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

Civil
Case No. 23/2928 SC/CIVL

BETWEEN: Michael Karl Klatt
Claimant

AND: API Limited (10825)
First Defendant

AND: Waterford Limited (3375)
Second Defendant

AND: Mark William Conway trading as Conway & Co.
Third Defendant

AND: Mark David Morton
Fourth Defendant

AND: Vanuatu Financial Services Commission
Interested Party

Dates of Hearing:	29 February 2024, 1 March 2024, 7 March 2024, 11 March 2024 & 18 March 2024
Before:	Justice V.M. Trief
In Attendance:	Claimant – Mrs M.N. Ferrieux Patterson & Ms L. Raikatalau
	First Defendant – Mrs S. Motuliki, holding papers for Mr J.C. Malcolm
	Second & Third Defendants – Mr M. Hurley
	Fourth Defendant – Mr N. Morrison
	Interested Party – no appearance (in person)
Date of Decision:	8 May 2024

DECISION AS TO DEFENDANTS' APPLICATION FOR REVOCATION OF THE ORDERS DATED 17 JANUARY 2024

A. Introduction

1. This was a contested application to revoke the Orders dated 17 January 2024 for the disclosure of the company records of the international company First Defendant API Limited (10825) ('API').

2. The hearing was necessarily spread across 5 days, at times that the Court had available and that counsel could attend.

B. Background

3. The Claimant Michael Klatt is the Administrator with the Will of the estate of Malcolm Roy Smith (deceased) ('Mr Smith').

4. Mr Smith died in Australia on 4 April 2021. He was ordinarily resident in Papua New Guinea ('PNG').

5. Mr Klatt is the administrator of Mr Smith's estate pursuant to an order of the Supreme Court of Queensland, Australia dated 18 May 2022 and to letters of administration with a will dated 25 May 2022. The letters of administration with the will were resealed in the Supreme Court of Vanuatu by Order dated 31 August 2023 in Probate Case No. 2027 of 2023 (the 'reseal proceedings').

6. API is an international company registered in Vanuatu. On 19 June 1992, it was registered as an exempt local company limited by shares (no. 4663). On 7 November 1994, it was de-registered and re-registered as an international company under the *International Companies Act* [CAP. 222] (the 'Act').

7. The company records of a company registered under the Act (i.e. an international company) are confidential: subs. 125A(3) of the Act. No person may disclose or be involved in any way in the disclosure of the details of company records of any company registered under the Act, except as required or permitted under the Act: subs. 125A(4) of the Act.

8. A person who contravenes subs. 125A(4) of the Act commits a criminal offence: subs. 125A(5) of the Act.

9. A shareholder is authorised to disclose the identity of the company's beneficial owners: subs. 125A(9) of the Act. Otherwise, company records may only be disclosed by the Interested Party the Vanuatu Financial Services Commission ('VFSC'), or a person authorised by the VFSC, if required to do so by a court of competent jurisdiction under s. 125B of the Act: para. 125A(6)(a) of the Act.

10. The Second Defendant Waterford Limited (3375) is a local company and a Director Services Provider under the *Company and Trust Services Providers Act* No. 8 of 2010 ('CTSP Act') and is the registered agent of API ('Waterford').

11. The Third Defendant Mark Conway trades under the business name Conway & Co, which is a General Services Provider under the CTSP Act and at various times since at least 1992, provided and continues to provide general company services to API. He is a Director of Waterford.

12. The Fourth Defendant Mark Morton has been the Authorised Representative for API, appointed by API, since Mr Smith's death.

13. On 27 October 2023, the Claimant filed the Claim and an interlocutory application titled, "Applicant's Disclosure Application under Section 125A(6)(a) and 125B of the Act and Rule 8.9 of the *Civil Procedure Rules"* ('CPR') (the 'Disclosure Application').

14. The Claimant also filed on 27 October 2023 the following Sworn statements in support:

    a) Michael Karl Klatt;

    b) Philip Clive McKay;

    c) David Michael Salmon; and

    d) Kevin Russel Smith.

15. On 15 November 2023, the Claimant filed the Sworn statement of Service of Marie Hellen Omry of proof of service on 13 November 2023 on the registered office of API and Waterford Limited of *inter alia* the Claim, Disclosure Application and sworn statements.

16. On 27 November 2023, counsel Mr Malcolm filed First Defendant's Response stating that API disputed all of the Claim.

17. On 28 November 2023, Mr Malcolm filed Second Defendant's Response. He did not tick any of the options on the second page of the Response, but I assume from the stance taken till now that Waterford disputes all of the Claim.

18. On 30 November 2023, I issued Orders for the substituted service of Mr Morton.

19. On 1 December 2023, I issued Orders for the substituted service of Mr Conway.

20. By the same Orders dated 1 December 2023, I directed the Claimant to serve the Disclosure Application and supporting sworn statements, and file proof of service, by 4pm on 11 December 2023. I directed the Defendants to file and serve submissions

in response to the Application by 4pm on 15 January 2024. I stated that the Court would determine the Application on the papers after that.

21. On 12 December 2023, the Claimant filed the Sworn statement of Service of Breeanna Emelee of proof of service of *inter alia* the Claim, Disclosure Application and sworn statements by emails dated 7 December 2023 to Mr Conway and Mr Morton.

22. No submissions were filed in response or opposition to the Disclosure Application.

23. By Orders dated 17 January 2024, I **granted** the Disclosure Application and stated at [4]-[6] as follows:

> *4. Having considered the Application and the supporting Sworn statements, I am satisfied of the following:*
>
> *a. That the Claimant is the Administrator in the estate of Malcolm Roy Smith (the 'Deceased');*
>
> *b. That the Claimant's letters of administration were resealed in the Supreme Court of Vanuatu on 31 August 2023;*
>
> *c. That the Deceased used the First Defendant company for commercial transactions between his companies in Australia, Papua New Guinea and other countries in the Pacific (including those named in the Application);*
>
> *d. That there is a strong supposition that at the time of his death, the Deceased was the beneficial owner holding a controlling interest in the Third Defendant[1] and other related companies;*
>
> *e. That the documents sought by way of the Application are accessible by and through the Defendants and the Interested Party;*
>
> *f. That the documents sought relate to the ownership records of the First Defendant and are necessary to allow the Claimant to carry out his duties to the Court in identifying all assets of the estate and to prevent the potential pilfering of assets in the estate of the Deceased, and for the resolution of the issues in this matter;*
>
> *g. The disclosure of the documents sought is necessary and beneficial for the efficient and active management of the estate and this matter;*
>
> *h. The Defendants and Interested Party do not have any known or perceived financial difficulties, and the Application could not represent strain in any way to their financial status and ability;*
>
> *i. The Defendants and Interested Party will not suffer any particular disadvantages in respect of the orders sought, and in any case the proper administration of the estate is of priority; and*

