reinstatement of the action and submitted that there had not been sufficient explanation for the delay. Mr Morrison also submitted that 100% Pur Fun must establish the need to reinstate on the underlying merits of the Claim.

F. Discussion

- 11. This Court has jurisdiction to set aside its own Orders including a default judgment.
- 12. The Orders dated 16 March 2020 were clearly incorrect in stating that the Claimant had not filed a Response or Defence to Stage Four and Breakas' Counter Claim. Despite being clumsily titled, the requisite Defence was filed on 3 September 2019.
- 13. It follows that it was also clearly incorrect for the Court to state that 100% Pur Fun had not taken any steps to advance the proceedings since the filing and service of the Claim.
- 14. 100% Pur Fun has explained why it did not sooner seek reinstatement of the Claim. Despite the requirement in rule 9.10(4) of the CPR, the Chief Registrar did not inform 100% Pur Fun via Mr Hurley of the strike-out of the Claim until 24 February 2021. Mr Hurley promptly gave notice of 100% Pur Fun's intention to apply to reinstate the claim and has worked with his client since 11 March 2021 to have signed undertaking as to damages filed. Mr Fielding obtained Mr Hurley's advice as well as independent legal advice before providing a signed




undertaking as to damages on 19 May 2022, which was filed on 31 May 2022. Subsequently, on 9 June 2022, 100% Pur Fun filed the Application.

15. As to the underlying merits of the Claim, Fatiaki J had already formed the view by the making of restraining orders on 18 July 2018 and by Decision dated 13 September 2019 that those orders ought to continue to trial on the basis that 100% Pur Fun has a serious question to be tried. The Decision has not been appealed. The merits of the Claim must now be tested at trial.
16. In the circumstances, the Application must be granted and the Orders dated 16 March 2020 be set aside.

G. Result and Decision

17. The Claimant's Application to Reinstate Action filed on 9 June 2022 is **granted**.
18. The Orders dated 16 March 2020 are **set aside**.
19. The costs of the Application are costs in the cause of the action.
20. This matter is listed for Conference **at 8am on 24 February 2023**.

**DATED at Port Vila this 24th day of October 2022
BY THE COURT**


Justice Viran Molisa Trief

