IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 21/3240 CoA/CIVA

BETWEEN: NEW HEBRIDES MERCANTILE SERVICES LTD T/A MOORINGS HOTEL
First Applicant

AND: LAWSON TRADING LIMITED
Second Applicant

AND: GRAND ISLE HOLDINGS LIMITED T/A PACIFIC ADVISORY
First Respondent

AND: GLEN CRAIG
Second Respondent

AND: WESTPAC BANKING CORPORATION
Third Respondent

Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice O. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice Vrian Molisa Trief***
Counsel:	*Ms L. Raikatalau for the Appellants* *Mr N. Morrison for the First Respondent* *Mr J.C. Malcolm for the Second Respondent* *Mr J. Ridgway for the Third Respondent*
Date of Hearing:	*15 November 2021*
Date of Judgment:	*19 November 2021*

JUDGMENT

Introduction

[1] This matter concerns two decisions of the same Supreme Court Judge, the first of which was a 27 September 2021 decision in which the judge refused to recuse himself from having an ongoing role in the proceedings (the Recusal Judgment), and the second of which was a judgment for security for costs dated 28 September 2021 (to be read with an initial interim decision dated 16 November 2020) (together referred to as the Security for Costs judgment).

[2] The first and second appellants (which we will refer to as Mercantile and Lawson) are companies that have in the past conducted various hospitality and entertainment businesses in Vanuatu. Mercantile was the registered lessee of a leasehold property on which it conducted some of its business. The property was the security for a registered mortgage for advances made by the third respondent, Westpac Banking Corporation (Westpac). Lawson had an interest in the businesses conducted in the premises owned by Mercantile.

[3] On 2 December 2013 Westpac obtained an order of the Supreme Court to sell and transfer the leasehold property owned by Mercantile. Mercantile and Lawson allege that Westpac appointed the first respondent, Grand Isle Holdings Limited trading as Pacific Advisory (Grand Isle), and the second respondent, Glen Craig (Mr Craig), to act as managers of the leasehold property of Mercantile. They allege that all three of the respondents carried out certain actions in relation to the businesses of Mercantile and Lawson which went beyond any powers conferred by the court order, and were unlawful.

[4] On Wednesday 10 November 2021 the appellants advised that they would not be proceeding with the appeal against the recusal judgment, leaving only the security for costs appeal to be determined.

[5] Both challenges to the two decisions are properly regarded as appeals against interlocutory decisions under r 21(1) of the Court of Appeal Rules 1973. Despite this all parties have presented their submissions as if this is an appeal, with some passing reference by the appellants to leave to appeal. We will treat the challenges as applications for leave to appeal. For convenience we will refer to the parties as appellants and respondents.

Costs on the Recusal Judgment appeal

[6] As stated, the challenge to the Recusal Judgment, expressed as an appeal, has been abandoned. The respondents seek costs.

[7] The application in the Supreme Court seeking recusal of the primary judge was supported by a number of lengthy affidavits and extensive submissions. The submissions that were filed in this court by the appellants supporting the challenge to the Recusal Judgment were very extensive.

[8] All three respondents contested the recusal application, and the appeal. The major burden on preparing the submissions in answer to those of the appellants was taken by Mr Malcolm for the second respondent. He prepared a very extensive submission for the hearing. He informed the Court, and we accept, that he had done virtually all his preparation before the notice that the appeal would not proceed was circulated approximately five days before the hearing.

[9] Counsel for the other two respondents also did some work on the recusal appeal, although it is clear that sensibly the main burden was left for Mr Malcolm, as one primary set of submissions in response was all that was required.

[10] Mr Malcolm sought a significant order for costs and, without specifically urging us to award indemnity costs, raised that possibility.

[11] We have decided that in relation to costs the best course of action is to direct that cost orders be made in favour of each of the three respondents, to be paid by the appellant, and that costs are to be taxed and fixed by the Master.

