

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil
Case No. 19/2409 SC/CIVL

**BETWEEN: Estate of Stephen Quinto &
Estate of Nicola Juliet Quinto**
Claimants

AND: Nigel John Giltrap
Defendant

Date of Hearing: 22 March 2023
Before: Justice V.M. Trief
Counsel: Claimants – Ms L. Raikatalau, for Mrs M.N. Ferrieux Patterson
Defendant – Mr M. Hurley
Date of Decision: 27 March 2023

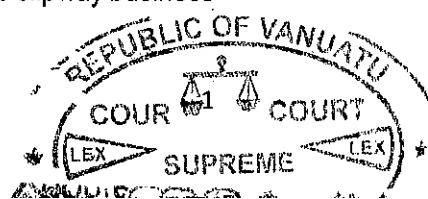
**DECISION AS TO CLAIMANTS' URGENT APPLICATION FOR INTERLOCUTORY
ORDERS TO FREEZE FUNDS AND RESTRAIN THE DEFENDANT FROM
REMOVING ASSETS FROM VANUATU**

A. Introduction

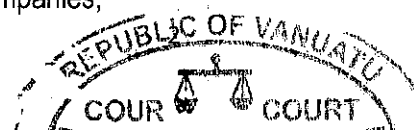
1. The Claimants, the respective estates of Stephen and Nicola Quinto (deceased), are claiming damages and compensation for personal injuries arising from assault by the Defendant Nigel Giltrap. The Claim is disputed.
2. This was an Application by the Quinto's to freeze funds and restrain Mr Giltrap and third parties Tenir Limited ('Tenir'), Garde Limited ('Garde') and Shelley Giltrap (Mr Giltrap's wife) from dealing with assets or removing them from Vanuatu, filed on 13 February 2023.

B. Background

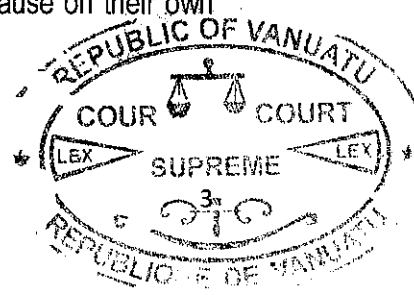
3. Mr Giltrap is the sole director of Santo Slipway Limited ('SSL') and Nicon Limited ('Nicon').
4. SSL owns leasehold title no. 03/OG52/001 at Luganville, Santo. In 2014, it was valued at AUD\$500,000. The lease is the site out of which Mr Giltrap conducts the slipway business through Nicon. In 2019, Nicon was valued at US\$4,200,000.



