

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

**Civil Appeal**  
**Case No.24/1757 COA/CIVA**

**BETWEEN:** **API LIMITED**  
First Applicant

**AND:** **WATERFORD LIMITED (3375)**  
Second Applicant

**AND:** **MARK CONWAY**  
Third Applicant

**AND:** **MARK DAVID MORTON**  
Fourth Applicant

**AND:** **MICHAEL KARL KLATT**  
Respondent

**AND:** **VANUATU FINANCIAL SERVICES COMMISSION**  
Interested Party

***Date of Hearing:*** **9 August 2024**

***Coram:*** ***Hon. Chief Justice V. Lunabek***  
***Hon. Justice J Mansfield***  
***Hon. Justice R. Young***  
***Hon. Justice D. Aru***  
***Hon. Justice E. P. Goldsbrough***

***Counsel:*** ***M. J. Hurley for the First to Third Applicants***  
***N. G. Morrison for the Fourth Applicant***  
***L. Raikatalau for the Respondent***  
***J. S. Tougon for the Interested Party***

***Date of Decision:*** **16 August 2024**

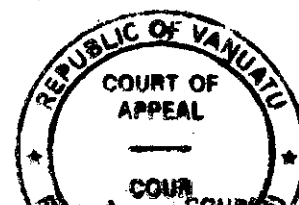
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**JUDGMENT OF THE COURT**

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**Introduction**

1. This application for leave to appeal raises the question of the power of the Supreme Court to make a disclosure order under Part 8 of the Civil Procedure Rules in relation to an international company registered under the International Companies Act [CAP. 222], and if that power exists

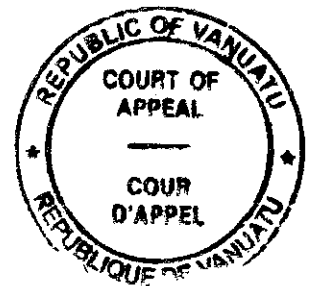


then it raises the question of whether the exercise of the power by the Supreme Court in the particular circumstances was valid.

2. The power of the Court to make disclosure orders under Part 8 of the Civil Procedure Rules is, in its terms, unrestricted provided that the criteria specified there are met in the particular circumstances. It is not explicitly or implicitly restricted in relation to international companies. So the answer to the first question depends upon the proper construction of the relevant provisions of the International Companies Act.
3. There was no contention that the Civil Procedure Rules take priority over the International Companies Act, if that Act has the prohibiting effect for which the applicants contend.
4. Before turning to that question, it is necessary to identify the relevant context. The Court does not decide questions which are academic, but only those which present themselves in the particular circumstances of a proceeding before the Court.

### Context

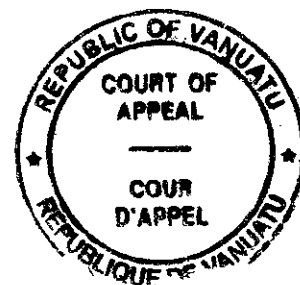
5. API Limited (API) is an international company registered in Vanuatu under the International Companies Act ("*the Act*"). As a starting point, its records are confidential. It was common ground that the relevant provisions of the Act are Sections 125A and 125B.
6. Waterford Limited ("*Waterford*") is a local company and a general service provider under the Company and Trust Services Providers Act No. 8 of 2010 ("*CTSP Act*") and is the registered agent of API. Part I of the International Companies Act sets out the status and functions of the registered agent. The registered agent is required under Section 35 of the Act to obtain specific and detailed information about the affairs of the international company and to maintain it, including as to the beneficial owners or members of that company. Part 6 deals with the Directors and officers obligations in relation to the company and Part 7 relating to the company's operation including maintaining a register of members and dates and other relevant documents. Although it was suggested by counsel for Mr Klatt that Section 35 of the Act setting out the obligation of a registered agent to obtain and maintain extensive material about the company inform of the proper construction of sections 125A and 125B, we do not consider that those provisions go beyond establishing clearly that Waterford as the registered agent of API must be presumed to have extensive and relevant records of API about its membership.
7. Mark Conway trades under the business name Conway and Co, a general services provide under the CTSP Act, and at various times for many years as provided and continuous to provide general corporate services to API. He is a director of Waterford.
8. Mark Morton, the Fourth Applicant, is the Authorised Representative for API, appointed by API subsequent to death of Malcolm Louis Smith (Mr Smith) refer to in the next paragraph of these reasons for Judgment.