The second decision – security for costs

Introduction

[12] The primary judge summarised the allegations in the statement of claim as follows:

> *"In December 2013 Westpac Banking Corporation obtained Supreme Court orders enabling enforcement of advances made by Westpac to New Hebrides Mercantile Services Limited t/a Moorings Hotel and secured by registered mortgage over Lease Title 11/OE21/003. Rumours Nightclub 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 and Mr Glen 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."*

[13] The appointment by Westpac of Mr Craig and/or the Pacific Advisory has been challenged as being unlawful. It is said that Mr Craig and Pacific Advisory had no right to take over the management of the businesses being run from the premises and to sell them off, together with business assets. It is said that this was unlawful and fraudulent, because it was outside Westpac's legal ability to so instruct its agents.

[14] Both Pacific Advisory and Mr Craig made applications for security for costs. Westpac has now also applied, since it was served with the proceedings earlier this year.

[15] The relevant rules set out in the Civil Procedure Rules are 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.*

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.*

15.20 What court must consider

In deciding whether to make an order, the court may have regard to any of the following matters:

(a) *the prospects of success of the proceeding;*

(b) *whether the proceeding is genuine;*

(c) *for rule 15.19 (a), the corporation's finances;*

(d) *whether the claimant's lack of means is because of the defendant's conduct;*

(e) *whether the order would be oppressive or would stifle the proceeding;*

(f) *whether the proceeding involves a matter of public importance;*

(g) *whether the claimant's delay in starting the proceeding has prejudiced the defendant;*

(h) *the costs of the proceeding."*

[16] The respondents made a number of key factual allegations in support of their application for security for costs. They annex to the affidavit of Mr Craig an extract from the Companies Register showing that Mercantile has been struck off several times although it appears to be now registered, and that Lawson has been struck off and there has been no renewal of it that Mr Craig is aware of. The point is made that the claim goes back to 2013 and that the proceedings were not filed until 2019. The delay it is said is extraordinary.

[17] No specific evidence has been filed by Mercantile or Lawson, but there are sworn statements from Mr Ernie Johnson and his son Justin Johnson, both former directors of the appellants, opposing the application for security for costs. It can be assumed that in their private capacity they are financing the litigation, or will benefit from it.

Should leave to appeal be granted?

[18] Rule 15.18 specifies that applications must be made orally unless the complexity of the case requires a written application. Consistent with this the primary judge approached the application in a robust manner, delivering a decision on the day of hearing.

[19] In his first security for costs decision of 16 November 2020, he noted that the claim appeared to be genuine.[1] We agree with that assessment, but beyond that cannot assess the merits.

[20] The judge noted that Lawson ceased trading in 2017 and owed some VT3 million to former staff. He observed, and we agree, that it is clear that the appellants would have no immediately available funds if their claim does not succeed. Thus the first and fundamental threshold for security for costs ordered against the company, namely that there was reason to believe that they will not be able to pay the defendants' costs if ordered to pay them (paragraph 15.19(a) of the Civil Procedure Rules), was established. There is reason to believe that the appellants will not be able to pay the respondents' costs if ordered to pay them.

[21] The judge also found that there was no material before the court as to the finances of either appellant. In that first security for costs decision he adjourned the application to get further evidence on the current financial position of companies associated with the appellants, their legal status in Vanuatu at present, the explanation for the delay in commencing the claim, quotes as to legal fees, and an explanation by the respondents as to prejudice suffered as a consequence of the late commencement of the claim.[2]

[22] In his second security for costs decision of 28 September 2021, he noted that the onus was on the respondents to make out their security for costs applications.

[23] He noted in his first 16 November 2020 judgment that the first and second respondents had filed blanket denials to the claim. Today with Westpac having also been served and having filed a statement of defence, this is basically the current position, although a few allegations are admitted. Thus surprisingly, given that a reputable bank is involved, none of the statements of defence appear to provide a detailed and meaningful response to the detailed allegations. The respondents do not explain what authority Westpac and its agents had to sell businesses and business assets as well as land. The fact that Westpac no longer operates in Vanuatu and was only served this year may be a reason, but such unhelpful pleadings are not in accordance with the spirit of the Civil Procedure Rules.