[1] This reference to "Third Defendant" was incorrect – it should have been to the "First Defendant".

j. *That the disclosure sought can be made at once, given that the information is kept in, and the Defendants and Interested Party have access to statutorily mandated registers and information sources, from which the information sought can be directly extracted and copied from.*

5. *Accordingly, the Application is* ***granted*** *and it its ordered as follows:*

a. *The Interested Party or any person authorised by the Commission (including the Second and Third Defendants) is to disclose the following records, including confidential company information, in respect of the First Defendant API Limited (10825) (an international company) ('API') pursuant to para. 125A(6)(a) and s. 125B of the International Companies Act [CAP. 222];*

i) *API's original Deed/declaration of Trust, including all successive deeds/declarations between the first and last inclusive;*

ii) *API's latest share register, confirmed by the Interested Party;*

iii) *Information of API's founding shareholder and beneficial owner;*

iv) *API's register of beneficial owners, required to be held under the Company and Trust Service Providers Act 2020 and the International Companies Act, since the date of incorporation of the company as exempted company and after as international company in 2010; and*

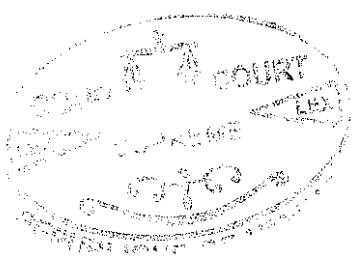
v) *Information on beneficial ownership in the name of the Deceased in any other company domiciled with Conway & Co from the date of their creation until today or till their date of termination including Malkris International Limited and other companies (being entities that the Deceased was believed to have an interest in in his life up until his death domiciled with the Third Defendant and/or Conway & Co, including but not limited to Malkris International Limited).*

6. *The costs of the Application are reserved.*

24. On 31 January 2024, the Defendants filed the Application seeking orders revoking the Orders dated 17 January 2024 (the 'Defendants' Application'). On 12 February 2024, the Sworn statement of Mark William Conway was filed in support.

25. On 6 February 2024, I convened a conference at short notice. All counsel attended. I stated as follows in the Minute and Orders dated 6 February 2024 at [6] and [7]:

6. *Having heard counsel, I am satisfied that the Orders dated 17 January 2024 were made on an ex parte basis and that an inter partes hearing is now required, and given the prejudice to the Defendants otherwise as the records of an international company are involved: Ebbage v Ebbage [2001] VUCA 7. Accordingly, the Application by Defendants filed on 31 January 2024 is* ***granted*** *and it is ordered that the Orders dated 17 January 2024 are* ***stayed*** *pending the determination of the Application following an inter partes hearing, which is scheduled* ***at 2.30pm on 15 February 2024****.*



7. *I will hear counsel as to the costs of the Application by Defendants filed on 31 January 2024 at the hearing on 15 February 2024.*

(my underlining)

26. On 15 February 2024, having heard counsel as to costs, I ordered the following in the Minute and Orders dated 15 February 2024 at [9]:

> 9. *Having heard counsel, I order that the costs of the Application by Defendants filed on 31 January 2024 are in the cause.*

27. On 16 February 2024, the Claimant filed the Sworn statement of Saphy Jeffrey attaching a copy of "Form 16 Sworn statement – Reseal of foreign grant" Sworn statement of Michael Klatt filed on 2 August 2023 in the reseal proceedings.

28. The parties filed the following in advance of the hearing:

    a. Defendants' Submissions regarding the Disclosure Application and the Interlocutory Orders for Disclosure in relation to API Limited (Vanuatu) filed on 12 February 2024;

    b. Claimant's Reply Submissions in re Disclosure Application (Section 125A(6) and 125B, *International Companies Act* [CAP. 222]) filed on 15 February 2024; and

    c. Sworn statement in Support of Marie-Noelle Ferrieux Patterson filed on 15 February 2024.

29. By Minute and Orders dated 28 February 2024, I stated that the *inter partes* hearing was to hear the Defendants' Application, not to rehear the Disclosure Application. I stated that the Disclosure Application had already been determined by way of the 17 January 2024 Orders, "on an *ex parte* basis." Then the Defendants filed their Application seeking orders for the revocation of the 17 January 2024 Orders and relisting of the matter. By listing the hearing of the Defendants' Application, I had relisted the matter as sought, however the Court's consideration of whether or not to revoke those Orders, or vary or maintain them, could only occur following that hearing. Accordingly, the *inter partes* hearing was to hear the Defendants' Application therefore Defendants' counsel would make their oral submissions first, then Claimant's counsel in response and if necessary, Defendants' counsel in reply.

30. I noted in the same Minute and Orders dated 28 February 2024 that it followed that all references in the Minute and Orders dated 6 February 2024 and the Minute and Orders dated 15 February 2024 to the *inter partes* hearing of the Disclosure Application were references to the hearing of the Defendants' Application.

31. On 29 March 2024, the Defendants objected to the admissibility of parts of Mrs Ferrieux Patterson's sworn statement. Claimant's counsel agreed that paras 2 and 5(a)-(e) be struck out and handed up a document on which they had hand-

written, "agree" next to the objections with which they agreed. I ruled that those paragraphs were **struck out** of Mrs Ferrieux Patterson's sworn statement.

32. On 1 March 2024, there was a contested application to adjourn and I ordered wasted costs in favour of the Defendants.