9. Mr Smith died in Australia on 4 April 2021. He was ordinarily resident in Papua New Guinea. Michael Klatt, the First Respondent, is the administrator of the Will of Mr Smith pursuant to an order of the Supreme Court of Queensland dated 18 May 2022 and to Letters of Administration with the Will attached dated 25 May 2022.
10. The Letters of Administration with the Will were resealed in the Supreme Court of Vanuatu by Order dated 31 August 2023 in Probate Case 2027 of 2023 (the reseat proceedings).
11. The primary Judge recorded that there is a strong supposition that, at the time of his death, Mr Smith was the beneficial owner holding a controlling interest in Waterford and in a practical sense in API. There is extensive material which is capable of showing that he had a significant role in relation to API, both as a chairman of its board, and a decision maker in relation to its activities. He appears to have had a significant role in the appointment of staff and in the conduct of its business.
12. It can now be taken, for the purposes of this application for leave to appeal, that he had either a controlling or very significant interest in API at the time of his death and that, in order to satisfactorily administer the Will, Mr Klatt is both entitled to and indeed obliged to enquire into the assets of Mr Smith's estate at his death including his interest in API.
13. Mr Klatt has made approaches to the Applicants to provide information concerning API's shareholdings and membership at the time of his death. He has been denied any information at all. API and the other Applicants for leave to appeal have simply asserted firstly that Mr Conway is the beneficial holder of all of the interest and shares in API, and that therefore it cannot be shown that Mr Smith at the time of his death had any interest in API. Further than that, they have simply relied upon Section 125A of the Act to refuse to provide any records of API to Mr Klatt despite his requests to do so.
14. Inevitably, in those circumstances, Mr Klatt applied to the Court for an order for disclosure of those records. That application has resulted in two orders of the Court. The first was made on 17<sup>th</sup> January 2024 directing the disclosure of significant documentation by each of the applicants and the second by order 8<sup>th</sup> May 2024 in which the order of 17 January 2024 was moderated to some extent but otherwise maintained.
15. For practical purposes, and including for the purpose of considering whether to grant leave to appeal, we will treat the disclosure order as finally made on 8 May 2024 as the operative order. The order is in the following terms:

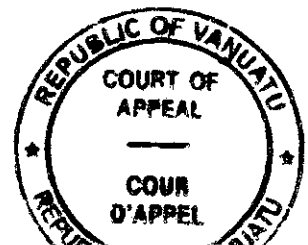
*"The interested party (Vanuatu Financial Services Commission) or any person unauthorised by the Commission (including the second and third defendants (that is Waterford and Mr Conway)) is to disclose the following records, including confidential company information, in respect of the first defendant API Limited (an international company) (Api) pursuant to para. 125A(6)(a) and Section 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 registered party;*
- (iii) *information of API's founding shareholder and beneficial owner; and*
- (iv) *API's registered beneficial owners, required to be held under the Companies and Trust Service Providers Act 2020 and International Companies Act since the date of incorporation of the company as an exempted company and after as an international company in 2010."*

16. The reference to exempted company refers to the fact that on 19 June 1992 API was registered as an exempt local company limited by shares, and subsequently on 7 November 1994 was de-registered and then re-registered as an international company under the Act.
17. The primary question, therefore, which leads to the application for leave to appeal is whether the disclosure order could have been, and should have been, made by the primary judge.
18. It should be noted that the application for leave to appeal (and to extend the time for filing of an appeal) when made on 7 June 2024 contained a number of other grounds or proposed grounds in respect of which leave to appeal was sought. In the course of submissions counsel for the Applicants withdrew or did not rely upon other grounds. For the sake of completeness we note that the grounds not pursued included a claim that the power the judge exercised should not have been exercised at the early stage of the proceeding or in the absence of a hearing, that there was belated service of the application upon Mr Conway, that there had been incomplete service of the relevant material upon Mr Morton, that the applicants had not been given the opportunity to respond before the orders made in January were made, that the seeking of the disclosure orders was an abuse of process of the Court, or that there was no proper evidentiary foundation for the exercise of the discretion to make the disclosure orders (putting aside the question of the proper application of the Act). That was an appropriate acknowledgement. A number of those concerns were no longer of practical significance, in the sense of having impaired the capacity of the Applicants to present their contentions in opposition to the disclosure order by the time of the orders made on 8 May 2024. In addition, the factual assessments by the primary judge of the quality of the materials supporting the disclosure application would not routinely be the subject of leave to appeal from an interlocutory decision.
19. The remaining grounds of appeal, therefore, concern the assertion that the primary judge did not, on the proper construction of the relevant provisions of the Act, have power to make orders in the terms made on 8 May 2024, and in doing so the primary judge had failed to give effect to the "regime of confidentiality" in relation to international companies prescribed by the Act, as to do so would undermine Vanuatu's status as an "Offshore Finance Centre".
20. As we noted, we have indicated that we accept that the proper construction of the relevant provisions of the Act, if they prohibit such an order, would take priority over the powers which the Court might otherwise have under the Judicial Services and Courts Act [CAP. 270] and the Civil Procedure Rules.



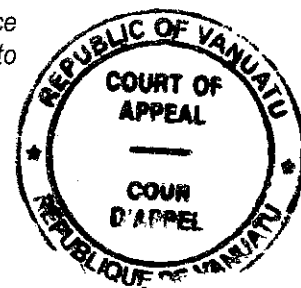
21. The alternative surviving argument in support of the application for leave was that Sections 125A(6)(a) and 125B of the Act do not on their proper construction empower to make orders of the kind made, both generally and in relation to Waterford and Mr Conway in particular.

**The relevant provisions**

22. Section 125A and 125B of the Act provide:

**125A. Confidentiality of company records**

- (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 VT 1 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*

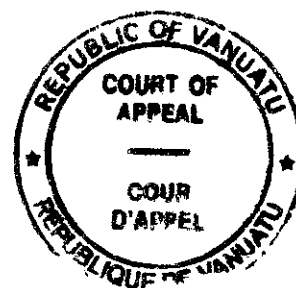
(v) *a domestic regulatory authority for the purpose of carrying out its regulatory functions; or*

(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.*

**125B. Court proceedings disclosing company records**

- (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 judgement, 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.*

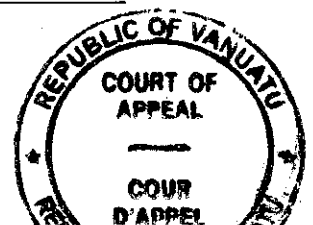
23. Those provisions were inserted into the Act by Act No. 4 of 2016 and at the same time Section 125, which previously dealt with confidentiality of company records, was repealed. Section 125 previously provided under the heading "Secrecy" as follows:

*"(1) Any person who except when required by a court of competent jurisdiction, with respect to any company otherwise than for the purposes of the administration of this act or for the carrying on of the business of the company, in Vanuatu or elsewhere, divulges, attempts, offers or threatens to divulge or induces or attempt to induce other persons to divulge any information concerning or respecting:*

- (a) *A shareholding or beneficial ownership of any share or shares in the company;*
- (b) *The management of such company; or*
- (c) *Any of the business, financial or other affairs or transactions of the company;*

*Shall be guilty of an offence."*

24. The primary judge noted that earlier provision and its relevance in the judgment appealed from and noted the observation of the Court of Appeal about Section 125 of the Act in PKF Chartered Accountants v Supreme Court [2008] VUCA 32 at [70] – [72]:



*[70] .... The matters which the appellants the Supreme Court ought to have considered are the secrecy requirements of Section 125 of [the Act] ....*

*[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 exemption which clearly apply in the present case. In Section 125 of the [Act], the exemption is "except when required by a court of competent jurisdiction". ...*

*[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 ...*

25. The primary judge regarded the position under Section 125A of the Act as an analogy, particularly having regard to the exemptions set out in Section 125A(6)(a).

### **Consideration**

26. In our view, the conclusion reached by the primary judge is correct.
27. Although Section 125A and 125B are in the same general terms as the previous provision, they are more detailed. What can be seen from Section 125A is that the confidentiality provision in sub-section (3) itself contains the proviso "*unless otherwise required to be made available to the public under another provision of this Act*" and sub-section (4) also imposing confidential obligations is subject to the expression "*except as required or permitted under this Act*". Then sub-section (6) specifically addresses the Court's power. It provides "*Despite sub-section (4) to enable the commission or a person authorised by the Commission to disclose company records if required to do so by a court of competent jurisdiction under Section 125B.*" There are further alternatives apparently to facilitate investigative agencies in relation to money laundering or counter terrorism or other activities.
28. We do not see in Section 125A any intention to impose a more restrictive obligation upon a court than existed previously. More specifically to confront the applicants' contentions, there is no foundation for the Applicants' contention that the Court is prohibited from exercising a power to make a disclosure order absolutely, or in any particular circumstances. The contrary is the case. Section 125B specifically contemplates that in the course of proceedings a court may make orders with respect to the protection of company records which are otherwise confidential by determining whether the disclosure to be made is in open court or otherwise, and including proceedings for the purpose of determining the rights or obligations of officers or members of the international company.
29. That is precisely the purpose of the current proceedings.
30. It is a matter for the discretion of the Court whether, in particular circumstances, the confidential material if disclosed should be disclosed in a way which confines its publication to particular persons or permits it to be exposed in open court, and if its publication is confined to private



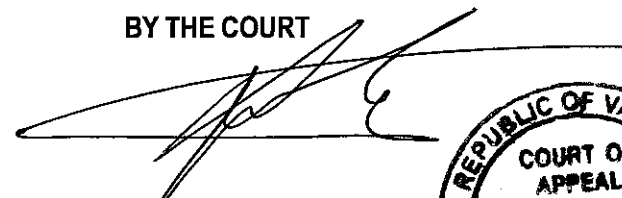


disclosure the Court may exercise its normal powers to ensure that the disclosure does not extend beyond those to whom it is necessary for the purpose of the particular proceeding.

31. In relation to the second ground upon which leave to appeal is sought, in our view there is simply no merit in that ground in particular having regard to the fact that Mr Conway has made a public assertion through his sworn statement that he is the sole shareholder of API. As we have noted, there is significant material which suggests that Mr Smith was either the sole shareholder or a significant shareholder of the API shares, and that he was actively involved in its management up to the time of his death. Once Mr Conway has chosen to positively assert the state of affairs as to membership in API by asserting his sole shareholding, it is obviously both appropriate and necessary for the Court in those circumstances to require disclosure for the purposes of determining the state of affairs at the time of and prior to Mr Smith's death, and then to explore the extent to which or the manner in which Mr Conway came to be the sole shareholder of API (s.125B(i)). It would be an affront to justice, in such circumstances, to preclude the court from having the power to direct the disclosure which it has directed.
32. Accordingly, although we consider that the matters specifically argued on behalf of the Applicants do warrant a grant of leave to appeal from the decision and the orders made by the primary judge on 8 May 2024, we dismiss the appeal. We order that the applicants pay to Mr Klatt costs of the application and of the appeal which we fix at VT150,000.
33. Counsel for Mr Klatt also sought an order for prompt disclosure. We are aware that the primary judge has suspended the disclosure obligations pending the outcome of this appeal and of separate proceedings challenging the resale proceedings validity. So any variation of that suspension order is a matter for the primary judge. We note that, having regard to Section 125B of the Act, the Court could direct the disclosure obligations to be progressed by the disclosure being made to the Court but not otherwise released to Mr Klatt until, and depending on, the resolution of the resale proceedings challenge. That would facilitate a more speedy disclosure, if disclosure to Mr Klatt is finally ordered.

**DATED at Port Vila, this 16<sup>th</sup> day of August, 2024.**

**BY THE COURT**



**Hon. Chief Justice Vincent Lunabek**

