

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

Civil
Case No. 24/3101 SC/CIVL

BETWEEN: Claymore Limited

Claimant

AND: Daniel Kalulu Kalsrap

First Defendant

AND: George Taleo

Second Defendant

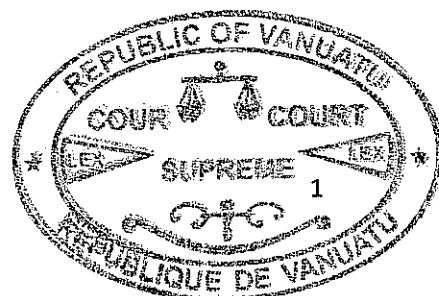
AND: Director of Lands

Interested Party

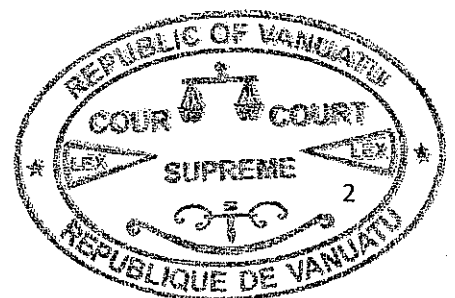
Date: 17 April 2025
Before: Justice V.M. Trief
Counsel: Claimant – Mrs M.N. Ferrieux Patterson/Ms L. Raikatalau
Defendants – Mr S. Kalsakau
Interested Party – Mr F. Bong

**DECISION AS TO SECOND DEFENDANT'S URGENT APPLICATION TO VARY THE COURT
ORDERS DATED 24 DECEMBER 2024**

1. On 1 October 2024, the Claimant Claymore Limited filed the Claim seeking a declaration that lease title no. 12/0844/238 located at Honeymoon Beach at Pango on Efate island ('lease 238') is outside the disputed custom area of Eleu-Eraukot, the subject of EIC 03/92 and LAC 1/2009, and permanent restraining orders against the First Defendant Daniel Kalulu Kalsrap and the Second Defendant George Taleo entering onto lease 238 and threatening or intimidating the Claimant and its workers, agents and associates in their conduct as lessee of the lease.
2. The Claim is disputed: Second Defendant's Defence filed on 14 February 2025, Interested Party's Defence filed on 26 March 2025 and First Defendant's Defence filed on 11 April 2025.



3. Also on 1 October 2024, Claymore Limited filed Application for Interim Orders and Interim Restraining Orders (the 'Claimant's Application'), and the Sworn statements of Juanick Harris and Nazario M.P. Fiakaifonu in support. Proof of service on the Defendants was filed on 18 October 2024 and on 23 October 2024.
4. Mr Kalsrap and the Interested Party the State did not file any submissions in response to the Claimant's Application. Mr Taleo filed submissions in response on 3 December 2024.
5. On 24 December 2024, the Court granted the Claimant's Application and issued restraining orders restraining the Defendants from entering lease title no. 12/0844/238 at Honeymoon Beach, Pango and ordered them to remove all of their unauthorized fencing and all cattle from the leased land.
6. On 14 February 2025, the Second Defendant filed Urgent Application to Vary Court Orders seeking the setting aside of the restraining orders restraining the Defendants' entry onto the leased land (the 'Application') and the Sworn statement of George Taleo. Proof of service on Claimant filed on 19 February 2025.
7. On 2 April 2025, the Claimant filed submissions in response to the Application, and the Sworn statement of Douglas Patterson in support.
8. On 8 April 2025, the Second Defendant filed Sworn statement of George Taleo in reply to the sworn statement of Douglas Patterson.
9. On 10 April 2025, the Claimant filed objections to the Sworn statement of George Taleo filed on 8 April 2025.
10. On 11 April 2025, the First Defendant filed submissions supporting the Application and 'insisting' that the restraining orders be removed entirely.
11. I overrule the objections made to Mr Taleo's sworn statement filed on 8 April 2025 as the Court's consideration set out in its 24 December 2024 Orders does not mean that any matter is *res judicata*. I reject such submission by Ms Raikatalau. As to matters of custom raised, it is not appropriate to rule those matters inadmissible on an interlocutory application.
12. Having considered the Application, the Second Defendant's sworn statements, the Claimant's sworn statement and submissions, and the First Defendant's submissions, the Application is **granted** for the following reasons:



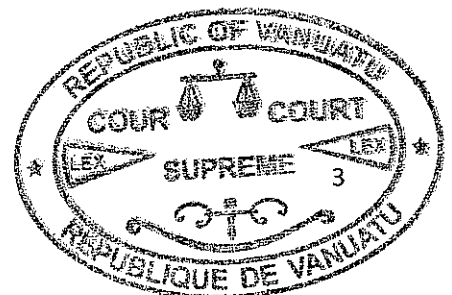
- a) The Claimant's Application for Interim Orders was made pursuant to rules 7.1 and 7.5 of the *Civil Procedure Rules* ('CPR'). In considering that Application, I took into account the factors set out in rule 7.5 of the CPR;
- b) However, the Claimant had already filed the Claim on 1 October 2024;
- c) Further, the Court of Appeal held as follows in *Teaching Service Commission v Director General in the Ministry of Education and Training* [2024] VUCA 7 at [60]:

60. *Rule 7.5 should not be used by trial courts to assess whether to grant an interlocutory order when the application has been filed at the time or subsequent, to the filing of proceedings. There are good reasons why this is so. A Rule 7.5 application will be before there are any pleadings. It will typically involve an urgent request to stop an action by another. It will typically be sought without serving the other potential party with the relevant documents to the potential litigation. And so, the court will not have the benefit of opposing evidence or submission. These factors all point to the need for caution by the court in granting such an injunction. The standard in R 7.5(3) reflects such a need. The standard an applicant is required to reach for such an interim injunction is therefore properly high. These factors, other than possible urgency, will not apply when there is an interlocutory application in proceedings which are current. The Court will have the benefit of pleadings and a contest on the facts and law.*

- d) Accordingly, in applying the rule 7.5 criteria to the Claimant's Application, I applied the wrong test;
- e) In the circumstances, I must reconsider the Claimant's Application;
- f) The Court of Appeal went on in *Teaching Service Commission v Director General in the Ministry of Education and Training* [2024] VUCA 7 at [64] to set out the following factors that the Court should consider in an application for an interlocutory order:

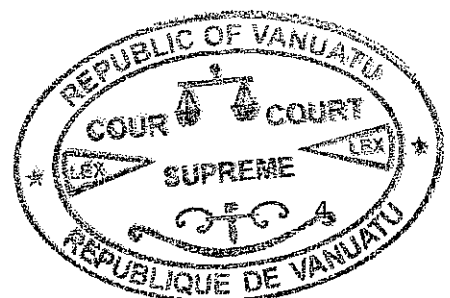
64. *They are in summary:*

- (a) *The first enquiry is what are the legal or equitable rights in the case before the court and does the injunction relate to those rights in the meantime? The purpose of an injunction is to preserve those rights;*
- (b) *Is there a serious question to be tried in the litigation? This is the New Zealand test. In Australia the test is perhaps slightly different. In Australia, the test is whether the claimant has made out a prima facie case in the sense that, if the evidence filed at the time of the interlocutory application remains the same at trial will the claimant probably be entitled to the relief sought?*
- (c) *The balance of convenience test. Here the court must balance the risk of refusing the order and doing a possible injustice to the applicant, against the grant of the order and doing a possible injustice to the respondent. There will be a variety of relevant factors. They are likely to include the attraction of*



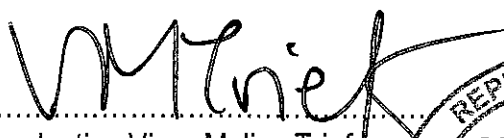
preserving the status quo; the claimant's need to show injury that could not be adequately met by damages; whether there is a viable undertaking as to damages, such that if the injunction is granted whether the respondents may be able to enforce the undertaking if later needed; and

- (d) *Overall justice. Here the court might consider whether the applicant comes to court with clean hands. This part will require the judge to make an overall assessment of where justice might lie in granting or refusing the application.*
- g) As to the first enquiry, the legal or equitable rights before the Court include Claymore Limited's rights as the registered proprietor of the 238 lease including to the quiet enjoyment of the lease, and the Defendants' asserted rights pursuant to para. 17(g) of the *Land Leases Act* [CAP. 163]. All are in possession of at least a portion of the leased land. The purpose of restraining orders (an injunction) being to preserve those rights, this would not be achieved by restraining the entry of the Defendants onto the leased land as a result of the interlocutory application, namely, the Claimant's Application;
- h) As to the second enquiry, I consider that there are serious questions to be tried in the litigation including the Defendants' asserted rights pursuant to para. 17(g) of the *Land Leases Act* and whether permanent restraining orders be granted against the Defendants. It is also foreshadowed in the First Defendant's Defence that a Counter Claim will be filed alleging that the registration of the 238 lease was made or obtained by fraud or mistake contrary to s. 100 of the *Land Leases Act*;
- i) Thirdly, I consider that the balance of convenience does not favour the making of a restraining order as to entry when the Defendants have raised an overriding right to occupy pursuant to para. 17(g) of the *Land Leases Act*. Rather, the balance favours that the Court maintain the status quo which is the continued occupation and use of the land subject to the outcome of this matter after trial to determine the Defendants' claimed rights under the said para. 17(g);
- j) Finally, I consider that overall justice does not favour the making of a restraining order as to entry at an interlocutory stage when the Defendants are in possession of a part of the leased land and claim to have been in continuous occupation of and used for generations. Such orders are to be made after trial and it is improper to do so on an interlocutory application when the defences have raised their overriding rights pursuant to para. 17(g) of the *Land Leases Act* as a triable issue; and
- k) For the foregoing reasons, the Application is **granted** and the restraining orders dated 24 December 2024 must be varied.



13. Accordingly, the Restraining Orders dated 24 December 2024 are **varied** as follows:
- a) Paragraph 8(a) of those Orders is **set aside**; and
 - b) Paragraph 8(b)(i) of those Orders is **set aside**.
14. The Defendants are to file and serve Counter Claim **by 4pm on 8 May 2025**.
15. The Claimant is to file and serve Reply to Defence, if any, Defence to Counter Claim and sworn statements **by 4pm on 5 June 2025**.
16. The Defendants are to file and serve sworn statements **by 4pm on 26 June 2025**.
17. This matter is listed for Conference **at 1.20pm on 27 June 2025**.
18. As previously ordered, listing for Trial **at 9am on 11 March 2026**.

**DATED at Port Vila this 17th day of April 2025
BY THE COURT**


Justice Viran Molisa Trief