33. I now determine the Defendants' Application.

C. The Law

34. Section 125A of the Act provides as follows:

> *125A. (1) For the purpose of this section, **company records** means records of a company registered under this Act and includes record of:*
>
> *(a) the shareholding in, or beneficial ownership of any share or shares in a company; and*
>
> *(b) the management personnel of such a company; and*
>
> *(c) the business, financial or other affairs or transactions of the company; and*
>
> *(d) the assets or liabilities of such a company; and*
>
> *(e) any other information prescribed by the Commission.*
>
> *(2) For the purpose of paragraph (1)(b), **management personnel** means the Directors or any authorised officers or agents of the company.*
>
> *(3) Company records are confidential unless otherwise required to be made available to the public under another provision of this Act.*
>
> *(4) Except as required or permitted under this Act, a person must not:*
>
> *(a) disclose; or*
>
> *(b) attempt, offer or threaten to disclose; or*
>
> *(c) induce or attempt to induce other persons to disclose; or*
>
> *(d) incite, abet, counsel or procure any person to disclose; or*
>
> *(e) be involved in any way in the disclosure of,*
>
> *the details of company records of any company registered under this Act.*
>
> *(5) A person who contravenes subsection (4) commits an offence punishable, on conviction, by a fine not exceeding US$100,000 or to imprisonment for a term not exceeding 5 years, or both.*
>
> *(6) Despite subsection (4), the Commission or a person authorised by the Commission may disclose company records if:*

(a) *required to do so by a court of competent jurisdiction under section 125B; or*

(b) *requested by:*

(i) *an officer of a company registered under this Act to which the information requested pertains to or a trustee company for the purpose of complying with the provisions of this Act; or*

(ii) *any person appointed as a liquidator, or by an officer of a company registered under this Act or trustee company in the performance of his or her duties as liquidator or an officer; or*

(iii) (Repealed)

(ba) *the disclosure is made to:*

(i) *the Financial Intelligence Unit; or*

(ii) *a supervisor within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act No. 13 of 2014 for the purposes of discharging a duty, performing a function or exercising a power under that Act; or*

(iii) *a law enforcement agency for the purpose of investigating or prosecuting an offence against a law of Vanuatu for which the maximum penalty is a fine of at least VT1 million or imprisonment for at least 12 months; or*

(iv) *a law enforcement agency for the purpose of investigating or taking action under the Proceeds of Crime Act [CAP. 284]; or*

(v) *a domestic regulatory authority for the purpose of carrying out its regulatory functions; or*

(vi) *the Sanctions Secretariat for the purpose of carrying out its functions under the United Nations Financial Sanctions Act No. 6 of 2017; or*

(c) *necessary to ensure compliance with any provisions of this Act.*

(7) (Repealed)

(8) (Repealed)

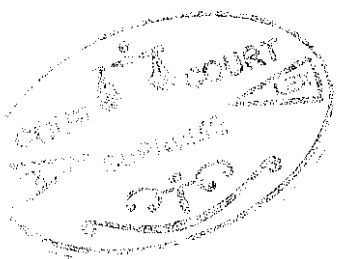
(9) *Despite the provisions of this Act, a shareholder is authorised to disclose the identity of the company's beneficial owners.*

(my underlining)

35. Section 125B of the Act provides as follows:

125B. (1) *If a company record under section 125A is likely to be disclosed in a Court proceeding, the Court may decide whether:*

(a) *the disclosure is to be made in open Court; and*



(b) *any confidential company information is to be disclosed in any written judgment, orders or minutes of the proceeding.*

(2) *Subject to subsection (1), civil or criminal proceedings relating to international companies commenced in any Court:*

(a) *under the provisions of this Act; or*

(b) *for the purpose solely of determining the rights or obligations of officers, members or holders of debentures; or*

(c) *relating to any appeal from the proceedings referred to in paragraphs (a) or (b),*

may be held in an open Court.

36. Rule 8.2 of the CPR provides as follows:

8.2 (1) A party must disclose a document if:

(a) *the party is relying on the document; or*

(b) *the party is aware of the document, and the document to a material extent adversely affects that party's case or supports another party's case.*

(2) *A party that is not an individual is aware of a document if any of its officers or employees are aware of it.*

37. Rule 8.8 of the CPR provides as follows:

8.8 (1) The duty to disclose documents continues throughout a proceeding.

(2) *If a party becomes aware of documents that must be disclosed, the party must disclose the documents as required by rule 8.5.*

(3) *The party must disclose the documents:*

(a) *within 7 days of becoming aware of the documents, and in any case before the trial starts; or*

(b) *if the party becomes aware of the documents after the trial has started, as soon as practicable after becoming aware of the documents.*

38. Rule 8.9 of the CPR provides for **specific disclosure** as follows:

8.9 (1) A party may apply for an order to disclose the documents described in the application.

(2) *The documents may be identified specifically or by class.*

(3) *The court may order disclosure of the documents if the court is satisfied that disclosure is necessary to:*

(a) *decide the matter fairly; or*

(b) *save costs.*

(4) *The court must consider:*

(a) *the likely benefit of disclosure; and*

(b) *the likely disadvantages of disclosure; and*

(c) *whether the party who would have to disclose the documents has sufficient financial resources to do so.*

(5) *The court may order that the documents be disclosed in stages.*

(my underlining)

D. The Claim

39. The following is an account of the facts alleged by Mr Klatt in the Claim:

a. That throughout his lifetime, Mr Smith exercised control over API and "related entities" and benefitted from them by receiving dividends and remuneration since their incorporation: para. 7;

b. "Related entities" is not defined;

c. That at all material times, Mr Smith exercised a controlling interest in API and "related entities" as if he were the shareholder or their shares were held for his benefit: para. 8;

d. The affairs of API were at all times conducted by Mr Conway, and, since November 2020, he has represented himself as the owner of the shares of API as a nominee shareholder for a number of other people whose identifies he has refused to disclose: para. 14;

e. That since Mr Smith's passing, Mr Conway has stated that Mr Smith was not the owner of or beneficially entitled to any shares in API. Mr Conway has refused to explain how Mr Smith had been entitled to instruct him about the affairs of API and to receive benefits from API: para. 15;

f. That Mr Smith conducted extensive business dealings through companies in PNG, Australia, Singapore, New Zealand, Hong Kong, Nepal and Vanuatu: para. 19;

Particulars

Malcolm Roy Smith known companies structures

g. That at all material times prior to his death, Mr Smith did represent and

conduct himself as the controller and ultimate beneficial owner of API: para. 20;

Particulars of Deceased's conduct

a) *Decision making in relation to API by the Deceased;*

b) *Acted as a chairman of API;*

c) *Payment of invoices for API with Conway;*

d) *Communications by the Deceased in relation to API as holding company;*

e) *Communications by the Deceased in relation to rights to API dividends;*

f) *Various communications in relation to API by the Deceased indicating controlling interest including appointment of staff members and donations etc...*

g) *Permissions sought from and provided by the Deceased in relation to disclosure of beneficial ownership information relating to API;*

h) *Information relating to the Deceased's business structure relevant to API;*

i) *Confirmed controlling interest in subsidiary companies of API;*

j) *Representations made to his family and employees by the Deceased in relation to API and subsidiary companies;*

k) *Acknowledgment by all parties concerned of the Deceased's interest in API;*

l) *Other information to be provided as available including through discovery process.*

h. That the beneficial ownership of API is an interest held by Mr Smith at the time of his death, for which Mr Klatt as Administrator is entitled to call into Mr Smith's estate: para. 22;

i. That Mr Smith had an absolute controlling interest in API, so much as to amount to a revocable trust held by Waterford in Mr Smith's favour during his lifetime, which upon his death became irrevocable and subject only to beneficiaries' rights and permissions: para. 25;

j. That in the circumstances and in order to satisfactorily administer the will, Mr Klatt is obligated by law to enquire into the assets of Mr Smith's estate including but not limited to the interest that Mr Smith had in API: para. 26; and

k. That since Mr Smith's death, the Defendants have refused to provide any information concerning API sought by the estate representatives and to

cooperate with the estate representatives including Mr Klatt and have simply denied that the estate has any interest in API: para. 27.