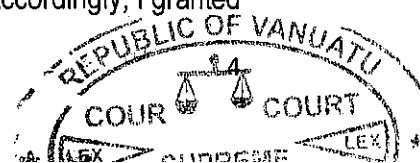
5. Mr and Mrs Giltrap beneficially owned 50% of the shares in SSL and Nikon up until 2 October 2019 when Mr Giltrap transferred his shares to Mrs Giltrap. Mrs Giltrap has been the sole shareholder of the 2 companies since.
6. Mr Giltrap transferred the shares 3 weeks after he was served the Claim in this matter.
7. The Application and Submissions
8. The Application seeks the following orders pursuant to the Court's inherent jurisdiction and rules 7.5, 7.7 and 7.8 of the *Civil Procedure Rules* ('CPR'):
 - a. That Mr Giltrap, Mrs Giltrap, Tenir and Garde be restrained from dealing with the assets of SSL and Nikon in any way that does not reflect a 50% shareholding for Mr Giltrap and 50% for Mrs Giltrap;
 - b. That Tenir, Garde and Mrs Giltrap be restrained from dealing in any way with the shares in SSL and Nikon;
 - c. Any sale of shares in SSL and Nikon can only proceed by order of the Court if upon an application to vary the previous orders, and such order is made on condition that any sale proceeds up to an amount equivalent to VT140,939,660 from the sale of such shares, are deposited into the Chief Registrar's Trust Account to be held in trust pending determination of the Claim; and
 - d. A caution be registered against lease title no. 03/OG52/001.
9. The grounds of the Application are as follows:
 - a. Mr Giltrap is the sole Director of companies Santo Slipway Limited ('SSL') and Nikon Limited ('Nikon');
 - b. Both SSL and Nikon are 2-share companies;
 - c. Since 20 February 2014, Mr Giltrap was the beneficial owner of one share in each of SSL and Nikon. Mr Giltrap's share was held by Garde as nominee shareholder for him in both companies; Tenir held the other share for Mrs Giltrap;
 - d. On 9 September 2019, Mr Giltrap was served the Claim in this matter seeking damages and compensation arising from an assault by Mr Giltrap. The total claimed initially was VT94 million, now VT140,939,660;
 - e. On 2 October 2019, a mere 3 weeks after being served with the Claim, Mr Giltrap moved his beneficial shares in SSL and Nikon (held by Garde) to Mrs Giltrap;
 - f. There is a real likelihood that the Claim against Mr Giltrap will succeed as Mr Giltrap was convicted for criminal assault on Mr Quinto. Any prospective judgment is likely to involve Mr Giltrap's assets which includes his equitable interest held by his wife in SSL and Nikon;
 - g. Mr Giltrap is a prohibited immigrant and resides overseas;
 - h. Mr Giltrap is the sole Director of SSL and Nikon and is in control of the assets of those companies. This shows his continued interest in those companies;



- i. In the specific circumstances of this case, there is a real risk that the equitable interest held by Mrs Giltrap for Mr Giltrap in SSL and Nikon will either be dissipated or otherwise dealt with to diminish their value;
 - j. If SSL and Nikon's assets were dealt with or if their shares were sold, and if the sale proceeds were removed abroad, it is unlikely that the Quinto's would be able to enforce any judgment against Mr Giltrap; and
 - k. All and any funds falling within the ambit of the orders sought, if frozen and held in trust by the Chief Registrar will guarantee security of the funds and will assist in satisfaction of the claim if successful whether partially or completely.
10. The supporting Sworn statement of Breeanna Emelee was filed on 13 February 2023.
11. The Undertaking as to Damages filed on 22 March 2023 is by Mrs Ferrieux Patterson, undertaking to pay any damages or costs incurred by the Defendants if appropriate. Further, that that undertaking would be replaced by an undertaking made by the Administrator, once probate has also been granted in respect of Mrs Quinto's estate.
12. Ms Raikatalau submitted that it is doubtful that the share transfers were part of a separation agreement between the Giltrap's and there is no separation agreement in evidence. She submitted it is more likely that the share transfers was a deliberate act by Mr Giltrap to render judgment in this matter (if any) unenforceable against him therefore it is more likely than not that Mrs Giltrap holds the 2 shares in constructive trust for Mr Giltrap. She submitted that Mr Giltrap's deliberate act to move assets so as to nullify the chances of enforcing a judgment against him would render the proceedings nugatory.
13. Ms Raikatalau also submitted that Mr Giltrap's sworn statement in support of the submissions in response was inadmissible pursuant to subs. 11(3) of the *Oaths Act* [CAP. 37] as it was sworn before a Justice of the Peace ('JP') in New Zealand and a JP does not have authority to administer an oath on a document that would be used internationally. She also objected to the attachments as not having been certified as true copies of the originals.
14. Further, that rule 7.8 of the CPR does not distinguish between legal ownership and beneficial ownership. Therefore ownership of the assets is all that is required for the purposes of rule 7.8.
15. Ms Raikatalau stated that the caution over lease title no. 03/OG52/001 would be withdrawn once the Department of Lands opens again (it is currently closed post-cyclones).
16. The Application was opposed. Mr Hurley submitted that the orders sought are futile because any judgment would be against Mr Giltrap personally. The Quinto's will not be able to take any enforcement action against SSL and Nikon because even on their own case, Mrs Giltrap is (at least) a 50% beneficial owner. Therefore the Quinto's would not be able to wind up or apply to enforce the 2 companies' assets because on their own evidence, Mr Giltrap does not have a majority interest in them.
17. Mr Hurley also submitted as follows:



- a. That rule 7.5 of the CPR is inapplicable because that rule only applies to an application for an interlocutory order before a proceeding has started;
 - b. That rule 7.8 of the CPR is inapplicable to the Application vis-à-vis Mr Giltrap because the evidence is that Mr Giltrap does not have any assets which are the subject of the Application;
 - c. None of the third parties Garde, Tenir, Mrs Giltrap, SSL or Nikon have been joined to the Application nor is there evidence the Application has been served on them;
 - d. There is no undertaking as to damages that may be caused to the third parties who will be adversely affected if the orders are made. That should be reason alone for the Application to be refused;
 - e. In addition, the undertaking should be given by the applicant and was not.
 - f. Contrary to rule 7.8(5)(b) of the CPR, the Application does not state how Garde, Tenir and Mrs Giltrap would be affected if the orders sought are made. Undoubtedly they would be affected if orders were made against them. The Application ignores their interests; and
 - g. The evidence supporting the Application is not by anyone acting as administrator for either of the deceaseds' estates. It is by Ms Emelee who is an employed solicitor in the firm representing the Quinto's. Paragraphs 5, 6, 10 (penultimate and last sentences), 13 and 16 of that sworn statement contains matters of conjecture and speculation.
18. As for the order sought in the Application that a caution be registered against SSL's lease, Mr Hurley submitted that the Application does not disclose that, without any lawful basis, the Quinto's via their lawyers arranged for a caution to be registered over that title on 1 June 2020. Even if an award were made in the Quinto's favour, they would be unsecured creditors and unsecured creditors do not have a cautionable interest under s. 93 of the *Land Leases Act* [CAP. 163]. Further, the assertion in the registered caution that "*Nigel Giltrap who is the beneficial owner of the lessee of this lease*" was never true, on any objective view. The Quinto's and their lawyers were put on notice of the above matters in Mr Hurley's letter dated 18 January 2023.
 19. They were also put on notice that a lawyer lodging a caution which does not disclose a cautionable interest can be liable for disciplinary proceedings for professional misconduct: *Legal Services Commissioner v Kotsifas (Correction) (Legal Practice)* [2014] VCAT 1615.
 20. Mr Hurley submitted that not only have the Quinto's and their lawyers disregarded those matters, they have sought to legitimise the position by the order sought in para. 4 of the Application that a caution be registered against lease title no. 03/OG52/001. Accordingly, not only should the order sought be refused but there should be an order directing the Quinto's to forthwith file an application for withdrawal of the caution registered on 1 June 2020 and provide evidence to Hurley Lawyers that has been done.
 21. Mr Hurley handed up an extract from the New Zealand Ministry of Justice website as to a JP's power to complete an affidavit (sworn statement). Ms Raikatalau sought to refer me to another website extract but did not have the source details. Accordingly, I granted



her leave to forward after the hearing the information she wished to refer to with its source details. She forwarded extracts from the Royal Federation of the NZ Justices Association, the New Zealand Society of Notaries and a private law firm Legal Vision.