[1] Paragraph 18 of judgment of Case No. 19/484 SC/Civil
[2] Paragraph 24 of judgment of Case No. 19/484 SC/Civil

[24] The appellants also have not been forthcoming in information. Despite the judge adjourning the case after the first hearing, the appellants have not provided detailed financial records, or any explanation as to their current financial position.

[25] The judge considered in terms of s 15.20(d) whether the appellants' lack of means is because of the respondents' conduct. He found, and we agree, that it is not possible to say that this is so on the information before the court. General allegations to this effect are made by the appellants' witnesses, but they are not sufficient. There is a question as to whether the appellants' businesses were viable before Westpac took action, and it does seem clear that the appellants' businesses were not doing well before enforcement action was taken by Westpac. This is the judge's assessment,[3] and we agree with it.

[26] The judge also commented that if an order for security for costs is made, to continue with the proceedings, it is likely that Mr Johnson would have to meet the order and pay the security. As the judge observes, there is nothing to suggest that he cannot do so. The judge found it difficult to accept that there was genuine impecuniosity, given Mr Johnson's apparently successful businesses in Australia. Therefore the considerations set out paragraph 15.20(e) where a court must consider whether a security for costs order would be oppressive or would "stifle" the proceeding, cannot be answered on the material available in the appellants' favour. To the contrary, it would seem that if Mr Johnson was able to fund the appellants in bringing this litigation, he may also well be able to fund the security for costs.

[27] It is not a point in the appellants' favour that Mr Johnson has not explained in detail the funding he is putting into the proceedings, or explained how far he would go in funding the litigation. The judge also correctly noted that if Mr Johnson were to offer a personal guarantee that might be relevant to the exercise of the discretion, but he has not done so.

[28] There is also the question of the delay. As explained by Mr Johnson in his affidavit, this followed the collapse of the business operations of the appellants in Vanuatu, and that he, Mr Johnson, had to return to Australia and re-group financially. Whatever the reasons, the gross delay in issuing the claim is a factor in favour of granting security under 15.20(g), and there is obvious prejudice as Westpac has ceased to operate in Vanuatu and will have difficulty in finding staff and records to assist in the defence. This will make it harder for all respondents.

[29] We are unable to fault the judge's reasoning on the security for costs issue. He addresses all the relevant issues. The central fact is that there is every reason to be concerned that should the appellants fail the appellant companies will be allowed to be wound up, and the respondents will get no costs.

Quantum

[30] The judge ordered security for costs of VT2 million for each respondent, a total of VT6 million. The appellants are critical of this, saying that the amounts were too high. Undoubtedly in Vanuatu terms these are significant orders for security.

[3] Paragraph 28 of judgment of Case No. 19/484 SC/Civil

[31] However, we accept the submission of Mr Malcolm that this will be expensive litigation to run. Given that the trading of the appellant companies in 2014 will have to be unravelled, we consider it likely that the hearing will take some weeks. Against that prospect an order for security of costs for VT2 million for each respondent seems to us to be no more than reasonable.

Conclusion

[32] We are unable to discern any error in the judge's reasoning on security for costs. Indeed we can say that we have heard full argument and we are satisfied that this was a proper case for an order for security for costs.

Result

[33] The application for leave to appeal is declined.

[34] The respondents are entitled to their costs in this court on the standard basis to be taxed and fixed by the Master. The order might have been for costs on indemnity basis, but is set at this level is a reflection of our concern at the bare denial statements of defence filed, that have made our task on this appeal in assessing the merits of the claim more difficult.

DATED at Port Vila this 19th day of November 2021

BY THE COURT

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Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU