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

**Civil**
**Case No. 24/926 SC/CIVL**

**BETWEEN: Mark David Morton**
Claimant

**AND: Michael Karl Klatt**
Defendant

**AND: API Limited (10825)**
First Interested Party

**AND: Waterford Limited (3375)**
Second Interested Party

**AND: Mark William Conway**
Third Interested Party

*Date:* 25 November 2024
*Before:* Justice V.M. Trief
*Counsel:* Claimant – Mr N. Morrison
Defendant – Ms L. Raikatalau
First Interested Party – Mr J. Malcolm
Second & Third Interested Parties – Mr M. Hurley

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## DECISION AS TO DEFENDANT'S APPLICATION FOR SECURITY FOR COSTS

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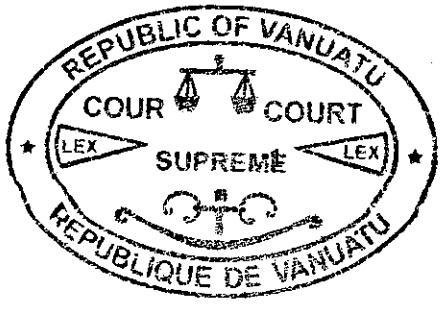
### A. Introduction

1. The Claimant Mark David Morton of Queensland, Australia is and at all material times has been a beneficiary of the Estate of the late Malcolm Roy Smith (the 'Estate'). This is not in dispute and was admitted by the Defendant Michael Karl Klatt in his defence filed on 25 June 2024 (the 'Defence').



2. Mr Klatt is also based in Queensland, Australia. On 31 August 2023, he was appointed administrator of the Estate by grant of reseal of Letters of Administration by the Supreme Court of Vanuatu in Probate Case No. 2027 of 2023 (the 'reseal proceedings'). He filed a sworn statement in support of the application for reseal on 2 August 2023 ('Mr Klatt's statement').

3. In the present proceeding, Mr Morton claims that Mr Klatt's statement contained falsities and misleading statements relating to the assets held by the Estate in Vanuatu and that the falsities may result in adverse financial consequences or other legal liability of the Estate and Mr Morton. By the Claim, he is seeking an order that the reseal order be revoked pursuant to rule 24(1) of the *Succession and Probate and Administration Regulation* 1972 (UK) (the 'Regulation'). Rule 24(a) of the Regulation relevantly provides that the Court may, at any time, upon the application of any person interested in the estate or of its own motion revoke the administration already granted.

4. In his Defence, Mr Klatt disputes that Mr Morton has any entitlement to the relief claimed.

5. On 5 July 2024, Mr Klatt filed Application for Security for Costs (the Application').

6. On 2 September 2024, the Claimant, Second and Third Interested Parties Waterford Limited (3375) and Mark William Conway filed submissions. On 3 September 2024, the First Interested Party API Limited (10825) filed submissions. All oppose the Application.

7. By Orders dated 29 July 2024, the Court directed the Defendant to file and serve any submissions in reply by 4pm on 9 September 2024 and the Court would determine the Application on the papers after that.

8. The Defendant did not file reply submissions, instead filing on 28 August 2024, an Application to Consolidate Proceedings ('consolidation application') and on 17 September 2024, filed Defendant's Counsel Memorandum. Counsel requested at [2] of that Memorandum that the consolidation application be heard first to allow it to rely on material filed in both cases, citing the Court of Appeal judgment dated 16 August 2024 in *API Limited v Klatt* [2024] VUCA 25 at [33], and requested a conference to 'address the implications of the Court of Appeal judgment at [33] to the future course of the proceedings in the present matter'.

9. Subsequently, Claimant's counsel emailed the Court Registry objecting to the course suggested in the Defendant's Counsel Memorandum at [2]. In the Orders dated

21 October 2024, I incorrectly referred to the "Defendant's counsel" at [7]. I **correct** that reference now to, "Claimant's counsel".

10. By Orders dated 21 October 2024, I stated that a Memorandum is not an Application nor can it be used to obtain a hearing as to matters which must properly be raised by way of an application, or to obtain a hearing as to matters relevant to an application which has not yet been heard. Hence I declined to call a conference as requested in the Defendant's Counsel Memorandum at [6] or to hear the consolidation application first as requested in the Memorandum at [2]. I directed that the Defendant had a final opportunity to file and serve submissions in reply as to security of costs, by 4pm on 29 October 2024, and the Court would determine the Application on the papers after that.

11. The Defendant filed submissions in reply as to security for costs a week late, on 5 November 2024.

12. The Defendant has not filed any evidence in support of the Application for security for costs.

13. This is the decision.

B. Application for Security for Costs

14. In the Application, Mr Klatt applies for security for costs under rules 15.18 and 15.20 of the *Civil Procedure Rules* ('CPR'). He is seeking VT2,000,000 security for costs from not only the Claimant but also the Interested Parties. Rule 15.18(1) provides that 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.

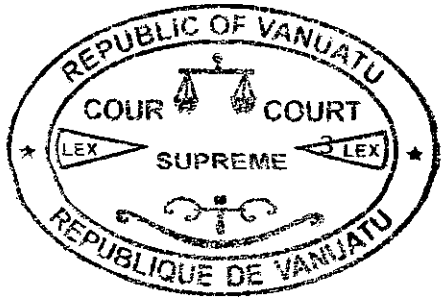
15. The Application is made on the following grounds:

    a) That Mr Morton is normally resident overseas and has no known assets in Vanuatu;

    b) That there is serious concern as to the genuineness of the proceeding based on a credibility argument;

    c) That there is no cause of action disclosed in the Claim; and

    d) The supporting statements filed in support of the costs of VT2,000,000 against the Claimant and against each Interested Party.