C. Objections to Evidence

22. Subsection 11(3) of the *Oaths Act* [CAP. 37] provides, relevantly, as follows:

11.
(3) *Any oath or affidavit required for the purpose of any court or matter in Vanuatu, ... may be taken or made in any place out of Vanuatu before any person having authority to administer an oath in that place, and in the case of a person having such authority, ... judicial and official notice shall be taken of his seal or signature affixed, impressed or subscribed to or on any such oath or affidavit.*

23. Paragraph 4(a) of the *New Zealand Justices of the Peace Act 1957* provides as follows:

4. *The functions and powers of Justices shall be –*
(a) *to take oaths and declarations under the provisions of the Oaths and Declarations Act 1957 or any other enactment:*

24. 'Justice' is defined in s. 2 of the *Justices of the Peace Act 1957* (NZ) to mean 'a person who is a Justice of the Peace for New Zealand...'.
25. Under para. 4(a) of the *Justices of the Peace Act 1957* (NZ), JPs have authority to administer an oath in New Zealand. The website extracts relied on by Ms Raikatalau did not expressly state that a JP cannot administer an oath on a sworn statement to be used overseas. Legal Vision is a private law firm and therefore not an authoritative source; I disregard what it purports to give advice on. In the circumstances, I accept that a JP in New Zealand can administer oaths on a sworn statement to be used in a Vanuatu court and decline to rule Mr Giltrap's sworn statement inadmissible.

26. As to the objections to Ms Emelee's sworn statement, her paras 5, 6 (first 2 sentences), 10 (penultimate and last sentences), 13 and 16 do contain matters of conjecture and speculation. Those paras also constitute legal submissions which are for counsel to make and have no place in a sworn statement. Those paras are ruled inadmissible and struck out.

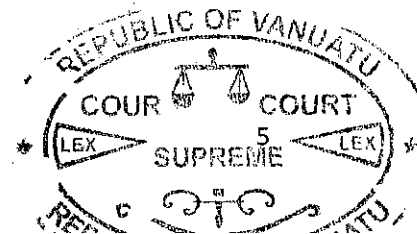
26. As to the objections to Ms Emelee's sworn statement, her paras 5, 6 (first 2 sentences), 10 (penultimate and last sentences), 13 and 16 do contain matters of conjecture and speculation. Those paras also constitute legal submissions which are for counsel to make and have no place in a sworn statement. Those paras are ruled inadmissible and struck out.

D. Discussion

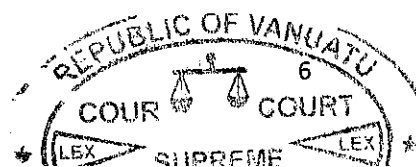
27. The Application seeks freezing orders in respect of property therefore the applicable rule is rule 7.8 of the CPR.

28. Rule 7.8 of the CPR allows for freezing orders to be sought against third parties: rule 7.8(3) and (5)(b) and (e).

29. However, there is no evidence that any of the third parties who may be affected by the orders sought were served with the Application. That is not fatal to the Application but is the preferred approach.



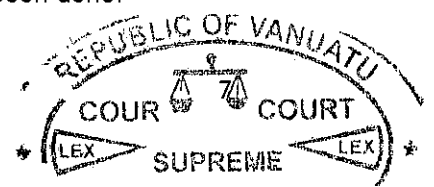
30. Further, the Undertaking as to Damages does not relate to damages that may be caused to the third parties who will be adversely affected if the orders are made. Mr Hurley is correct that that alone is reason for the orders sought to be refused.
31. The Court may make the orders sought only if it is satisfied of the matters in rule 7.8(4)(b) of the CPR which provides as follows:
- 7.8 ...
- (4) *The court may make the order only if:*
- ...
- (b) *the court is satisfied that:*
- (i) *the applicant has a good and arguable case; and*
- (ii) *a judgment or order in the matter, or its enforcement, is likely to involve the assets; and*
- (iii) *the assets are likely to be removed from Vanuatu, or dealing with them should be restrained.*
32. I consider that the Quinto's have a good and arguable case, the Claim being for damages arising from assault for which Mr Giltrap has been convicted: rule 7.8(4)(i), CPR.
33. However, for the reasons that follow, I do not see how a judgment in the Quinto's favour, or its enforcement, is likely to involve the assets: 7.8(4)(b)(ii), CPR.
34. On the Quinto's own evidence, Mr Giltrap does not have any assets in Vanuatu.
35. The assets that the orders are sought over are the shares in SSL and Nikon.
36. Ms Raikatalau submitted that Mr Giltrap by deliberate act transferred his shares to Mrs Giltrap to evade enforcement of any judgment against him therefore Mrs Giltrap holds the shares in constructive trust for him. However, I cannot make findings of fact on disputed matters on an interlocutory application.
37. Similarly, I cannot make findings as to whether or not Mr Giltrap transferred the shares as a result of a separation agreement with Mrs Giltrap. Nor as to whether or not Mr Giltrap is a prohibited immigrant or now has a residence visa. That said, the evidence does show both. It shows that Mr Giltrap was a prohibited immigrant but is no longer and currently holds a residence visa.
38. So the assets in question are the shares in SSL and Nikon. However, any judgment in this matter would be against Mr Giltrap personally.
39. Ms Emelee's sworn statement does not set out how the assets to be subject to the orders will form part of any judgment or its enforcement. This is a mandatory requirement pursuant to rule 7.8(6)(d)(i) of the CPR.
40. It is a general principle of law that a company is a person of its own: *Goiset v Blue Wave Limited* [2001] VUSC 124 per Lunabek CJ.



41. I am unclear therefore how a judgment in this matter could be enforced against SSL or Nikon when they are separate legal persons from Mr Giltrap and are not party to this proceeding.
42. Further, I agree with Mr Hurley that the Quinto's could not take any enforcement action against SSL or Nikon because on their own case, Mrs Giltrap is (at least) a 50% beneficial owner. Accordingly, the Quinto's will not be able to wind up or apply to enforce the 2 companies' assets because on their own evidence, Mr Giltrap does not have a majority interest in them.
43. It may be possible to pierce the corporate veil if Mr Giltrap was the majority shareholder of SSL and Nikon, but he has never been. To do so would be to completely ignore the rights of Mrs Giltrap.
44. It may also be possible to pierce the corporate veil of SSL and Nikon due to Mr Giltrap's act of transferring his shares to Mrs Giltrap and her complicity in this. However, I cannot make the requisite findings of fact on this interlocutory application. This must be raised and determined by other action.
45. In the circumstances, I fail to see how a judgment in this matter, or its enforcement, is likely to involve the assets.
46. For the reasons given, the Application must be declined and dismissed.
47. As to the order sought at para. 4 of the Application, the Quinto's did not have a judgment in their favour on 21 June 2020. They still do not. Even if they did, they would be unsecured creditors and unsecured creditors do not have a cautionable interest under s. 93 of the *Land Leases Act*. The caution lodged on 21 June 2020 over leasehold title no. 03/OG52/001 must be removed forthwith. I will so order.
48. Even when this was pointed out to Ferrieux Patterson Lawyers in January this year, the caution was not removed. The Quinto's and their lawyers instead sought to legitimise the position by the order sought in para. 4 of the Application. The Quinto's lawyers have laid themselves open to a complaint against them to the Law Council of professional misconduct.

E. Result and Decision

49. Paragraphs 5, 6 (first 2 sentences), 10 (penultimate and last sentences), 13 and 16 of the Sworn statement of Breeanna Emelee filed on 13 February 2023 are ruled **inadmissible** and struck out.
50. The Claimants' Urgent Application for Interlocutory Orders to Freeze Funds and Restrain the Defendant from Removing Assets from Vanuatu is declined and **dismissed**.
51. The Claimants via their lawyers Ferrieux Patterson Lawyers are to forthwith file an application for withdrawal of the caution registered on 1 June 2020 over leasehold title no. 03/OG52/001 and provide evidence to Hurley Lawyers that has been done.



52. Costs are to follow the event. The Claimants are to pay the Defendant's costs of the Application as agreed or taxed by the Master. Once set, the costs are to be paid within 21 days.

**DATED at Port Vila this 27th day of March 2023
BY THE COURT**

VM Trier
Justice Viran Molisa Trier