40. The following relief is sought:

A. *A declaration that the Deceased, Malcolm Roy Smith, was the ultimate beneficial owner of API at the time of his death.*

B. *A declaration that since the death of the Deceased, Conway has held and continues to hold 100% or any amount of shares of API in trust for the estate of Malcolm Roy Smith.*

C. *An order that the Defendants provide all information in their possession both documentary or in any other form in which information can be stored concerning the structure and dealings of API Limited to the Claimant.*

D. *An order that the Second Defendant, Waterford Limited, and Third Defendant, Mark Conway to immediately provide a full account to the Court with copies to the Claimant of the updated financial accounts and statements API and related companies as required from the date of the Deceased's death to the date of the Court's determination of the Claim.*

E. *An Order that any sum found to be due in the taking of account through the Claimant to be paid jointly and severally by Third Defendant and any others including the Second and Third Defendants found to have caused any loss to Mal's Estate.*

F. *An order that following disclosure of the current company structure of API, the Claimant be at liberty to apply for appropriate orders to enable him to examine the company's affairs with the cooperation of all the companies' directors and officers which can be compelled by further Court orders if necessary.*

G. *Liberty to apply consequent upon the last order.*

H. *Costs or any other orders as deem [sic] just by the Court.*

41. No Defences have been filed. Defendants' counsel stated that defences would be filed after determination of the Defendants' Application: Minute and Orders dated 15 February 2024 at [12].

E. <u>The Defendants' Application and Submissions in Response</u>

42. By the Defendants' Application, the Defendants seek the following orders on the grounds that:

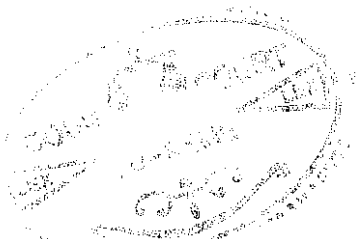
THE DEFENDANTS *jointly apply for orders:-*

1. *Revoking orders of 17 January 2024, and relisting the matter for argument.*

2. *Costs.*

3. *Staying Orders pending hearing of same.*

ON THE GROUNDS:-



4. *The Orders are opposed as being unlawful and unjust.*

5. *Not to stay is to make it irrelevant and not in the interest of justice.*

6. *The Sworn statement and rules herein.*

43. The Defendants submitted the following in their written submissions at [1]:

> 1. *These submissions support the contention that the Orders made by the Court on 17 January 2024 ('Orders') be and remain set aside, and permanently stayed on the following grounds –*
>
> a. *That the Disclosure Application is an abuse of process and contrary to the purpose and intention of the provisions of the Vanuatu* International Companies Act *[CAP. 222] as amended ('IC Act');*
>
> b. *Further or in the alternative, that the Supreme Court did not have the power to make Order 5a pursuant to the provisions of the IC Act, or otherwise;*
>
> c. *Further or in the alternative, sections 125A(6)(a) and 125B of the IC Act do not empower the Supreme Court to make the orders so made in respect of the Second and/or Third Defendants and/or Fourth Defendant because they are not international companies;*
>
> d. *Further, or in the alternative, so far as the Interested Party is concerned, the Orders are vague and illusory and otherwise unenforceable against it;*
>
> e. *Further or in the alternative, the Claimant did not provide full and frank disclosure to the court; [and]*
>
> f. *Further or in the alternative, that it is just and equitable for the Orders to be set aside.*

44. The balance of the written submissions elaborated on each of the "grounds" set out at its [1](a)-(f) (at pp 2-5) then analysed the Claim (at pp 5-9), the Disclosure Application (at pp 9-12) and the Claimant's sworn statements (at pp 12-13) to demonstrate, in the Defendants' submission, the speculatory nature of the Disclosure Application, the abuse of process, and the misuse of the Act by Mr Klatt and his counsel.

45. The Defendants submitted that it was open to the Court not only to permanently stay the 17 January 2024 Orders, but also to strike out the Disclosure Application for being a clear abuse of process.

46. The Second and Third Defendants' counsel Mr Hurley submitted that the Disclosure Application was an abuse of process and Mr Klatt erred procedurally by seeking disclosure *ex parte* and that he took advantage of the Court vacation and the likely absence of the Defendants. He submitted that Mr Klatt had not made full and frank disclosure which was a serious failure, and that this Court did not have power under the Act to make the orders at [5](a) of the 17 January 2024 Orders as the Disclosure Application was a "fishing expedition" for the purposes "of a Court proceeding" rather

than "in a proceeding", because the Second-Fourth Defendants were not international companies, because API was incorporated well before any requirement to provide the documents at [5](a)(i)-(iv) to the VFSC, and that [5](a)(v) of the Orders was a fishing expedition in respect of "other companies" when no "other companies" were party to the Disclosure Application or to the Claim.

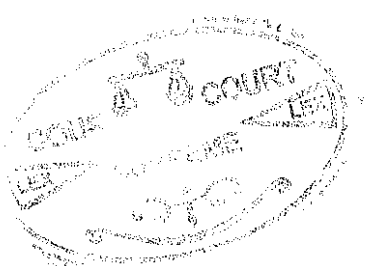
47. The First Defendant's counsel Mrs Motuliki and the Fourth Defendant's counsel Mr Morrison adopted Mr Hurley's submissions.

48. In response, Claimant's counsel Ms Raikatalau submitted that the Disclosure Application was not heard *ex parte* as it was served, the Defendants were given the opportunity by Orders to respond but did not, hence the 17 January 2024 Orders were made *ex parte* simply for lack of participation by the Defendants. She submitted that what happened in the present case was different from the facts in *Ebbage v Ebbage* [2001] VUCA 7 ('*Ebbage*') in which there were ex *parte* orders. She submitted that any issues as to service on Mr Conway and Mr Morton were immaterial as neither of them are required by the Act to keep API's company records. She submitted that there had not been any procedural irregularity requiring the Court to act to protect the integrity of its processes by setting aside its Orders, citing *Republic of Vanuatu v Natonga* [2016] VUCA 28 ('*Natonga*').

49. She submitted that the disclosure sought was *intra vires* s. 125B of the Act because it was relevant to the proceedings and "in a Court proceeding". She submitted that the substance of the Orders was allowed by law and that the Court could amend the Orders if necessary.

50. Ms Raikatalau also submitted that the Defendants could not rely on *Australian Competition & Consumer Commission v Golden Sphere International Inc* [1998] VUSC 24 ('*ACCC*') to say that Mr Klatt had not made full and frank disclosure when they had had the opportunity to respond to the Disclosure Application but did not. She submitted that in any event, it was only one letter which was not disclosed and that the letter would not have had any bearing on the Court making the 17 January 2024 Orders.

51. She also submitted that there was a strong supposition that at the time of his death, Mr Smith held a controlling interest and was the beneficial owner of API, and that this was backed by an overwhelming amount of material and overwhelming evidence. She submitted that no evidence had been filed to negate this strong supposition to justify the revocation of the 17 January 2024 Orders. She submitted that the insurmountable evidence leaned towards there being likely pilfering of the estate assets through fraudulent means. She submitted that if the Orders were set aside, that the Court applying *Natonga* should rehear the Disclosure Application *inter partes*.



52. In reply, Mr Hurley submitted that the contents of Mr Klatt's sworn statement in the reseal proceedings (that Mr Smith left property in Vanuatu, namely, API) and then his evidence in the present proceedings months later seeking a declaration that Mr Smith was the ultimate beneficial owner of API at the time of his death must bear on the veracity of Mr Klatt overall. He invited the Court to comment on the obvious conflict between those matters.

53. He submitted that the Disclosure Application is speculative as there is no evidence to rebut that Mr Conway is the beneficial owner of API (as shown in **Annexure "MKK-5**"). His understanding of the Claimant's submissions was that there still had to be an *inter partes* hearing of the Disclosure Application, however the hearing of the Defendants' Application was the *inter partes* hearing. He submitted that the Court was *functus oficio* in relation to the Disclosure Application as it had already determined that application.

F. Consideration

Whether Court functus oficio in respect of the Disclosure Application

54. The Disclosure Application has already been determined by way of the 17 January 2024 Orders. I agree therefore that the Court is *functus oficio* in respect of that application.

55. With respect, the Claimant's submissions rest on a misapprehension of *Natonga* in urging the Court to rehear the Disclosure Application *inter partes* if the 17 January 2024 Orders are set aside or revoked. In *Natonga*, the Supreme Court Judge determined that he did not have jurisdiction to determine an application to set aside consent orders. The Court of Appeal held on appeal that the Judge had jurisdiction and remitted the application to set aside the consent orders back to the Supreme Court for determination. In *Natonga,* the application to set aside consent orders had not yet been determined on its merits whereas in the present matter, the Disclosure Application has already been determined. Accordingly, in the event that the 17 January 2024 Orders are revoked or set aside, there will not be a rehearing of the Disclosure Application, *inter partes* or otherwise.

Whether or not abuse or process or that Mr Klatt erred procedurally by seeking disclosure ex parte

56. Having heard counsel at the conference on 6 February 2024, I stated that I was satisfied that the 17 January 2024 Orders were made "on an *ex parte* basis" and that an *inter partes* hearing was now required, in accordance with *Ebbage*.

57. I then stayed the 17 January 2024 Orders pending the determination of the Disclosure Application following an *inter partes* hearing.

58. It was not until counsel appeared before me on 28 February 2024 that I realised that what was required was to hear the Defendants' Application, not an *inter partes* (re)hearing of the Disclosure Application. I therefore stated in the Minute and Orders dated 28 February 2024 that my references in the Minutes and Orders dated 6 February 2024 and 15 February 2024 to the "*inter partes* hearing of the Disclosure Application" were references to the hearing of the Defendants' Application.

59. I consider that by listing the hearing of the Defendants' Application, I had relisted the matter as sought in that application. However, the Court's consideration of whether or not to revoke the 17 January 2024 Orders, or vary or maintain them, could only occur following that hearing.

60. Unfortunately, I also set out in the Minute and Orders dated 6 February 2024 at [6] that the Defendants Application was granted. However, it is clear from the foregoing that I had only *partially* granted the Defendants' Application in that I had relisted the matter for argument as sought and had stayed the 17 January 2024 Orders pending the hearing of the Defendants' Application.

61. In the Minute and Orders dated 15 February 2024, I ordered that the costs of the Defendants' Application were in the cause. However, the hearing of that application had not yet occurred. It follows that the costs will in the cause until determined otherwise as a result of the determination of the Defendants' Application. I will deal with the costs of the Defendants' Application at the end of this decision.

62. The Defendants submitted that Mr Klatt sought disclosure *ex parte* and that he took advantage of the Court vacation and the likely absence of the Defendants. Presumably, they made those submissions given my statement in the Minute and Orders dated 6 February 2024 that I was satisfied that the 17 January 2024 Orders were made "on an *ex parte* basis". However, that is disappointing because those submissions completely overlook that the Disclosure Application was served on the Defendants and proof of service was filed, that both API and Waterford were represented by counsel by 27 November 2023, that the Orders dated 1 December 2023 gave the Defendants the opportunity to file and serve submissions in response by 4pm on 15 January 2024, and that they did not do so.

63. In the Minute and Orders dated 6 February 2024, I also cited *Ebbage* for the principle that after making *ex parte* orders, the Court must list the matter for an *inter partes* hearing. However, in *Ebbage*, the Court made its orders on an application which had not been served and in the absence of the defendant, therefore *ex parte*. On the other hand, in the present case, the Disclosure Application was served and the Defendants were given the opportunity to respond, but they did not. Accordingly, I described the 17 January 2024 Orders as having been made "on an *ex parte* basis" for lack of participation by the Defendants but those Orders were not actually made *ex parte* in the correct usage of that term, "*ex parte*".

64. In the circumstances, I reject the Defendants' submissions that the Disclosure Application was an abuse of process or that there was procedural irregularity justifying the revocation or setting aside of the 17 January 2024 Orders. This disposes of part of ground [1](a) of the Defendants' written submissions.

Full and frank disclosure

65. It is accepted that the Claimants' evidence did not include the letter dated 10 August 2021 from Mr Morton (at that time, an executor of Mr Smith's estate) to Mr Conway [**Attachment "MWC1"**, Mr Conway's sworn statement]. This was the letter that Mr Conway was responding to by way of his letter dated 27 August 2021 to Mr Morton [**Attachment "MKK-10"**, Mr Klatt's sworn statement], in which Mr Conway stated that Mr Smith had not held a beneficial interest in the shares of API "*during the period I have been a director of API Limited*".

66. I understood the Defendants' submissions to be that if the 10 August 2021 letter had been included, that it would have been clear that by 27 August 2021, Mr Conway had already told Mr Morton (then an estate representative) that Mr Smith was not the beneficial owner of API therefore the omission of the letter meant that there had not been full and frank disclosure. Further, that full and frank disclosure is a factor for the Court to take into account in deciding whether or not to set aside the 17 January 2024 Orders, as Saksak J did in *ACCC*.

67. However, the pleadings in the Claim clearly allege that since Mr Smith's passing, Mr Conway has stated that Mr Smith was not the owner of or beneficially entitled to any shares in API, and that Mr Conway has refused to explain how Mr Smith had been entitled to instruct him about the affairs of API and to receive benefits from API – see the Claim at [15]. It is also pleaded that since Mr Smith's death, the Defendants have simply denied that Mr Smith's estate has any interest in API – see the Claim at [27].

68. Mr Klatt included in his evidence the document titled, "Register of Members (Shareholders) – Summary" which was certified by Geoffrey Gee on 13 April 2021 which shows API's list of members since its date of registration and that since 20 November 2020, Mr Conway is the sole shareholder of API [**Annexure "MKK-5"**].

69. In the circumstances, I do not agree that the omission of Mr Morton's 10 August 2021 letter from the Claimant's evidence was an omission of a material fact. It is pleaded in the claim that Mr Conway has since Mr Smith's passing, stated that Mr Smith was not the owner of or beneficially entitled to any shares in API. Mr Klatt's own evidence included API's shareholder register showing Mr Conway as the sole shareholder

since 20 November 2020. Accordingly, I agree with Ms Raikatalau's submission that even if the letter had been disclosed, that it would not have had any bearing on the Court making the 17 January 2024 Orders. That disposes of ground [1](e) of the Defendants' written submissions.

Matters for trial or for separate proceedings

70. **Annexure "MKK-5"** shows that since 20 November 2020, Mr Conway is the sole beneficial owner of API. The Defendants invited me to hold that there was no evidence rebutting that and that there was no definitive evidence by Mr Klatt that Mr Conway had managed API on Mr Smith's behalf.

71. However, these are conclusions for the Court to draw (if at all) after trial. They are matters as to the merits of the Claim which can only be determined after trial. The Court cannot make findings on disputed questions of fact on an interlocutory application.

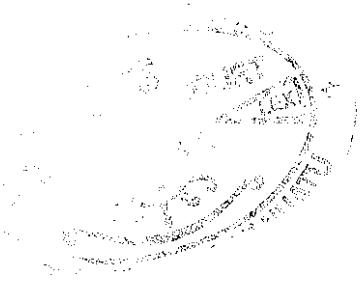
72. As the Court of Appeal held in *Union Electrique du Vanuatu Ltd v Republic of Vanuatu* [2012] VUCA 2 ('*Union Electrique*') at [70]:

> *70. ... in complex matters a Court should be very wary about embarking on a merits assessment of disputed facts and difficult questions of law at the interlocutory stage.*

73. I was also invited to conclude that Mr Klatt should not have deposed in the reseal proceedings that Mr Smith left property in Vanuatu, when he already had evidence [**Annexures "MKK-5" and "MKK-10"**] that Mr Smith was not the beneficial owner of API, therefore he should not have brought an Application to reseal the letters of administration nor should the reseal Orders have been made. I was invited to comment on the obvious conflict between the evidence in the reseal proceedings, and Mr Klatt's evidence in the present proceedings months later seeking a declaration that Mr Smith was the ultimate beneficial owner of API at the time of his death, and that this must bear on the veracity of Mr Klatt overall.

74. However, I cannot make credibility findings on an interlocutory application. Such findings must be made after trial, as the parties had had the opportunity to cross-examine the witnesses and then make their submissions based on the evidence.

75. I also cannot consider a challenge to the reseal Orders in the present proceedings via the interlocutory application that is the Defendants' Application. Any such challenge must be raised in the reseal proceedings or in separate proceedings.



Whether or not the Court is not empowered to make the 17 January 2024 Orders against the Second-Fourth Defendants

76. The disclosure sought is of the company records of API, which is an international company therefore any such disclosure can only be made "if required to do so by a court of competent jurisdiction under s. 125B": para. 125A(6)(a) of the Act.

77. What matters is that API is an international company. It is wholly irrelevant to the question of disclosure pursuant to para. 125A(6)(a) and s. 125B of the Act that the Second-Fourth Defendants are not international companies.

78. Accordingly, I reject the Defendants' submission that para. 125A(6)(a) and s. 125B of the Act does not empower the Supreme Court to make the 17 January 2024 Orders in respect of those Defendants. That disposes of ground [1](c) of the Defendants' written submissions.

Whether the 17 January 2024 Orders are vague and unenforceable so far as the VFSC is concerned

79. I do not agree with the Defendants' submission that the 17 January 2024 Orders are vague and unenforceable so far as the VFSC is concerned as API was incorporated well before any requirement to provide the documents at [5](a)(i)-(iv) to the VFSC. If the VFSC does not possess one or other of those records, it simply needs to inform the Court. It must necessarily do so post-Orders because it has chosen so far not to participate in the proceedings and to abide the Order of the Court. That disposes of ground [1](d) of the Defendants' written submissions.

80. I turn now to the jurisdictional attacks on the 17 January 2024 Orders, that is, grounds [1](a) and (b) of the Defendants' written submissions.

Whether or not the Supreme Court had the power to make the 17 January 2024 Orders pursuant to the provisions of the International Companies Act

81. The Defendants submitted that this Court did not have power under the Act to make the orders at [5](a) of the 17 January 2024 Orders as the Disclosure Application was a "fishing expedition" for the purposes "*of a Court proceeding*" rather than "*in a Court proceeding*", and that the Disclosure Application was contrary to the purpose and intention of the provisions of the Act. In addition, that [5](a)(v) of the Orders were a fishing expedition in respect of "other companies" when no "other companies" were party to the Disclosure Application or the Claim.

82. The Disclosure Application was made pursuant to para. 125A(6)(a) and s. 125B of the Act and rule 8.9 of the CPR.

83. Sections 125A and 125 of the Act were inserted by the *International Companies (Amendment) Act* No. 4 of 2016. Prior to that, a single section namely s. 125 of the Act provided for secrecy of information relating to international companies. Section 125 was repealed and a new s. 125 was substituted by the Amendment Act No. 4 of 2016, and then was repealed altogether by the *International Companies (Amendment) Act* No. 14 of 2017.

