

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: 19 June 2023
Before: Justice V.M. Trief
Counsel: Claimants – Ms L. Raikatalau, for Mrs M.N. Ferrieux Patterson
Defendant – Mr M. Hurley

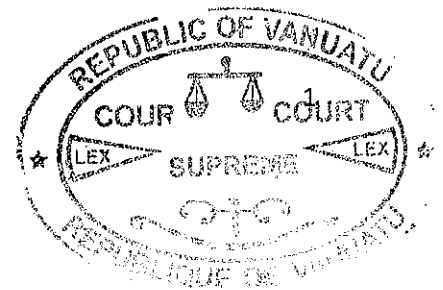
**DECISION AS TO CLAIMANTS' APPLICATION FOR LEAVE TO APPEAL AND
APPLICATION TO STAY THE JUDGMENT OF THE COURT**

A. Introduction

1. This was a contested application for leave to appeal the decision dismissing an interlocutory application for freezing orders and to restrain the Defendant Nigel Giltrap and third parties from removing assets from Vanuatu. The parties filed submissions. This is the decision.

B. Background

2. The Claimants, the respective estates of Stephen and Nicola Quinto (deceased) (the 'Quinto's'), are claiming damages and compensation for personal injuries arising from the assault committed by Mr Giltrap. The Claim is disputed.
3. On 13 February 2023, the Quinto's filed Application for Interlocutory Orders to Freeze Funds and Restrain the Defendant from Removing Assets from Vanuatu. Orders were sought 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. The supporting Sworn statement of Breeanna Emelee was filed on the same date. The Application was opposed.

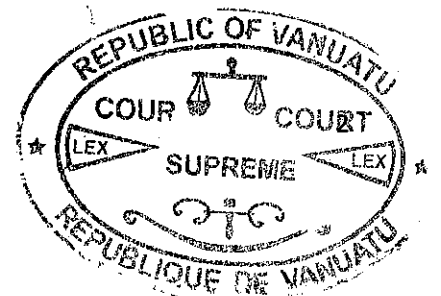


4. I heard the Application. Subsequently, by Decision dated 27 March 2023, I declined and dismissed it (the 'Decision'). The summary of the reasons for the dismissal of the Application for freezing orders and to restrain Mr Giltrap and third parties is as follows:
 - a) At [30]: "*Further, the Undertaking 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.*";
 - b) At [33]-[38]: for the purpose of Rule 7.8(4)(b)(iii) of the *Civil Procedure Rules* (the 'CPR'), the evidence does not disclose that there are assets held by Mr Giltrap that "*are likely to be removed from Vanuatu, or dealing with them should be restrained*";
 - c) At [39]: the sworn statement relied on by the Quinto's from Breeanna Emelee filed on 13 February 2023 does not address the mandatory requirement in Rule 7.8(6)(d)(i) of the CPR about "*how the assets to be subject to the order will form part of any judgment or its enforcement*"; and
 - d) At [42]: "*... 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 [Santo Slipway Limited ('SSL') and Nikon Limited ('Nikon')] because on their own evidence, Mr Giltrap does not have a majority interest in them.*"
5. On 21 April 2023, the Quinto's filed Application for Leave to Appeal the Decision and Application to stay that decision pending appeal.
6. On 15 May 2023, Mr Giltrap filed Defendant's Submissions in Opposition to Application for Leave to Appeal and Stay.
7. On 19 May 2023, the Quinto's filed Reply to Defendant's Opposition to Application for Leave to Appeal pursuant to Rule 21 of the Court of Appeal Rules.

C. The Applications

8. The following orders are sought:

1. The Applicant seeks leave to appeal:
 - (a) The 27 March 2023 interlocutory decision of the Court in its refusal to grant freezing orders in respect of property in the possession and control of third parties, namely Tenir Limited, Garde Limited as nominal shareholders for, and Shelley Giltrap the defendant's wife; and
 - (b) The 27 March 2023 orders for costs; and
2. That the interlocutory decision is stayed pending appeal upon leave being granted.



9. In essence, the Quinto's' draft notice and grounds of appeal ('draft notice', attached to the Application filed on 21 April 2023) contend that the issue that needs to be resolved is that the Court erred by not freezing 50% of the shares in the two companies SSL and Nikon that they contend are held on a constructive trust by a third party Mrs Giltrap, on Mr Giltrap's behalf.
10. There are nine proposed grounds of appeal in the draft notice.
11. Mr Hurley submitted that each of the Court's reasons for the dismissal of the Quinto's' Application for freezing orders and for restraining orders was correct. Accordingly, the prospects of a successful appeal were negligible and the Court should dismiss the Application for leave to appeal and for stay.

