

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

Civil Case No. 147 of 2009

**BETWEEN:** STAGE FOUR LIMITED  
First Claimant

**AND:** ROBERT JOHN HERD  
Second Claimant

**AND:** TERRY HANNAM  
First Defendant

**AND:** BEACHCLUB LIMITED  
Second Defendant

**AND:** SILVER HOLDINGS LIMITED  
Third Defendant

**AND:** SEASCAPE FOUR LIMITED  
Fourth Defendant

**AND:** DIRECTOR OF LANDS  
Fifth Defendant

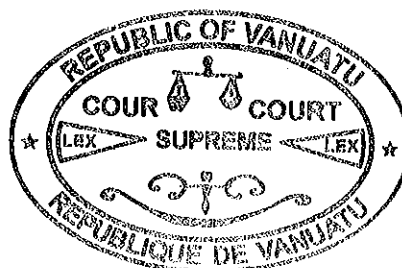
**Coram:** Justice D. V. Fatiaki

**Counsels:** Mr. N. Morrison for the Claimants  
Mr. J. Ozols for the Defendants

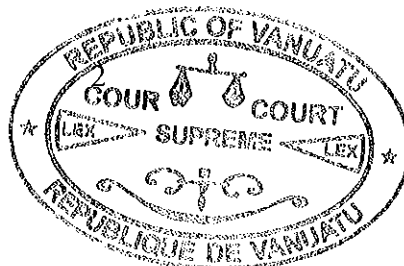
**Date of Decision:** 21 October 2011

**RULING**

1. In this application the defendants seek an order for security for costs against the second claimant **Robert John Herd** in the sum of **VT2,000,000**. The first defendant/applicant filed a sworn statement in support of the application in which he deposes to the following relevant facts:
  - (a) Mr. Herd's permanent residence is in Brisbane, Queensland, Australia and he has not visited Vanuatu since August 2008;
  - (b) Mr. Herd has **no** assets either in Vanuatu or in Australia in his own name;



- (c) The first claimant company is solely organized for the purpose of sheltering Mr. Herd against any claims of litigation in Vanuatu;
  - (d) There are a number of other Supreme Court claims pending against Mr. Herd and/or the first claimant company;
  - (e) His concern that any cost orders made against Mr. Herd in Vanuatu will not be satisfied;
  - (f) An order in December 2010 of the **High Court of New Zealand** for Mr. Herd to pay indemnity costs to the first defendant/applicant in the sum of **NZ\$37,911.87** has not been met despite a written demand being made for payment of the amount to Mr. Herd's local solicitors who have, in response, advised the first defendant "... *you have to deal with Mr. Herd directly*".
2. The application is orally opposed by claimant's counsel on the basis that the claim seeks an order for an account to be taken of the joint venture business entered into between the parties with a view to the acquisition of various real estate properties in Vanuatu in the names of the defendant companies of which "... *Mr. Herd is the beneficial owner of half of the shares in the third and fourth defendants*".
  3. Although given time to do so, **no** sworn statement has been filed by Mr. Herd disputing or denying the various factual matters deposed by the applicant including, his place of permanent residence in Australia; the absence of any assets in Vanuatu in his personal name **and** what steps (if any) have been taken by him to pay the outstanding indemnity costs order.
  4. In reply, defence counsel whilst not denying Mr. Herd's beneficial ownership in the defendant companies, nevertheless, highlights the defendant's undenied assertion that of the **VT54 million** purchase price for the four (4) islands enumerated in the claim, the defendant provided in excess of **VT50 million**, whereas Mr. Herd's contribution was approximately **VT2 million** which reflects the value of his beneficial interest in the assets of their joint venture. Plainly the applicant has more "*tied up*" in the venture on that score alone than the second claimant.
  5. There is not the slightest doubt that relations have soured considerably between the parties since the formation of their joint venture business, with each party seeking accounts against the other. There are also claims, and accusations and counter-accusations, of "*behind-the-back*" unauthorised dealings causing loss of profits, and even, allegations of "*fraud*" being made against the first defendant in the sale of a block of land at Narpow Point.



6. Be that as it may, the relevant provisions under which the application is brought are **Rules 15.18, 15.19 and 15.20** of the **Civil Procedure Rules 2001** ("CPR"). **Rule 15.18** gives the Court power on the application of a defendant to order the claimant to give security for the defendant's costs of the proceeding and **Rule 15.19** sets out what the Court has to be satisfied about **before** it may make a security for costs order including:

*"(d) The claimant is ordinarily resident outside Vanuatu; or*

*.....*

*(f) The justice of the case requires the making of the order".*

7. Finally **Rule 15.20** enumerates the various matters that the court may have regard to in deciding whether to make a security for costs order including (so far as relevant):

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

*(b) Whether the proceeding is genuine;*

*.....*

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

*.....*

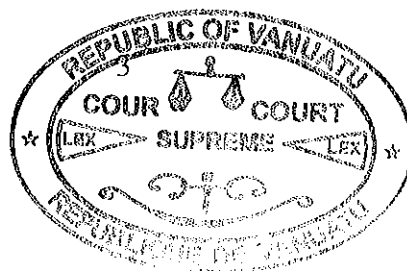
*(h) The costs of the proceeding".*

8. On the undisputed evidence before the Court I am satisfied that the application passes the threshold requirement in establishing that the second named claimant **Robert John Herd** is "... *ordinarily resident outside Vanuatu*".

9. As for the matters set out in **Rule 15.20** above, I am satisfied that the dispute and the proceeding between the parties is "*genuine*", and given the identity in the primary relief, sought by both parties viz "*an account*", there is every prospect of the primary relief being granted, especially, as any dealings with the real estate assets under dispute has been restrained until further order since December 2009.

10. In this latter regard I note that there has **not** been an application by the defendants to dissolve the injunction. Similarly there has been **no** activity by the claimant with a view to progressing the claim since it was last adjourned in March 2010 and therefore, presumably, **both** parties are content to let matters remain as they are.

11. Although claimant's counsel submits that the application is brought "*to frustrate and obstruct the progress of the claim*", there is **no** suggestion that Mr. Herd could not afford to put up any security for costs or that such an order would stifle the proceedings or seriously prejudice the claimant.




Additionally, no sworn statement has been filed in support (as there could have been) nor has there been any tangible efforts taken by the claimant to advance the claim including making a proposal for the taking or preparation of an account of the joint venture business by an independent third party which would go some way towards resolving this dispute, besides waiting, for "*some sensible settlement offer*" from the first defendant.

12. In the final analysis, I am satisfied that the "*justice of the case requires the making of an order*" for security for costs against the second claimant in the sum of **VT1 million** which is ordered to be provided by way of an irrevocable bank guarantee deposited with the Chief Registrar by 11 November 2011.
13. The applicant having succeeded in the application is awarded costs summarily assessed at **VT40,000** payable by the second claimant on or before 14 November 2011.

**DATED at Port Vila, this 21<sup>st</sup> day of October, 2011.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