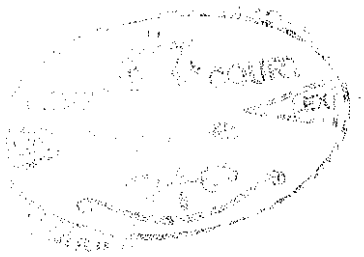
84. The Court of Appeal held as follows about s. 125 of the Act in *PKF Chartered Accountants v Supreme Court* [2008] VUCA 32 ('*PKF*') at [70]-[72]:

> *70. ... The matters which the appellants say the Supreme Court ought to have considered are the secrecy requirements of s. 125 of the* International Companies Act *1992 [CAP. 222] and s. 9 of the Trust Companies Act 1971 [CAP. 69].*
>
> *71. Those sections provide for secrecy of information relating to international companies and trust companies and make it an offence for the specified information to be divulged. However, crucially, both provisions have an exception which clearly applies in the present case. In s. 125 of the* International Companies Act, *the exception is 'except when required by a Court of competent jurisdiction'. In s. 9 of the* Trust Companies Act, *the exception is, 'except when lawfully required to do so by any Court of competent jurisdiction within Vanuatu or under the provisions of any law in force in Vanuatu.'*
>
> *72. It is clear that neither of these sections is intended to prevent the divulging of information when that is required by a court order...*
>
> *(my underlining)*

85. In analogous manner to the provision in s. 125 of the Act (now repealed), s. 125A provides for secrecy of information relating to international companies, and makes it an offence for the specified information to be divulged. There is also, crucially, an exception set out in para. 125A(6)(a) of the Act, namely, that the VFSC or a person authorised by the VFSC may disclose company records if 'required to do so by a court of competent jurisdiction under section 125B.'

86. In the same way that the Court of Appeal held in *PKF* about s. 125 of the Act, in my view, it is clear that neither of ss 125A and 125B of the Act are intended to prevent the divulging of information about an international company when that is required by a court order.

87. In the circumstances, I do not agree that the Disclosure Application was contrary to the purpose and intention of the provisions of the Act. That disposes of the remainder of ground [1](a) of the Defendants' written submissions.



88. How is the Court to decide whether or not to order disclosure?

89. Part 8 of the CPR provides for disclosure (known prior to the coming into force of the CPR as 'discovery').

90. Every party to a proceeding has a duty to provide disclosure. Rule 8.2(1) of the CPR provides that a party must disclose a document if (a) the party is relying on it; or importantly, (b) the party is aware of the document and the document to a material extent adversely affects that party's case or supports another party's case.

91. The duty to disclose continues throughout a proceeding, even after the trial has started: rule 8.8 of the CPR.

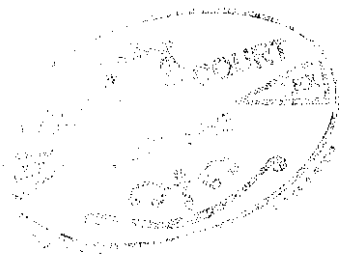
92. Until a sworn statement of disclosure is given (whether as to disclosure generally or specific disclosure), it is generally not possible to know whether there are documents in the possession of the disclosing party which are relevant to the proceeding and existing, or whether there are any other relevant documents. That is why the order for disclosure is made and ought to be complied with: *Melsul v Public Service Commission* [2006] VUSC 80 at [6] per Tuohy J.

93. There is a significant factor in the present case which is that it is known that API and Waterford are required to keep API's company records. Accordingly, the Disclosure Application sought their disclosure of API's company records.

94. Rule 8.9 of the CPR provides for specific disclosure. Rule 8.9(3)(a) of the CPR provides that, "*The court may order disclosure of the documents if the court is satisfied that disclosure is* **necessary *to: ... decide the matter fairly;***" (my bolding).

95. In *Unelco (Vanuatu) Ltd v Republic of Vanuatu* [2015] VUSC 178 ('*Unelco*') at [9]-[11], Harrop J set out the approach to an application for disclosure under rule 8.9 of the CPR as follows:

> *9. I proceed on the basis that being satisfied that disclosure is necessary to decide a matter fairly mean simply that disclosure should be ordered of documents relating to any matter in question in the proceedings. As Lindgren J said in* Trade Practices Commission v CC (New South Wales) Pty Ltd and Others *[1995] FCA 1418; (1995) 131 ALR 581 at 590: "The "matters in question" in the proceedings are the issues as revealed by the pleadings."*
>
> *10. As will become apparent in discussing the present application, this is important to keep in mind. Sworn statements do not reveal "matters in question", pleadings do. It is the pleadings which not only determine whether documents sought to be disclosed are relevant but also whether the contents of sworn statements are admissible (relevant) or not.*



> 11. *In order to determine this application and to assess the submissions made on it, it is therefore necessary carefully to identify what is in issue as revealed by the pleadings.*
>
> *(my underlining)*

96. In *Trade Practices Commission v CC (New South Wales) Pty Ltd and Others* [1995] FCA 1418; (1995) 131 ALR 581 ('*Trade Practices Commission*') at [43] and [49], Lindgren J held as follows:

> 43. *In a case such as this, where one party and not the other is likely to have documents relating to a matter in question, it seems to me to be prima facie "necessary" in the sense referred to that discovery be ordered. But this general position is subject to the well established exception that discovery should not be ordered to enable a mere "fishing expedition" (see below).*
>
> ...
>
> 49. *What does the reference to a "fishing expedition" mean? After all,* ex hypothesi, *the giving of discovery will often, if not always, reveal documents of which the other party was not previously aware (similarly, the administering of interrogatories will often, if not always, reveal information of which the other party was not previously aware). What is meant is that discovery must not be used for the purpose of ascertaining whether a case exists, as distinct from the purpose of compelling the production of documents where there is already some evidence that a case exists: see, for example, Commissioners for Railways v Small [1938] NSWStRp 29; (38 SR (NSW) 564 (NSW/FC) at 757 (Jordan CJ); Associated Dominions Assurance Society Pty Ltd v John Fairfax and Sons Pty Ltd, supra; W.A Pines Pty Ltd v Bannerman, supra; Barbarian Motor Cycle Club Inc v Koithan (984) 35 SASR 481 (SA/FC) at 486 (King CJ); Nestle Australia Ltd v Commissioner of Taxation (1986) 10 FCR 78 (FCA/Wilcox J) at 82-83; Mobex Pty Ltd v Comptroller-General of Customs, unreported, FCA/Foster J, 18 May 1994, at 18...*
>
> *(my underlining)*

97. Mr Klatt filed the Claim seeking a declaration that Mr Smith was the ultimate beneficial owner of API at the time of his death, and consequential orders. The cause of action in the Claim appears to be Mr Klatt's obligation by law to enquire into the assets of Mr Smith's estate, and that because of the factual matters pleaded, the beneficial ownership of API is an interest that Mr Smith held at the time of his death, which Mr Klatt as Administrator is entitled to call into Mr Smith's estate.

98. The issues posed by the Claim therefore include:

> (i) Whether or not prior to his death, Mr Smith represented and conducted himself as the controller and ultimate beneficial owner of API;
>
> (ii) Whether or not the beneficial ownership of API is an interest that Mr Smith held at the time of his death; and

(iii) If yes, did this amount to a revocable trust held by Waterford in Mr Smith's favour during his lifetime, which upon his death became irrevocable and subject only to beneficiaries' rights and permissions.

99. The Claimant's submissions included that the evidence in the present matter leaned towards there being likely pilfering of the estate assets through fraudulent means. However, fraud has not been pleaded in the Claim. That submission is not relevant to any issue revealed by the pleadings. It is unmeritorious.

100. At [4](d) of the 17 January 2024 Orders, I stated that I was satisfied that there was a strong supposition that at the time of his death, Mr Smith was the beneficial owner holding a controlling interest in API (which I mistakenly referred to as Mr Conway) "and other related companies". I went on to order in [5](a)(v) of those Orders the disclosure of information relating to "other companies (being entities that the Deceased was believed to have an interest in in his life up until his death domiciled with the Third Defendant and/or Conway & Co, including but not limited to Malkris International Limited)."

101. The pleaded Claim relates only to the beneficial ownership of API, not of any other company. I must conclude therefore that the disclosure sought in relation to "other companies" was for the purpose of ascertaining whether a case exists vis-à-vis those companies therefore I agree with the Defendants' submission that that aspect of the Disclosure Application was a fishing expedition: *Trade Practices Commission* at [49] per Lindgren J. Accordingly, even if the 17 January 2024 Orders are maintained, [5](a)(v) of those Orders must be revoked or set aside.

102. One of the issues raised by the Claim is whether or not the beneficial ownership of API is an interest that Mr Smith held at the time of his death. The disclosure sought by the Disclosure Application of API's company records included of its share register and register of beneficial owners. These are documents squarely related to the issue revealed by the pleadings of the beneficial ownership of API therefore I am satisfied that such disclosure is necessary to decide the matter fairly: rule 8.9(3)(a) of the CPR and *Unelco* at [9]-[11] per Harrop J.

103. In addition, API and Waterford are required by the Act to keep API's company records therefore are likely to have those records. On the other hand, there is no likelihood of Mr Klatt having those documents given the secrecy provisions in the Act relating to international companies. It seems to me, therefore, to be *prima facie* "necessary" for that reason also that the disclosure sought be ordered: rule 8.9(3)(a) of the CPR and *Trade Practices Commission* at [43] per Lindgren J.

104. Given Mr Conway's denials since Mr Smith died that Mr Smith has a beneficial interest in API, and because of the secrecy requirements of the Act in relation to API's company records, there is no guarantee that API and/or Waterford would have sought a court order for the disclosure of those records. In the circumstances, it

makes sense that Mr Klatt sought their disclosure. No doubt seeking their disclosure at this early stage of the proceedings would also inform his assessment of his prospects of success and whether or not to continue with the proceeding.

105. Was there already some evidence that a case exists for Mr Klatt?

106. I had stated in the 17 January 2024 Orders that I was satisfied that there was a strong supposition that at the time of his death, Mr Smith was the beneficial owner holding a controlling interest in API.

107. Ms Raikatalau submitted that that strong supposition was backed by an overwhelming amount of material and overwhelming evidence. She submitted that no evidence had been filed to negate this strong supposition to justify revocation of the 17 January 2024 Orders. Counsel for the Defendants strongly opposed this. Mr Hurley submitted that for all the 'overwhelming' and 'insurmountable' evidence referred to by Claimant's counsel, there was no evidence to rebut **Annexure "MKK-5"** which shows that Mr Conway is the beneficial owner of API.

108. However, a merits assessment of disputed facts is a matter for trial therefore not to be undertaken at this interlocutory stage: *Union Electrique* at [70] per the Court of Appeal.

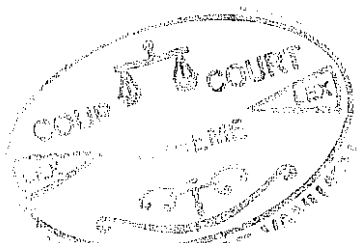
109. As per the test in *Trade Practices Commission* at [49], all that is required is that there is already some evidence that a case exists. I am satisfied that on the evidence set out in the sworn statements filed by the Claimant, that there is evidence that at times prior to his death, Mr Smith represented and conducted himself as the controller and ultimate beneficial owner of API. Accordingly, there is already some evidence that a case exists for Mr Klatt. It follows that the disclosure sought of API's company records was for the purpose of compelling the production of documents where there is already some evidence that a case exists, therefore such disclosure is necessary to decide the matter fairly and was not a fishing expedition: rule 8.9(3)(a) of the CPR and *Trade Practices Commission* at [49] per Lindgren J.

110. The foregoing disposes of ground [1](b) of the Defendants' written submissions.

111. In conclusion, in my view, the disclosure sought was *intra vires* para. 125A(6)(a) and s. 125B of the Act, and within the purpose and intention of the provisions of the Act. The Court had the power to make the 17 January 2024 Orders, however [5](a)(v) of those Orders was a fishing expedition and therefore must be set aside.

112. The 17 January 2024 Orders are otherwise maintained.

113. Given that both the Claimant and the Defendants have succeeded on an aspect of their cases, each party is to bear their own costs of the Defendants' Application.



G. Result and Decision

114. The Defendants' Application filed on 31 January 2024 is **partially granted** and it is ordered that **para. 5(a)(v) of the Orders dated 17 January 2024** is **set aside**.

115. The Orders dated 17 January 2024 are **otherwise maintained**.

116. Each party is to bear their own costs of the Defendants' Application.

117. This matter is listed for Conference **at 1.15pm on 30 May 2024.**

DATED at Port Vila this 8th day of May 2024
BY THE COURT

Justice Viran Molisa Trief