D. Discussion

12. There have been numerous decisions by the Court of Appeal outlining the relevant principles for granting leave to appeal. It is clear that leave is not granted lightly and the applicant bears a significant onus, for example, *Hudson & Co v Greater Pacific Computers Ltd* [1997] VUCA 2; *Ebbage v Ebbage* [2001] VUCA 7 at [33]; *Atel v Massing* [2001] VUCA 20; and *Toara v Erakor Island Resort Ltd* [2008] VUCA 14.
13. In *Atel*, the Court of Appeal stated:

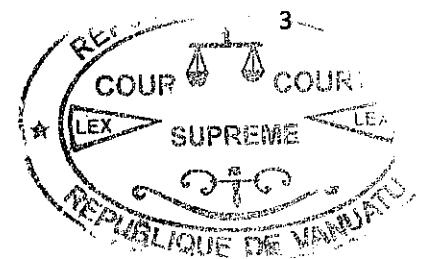
If the Court had jurisdiction it would not grant leave to appeal against an interlocutory Order unless there were reasonable prospects of success in the appeal. In other words the Court would need to be satisfied that there was a real issue that needed to be resolved which had a prospect of succeeding.

14. I now consider the merits of the proposed appeal.

Proposed Grounds 1-5 and 7 – The Court erred in failing to make findings of fact and draw conclusions on this interlocutory application

15. The error is said to be made at [33]-[38] and [42]-[45] of the Decision.
16. These proposed grounds of appeal are in essence a complaint about the Court's decision not to make findings of fact on a contested interlocutory application and that the Court erred in not "drawing a conclusion."
17. The Quinto's had urged the Court to make findings of fact in support of their alleged constructive trust namely that there had been an improper transfer of Mr Giltrap's beneficial ownership of 50% of the shares in SSL and Nikon to Mrs Giltrap. That was contested on the evidence.
18. I remain of the view that I could not make findings of fact on disputed matters on an interlocutory application. The Court of Appeal has reiterated this on numerous occasions, for example in *Gouras v NACA Ltd* [2020] VUCA 53 at [22]:

22. ... *The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the Court on such applications to hear a 'mini-trial' or to make a decision based on*



contested factual material. So care should be taken to ensure that any such applications are meaningful and cost effective...

19. Accordingly, these proposed grounds of appeal have no prospects of success.

Proposed Ground 6 – The Court erred in placing unnecessary weight in its ability to make findings of fact

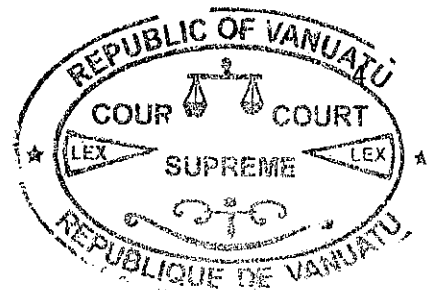
20. For the same reasons set out above, I consider that this proposed ground of appeal has no prospects of success.

Proposed Ground 8 – The Court erred in striking out numerous parts of Ms Emelee's sworn statement because they are inadmissible

21. Paragraphs 5, 6 (first 2 sentences), 10 (penultimate and last sentences), 13 and 16 of Ms Emelee's sworn statement which were struck out were in the nature of submissions and had no place in a sworn statement.
22. Even if those parts of Ms Emelee's sworn statement had not been struck out, the Decision to dismiss the Application would have been made.
23. Accordingly, this proposed ground of appeal also has no prospects of success.

Proposed Ground 9

24. This proposed ground of appeal is a catch-all complaint and is more in the nature of a submission. It has no prospects of success.
25. Finally, there is no proposed ground of appeal against [30] of the Decision. I agree with Mr Hurley that that alone is fatal to the prospects of the proposed appeal succeeding.
26. Even if there was a proposed appeal against [30] of the Decision, the Undertaking as to Damages did not comply with the requirement in Rule 7.8(5)(d) of the CPR that the application for freezing orders must include an undertaking as to damages that may be caused "to anyone else who may be adversely affected."
27. It is common ground that if the freezing orders had been granted, the third parties that would have been affected included SSL, Nikon, Tenir, Garde and Mrs Giltrap, and there would have been no undertaking as to damages to protect their interests.
28. The lack of an Undertaking as to Damages in the terms required is fatal to the prospects of the proposed appeal succeeding.
29. In addition, none of the proposed grounds of appeal show that there was a real issue that needed to be resolved which had a prospect of succeeding to outweigh the cost and delay of an appeal.
30. For the reasons given, the Application for leave to appeal and for stay pending appeal will be declined and dismissed.



E. Result and Decision

- 31 The Claimants' Application for Leave to Appeal and Application to Stay the Judgment of the Court, filed on 21 April 2023, is **declined and dismissed**.
- 32 Costs must follow the event. The Claimants are to pay the Defendant's costs of the Applications as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.

**DATED at Port Vila this 19th day of June 2023
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