C. Consideration

16. Having considered the Application, the Sworn statement of Mr Morton filed on 25 March 2024 and the written submissions of all the parties, the Application is **declined and dismissed** for the following reasons:

a) It is accepted that Mr Morton is ordinarily resident outside Vanuatu;

b) However, as to the balance of the first ground of the Application that Mr Morton has no known assets in Vanuatu, first, it is uncontested that Mr Morton is a beneficiary of the Estate. Mr Klatt's statement asserts that the Estate has assets in Vanuatu amounting to AUD$62.8 million. If, contrary to Mr Morton's understanding, Mr Klatt's assertion in that regard is correct, then Mr Morton has an equitable interest in those assets as a beneficiary of the Estate – so it would not be correct for Mr Klatt to assert, as he has in the Application at [2], that Mr Morton has no known assets in Vanuatu. If the Estate has no assets in Vanuatu, then the Claim in the present proceeding has been rightfully made and no costs order should be made against him. Accordingly, I reject the **first** ground of the Application;

c) In addition, and in any event, the Application is unnecessary and there is no utility in making an order for security for costs where the party against whom security is sought – here, Mr Morton – has an entitlement to a share in the Estate irrespective of the outcome of the proceedings, which is able to be set-off against any ultimate costs order: *Guamani v De Cruzado* [2023] NSWSC 502 at [9], [194]-[195];

d) Although rule 15.19(d) of the CPR lists a claimant who "is ordinarily resident outside Vanuatu" as a ground for ordering security for costs, the grant of the order remains discretionary: *Ly Nu Loung v Chen Jinqiu* [2017] VUSC 61 at [8] per Fatiaki J;

e) Rule 15.20 of the CPR directs the Court's attention to a non-exhaustive list of matters to which the Court may have regard in exercising its discretion as to whether to order security, including, among other things, the genuineness of the proceedings, and whether the proceeding involves a matter of public importance;

f) As set out in *Jenshel's Civil Court Practice Vanuatu* at annotation [15.20.3], as a general rule, where a claim is regular on its face and discloses a cause of action, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is genuine with a

reasonable prospect of success: *Bryan E. Fencott v Eretta* (1987) 16 FCR 497 at 514;

g) The Claim discloses a cause of action, namely an application by a person interested in the Estate (here, Mr Morton who is a beneficiary of the Estate) seeking the revocation of the administration already granted pursuant to rule 24(a) of the Regulation. Accordingly, I reject the **third** ground of the Application as devoid of merit;

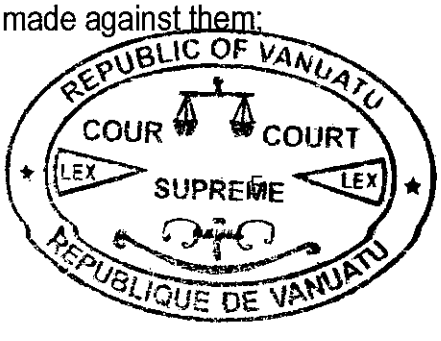
h) Mr Morton explained in his Sworn statement filed on 25 March 2024 at [5]-[6] that he has brought the application to revoke the reseal "out of concern that the grant was obtained unlawfully because the Court was misled by Mr Klatt in his application for resealing and accompanying affidavit filed on 2 August 2023" and that he is "concerned for any costs or other legal liability that may befall the Estate as a result of Mr Klatt's actions." It would be wholly inappropriate for the Court to determine, on an interlocutory application such as this, that those concerns were and are not genuinely held. The Application must therefore be determined on the basis that the proceedings are genuine. I reject Mr Klatt's submissions to the contrary and reject the **second** ground of the Application;

i) The proceedings concern a resealing application. The public has a particular interest (beyond the interest of parties in ordinary adversarial proceedings) in the integrity of the Court's processes in probate cases. Security for costs in such proceedings are accordingly rare. I consider that this proceeding involves a matter of public importance;

j) Ms Raikatalau submitted that it was unconventional but that an order for costs against the Interested Parties ought to be considered on the grounds that she enumerated. However, there is no power under rule 15.18 of the CPR for the Court to order the Interested Parties to pay security for costs as none of the Interested Parties is "the claimant" within the meaning of the CPR. Even if the Court may in its inherent jurisdiction order security for costs in circumstances where there is no power to do so under rule 15.18, this is subject to the Court's exercise of its discretion;

k) The basis of the Application against the Interested Parties rests on the mere assertion at [4] of the Application that, *"it is expected that all named parties will participate in this proceeding".* That is not a sufficient basis to order security for costs against an interested party;

l) Further, there is no evidence whatsoever that the Interested Parties would not be able to meet a costs order if one were made against them;



m) There is no evidence before the Court in support of the Application and no evidence that would justify an order for security for costs being made against Mr Morton and each Interested Party for VT2,000,000 i.e. a total of VT8 million. Mr Klatt bears the onus and evidentiary burden of filing evidence to establish an entitlement to security for costs and as to the amount. He has not done so. That disposes of the **fourth** ground of the Application; and

n) For the reasons given, the Application is declined and dismissed.

17. Costs must follow the event. The Defendant is to pay to the Claimant and the Interested Parties the costs of the Application fixed summarily in the sum of VT120,000 to the Claimant, VT80,000 to the Second and Third Interested Parties, and VT20,000 to the First Interested Party **by 4pm on 23 December 2024**.

**DATED at Port Vila this 25th day of November 2024**
**BY THE COURT**

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Justice Viran Molisa Trief

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU