

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

**Civil Case
No. 21/3027 SC/CIVL**

BETWEEN: GS Finance Ltd (in Liquidation)
Claimant

AND: Gil Jang Yoon
Defendant

Date: 7 August 2023
Before: Justice V.M. Trief
Counsel: Claimant – Mr J.C. Malcolm
Defendant – Mr R.E. Sugden

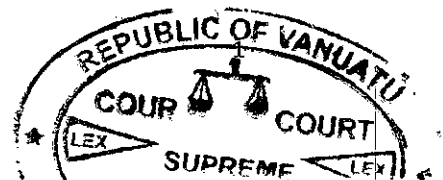
DECISION AS TO DEFENDANT'S APPLICATION THAT THE CLAIM BE STRUCK OUT

A. Introduction

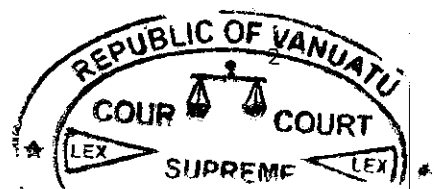
1. This was an application by the Defendant Gil Jang Yoon following receipt of particulars of the Claim.
2. The Claimant GS Finance Ltd (in Liquidation) ('GS Finance') is suing Mr Gil, an alleged director of GS Finance, for alleged theft and/or conversion of company property and for money had and received in the sum of VT29,027,140.

B. Background

3. GS Finance is a duly registered company in liquidation. It is able to sue and be sued through the liquidators.
4. Mr Gil is an individual residing in Port Vila, Vanuatu and is a shareholder in GS Finance.
5. On or about March 2020, GS Finance was placed in liquidation due to shareholder disputes only.
6. On 15 September 2021, GS Finance filed the Claim alleging that Mr Gil misappropriated company funds totalling VT29,027,140 between July 2018 and 13 May 2020 when he had the sole care and control of the entire business of the company.



7. Paragraph 8 of the Claim alleges as follows:
8. *Whilst the Defendant had care and control of the entire business of the Claimant between July 2018 and 13 May 2020, he misappropriated a total sum of money in the amount of VT29,027,140 (the company property).*
8. Defence filed on 15 October 2021 disputing the Claim.
9. On 9 May 2023, Defendant's Application for Particulars filed. The orders sought included, relevantly, para. 2 in the following terms:
2. *That the Claimant provide the following particulars for paragraph 8 of the Claim:*
- (i) *Whether the alleged misappropriation was of one sum or a number of misappropriations of sums that add up to VT29,017,140.*
- (ii) *If it is alleged that it was the one sum only, what is the Defendant alleged to have done to, or in respect of that sum, or, in other words, how is it alleged that he dealt with that sum?*
- (iii) *How is it alleged the Defendant's dealing with that sum amounted to misappropriation?*
- (iv) *If the alleged misappropriation was of more than one sum:*
- (a) *As to each alleged sum, how, when and where is the Defendant alleged to have dealt with the sum?*
- (b) *As to each alleged dealing how is it alleged that the dealing amounted to misappropriation.*
10. By Orders dated 2 May 2023, I had required GS Finance to file and serve submissions in response to the Application for particulars and stated that the Court would decide the Application on the papers after that.
11. By Orders dated 30 May 2023, I set out that no submissions in response were filed, agreed that the requested particulars be provided and granted the Application.
12. On 9 June 2023, Particulars were filed including, relevantly, under the heading, "QUESTION 2", at para. 2) the following:
- 2) *Paragraph 8 of the claim:-*
- 2.i *There were a number of misappropriations.*
- 2.ii *It was not one sum only. The Claimant has no knowledge what he did with the VT29,027,140 that he misappropriated.*
- 2.iii
- a) *He used his personal account for business transactions.*
- b) *Cash was taken and never banked to its company.*
- c) *Company transactions were done using the Defendant's personal account.*
- d) *There was no accounting to the company, or lawful shareholders or directors meeting agreeing to such actions.*



e) *Was theft of the company property.*

Removal wrongfully of company funds without lawful authority from the company is misappropriation of company funds.

2.iv a) *The Claimant has no knowledge how the Defendant dealt with the VT29,027,140 he misappropriated since that he did not repay the funds to the company.*

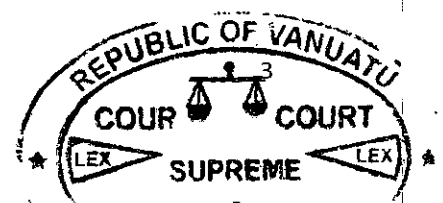
b) *He stole the company money.*

AND as set out in the various liquidator reports in this matter relied on as true and correct by the Claimant and repeated herein in their entirety.

13. On 13 June 2023, Defendant's Application was filed in which Mr Gil sought orders for the Claim to be struck out and costs for failure to provide the particulars sought in paras 2(iv)(a) and (b) of the Application for Particulars (the 'Application').
14. By Orders dated 16 June 2023, I required GS Finance Ltd to file submissions in reply then gave Mr Gil opportunity to file submissions in reply and the Court would determine the Application on the papers after that. Both parties have taken the opportunity to file those submissions.

C. Application and Submissions

15. By the Application, Mr Gil seeks orders for the Claim to be struck out and costs of the Application and of the proceeding. The Application is made pursuant to rule 6.8(2) of the *Civil Procedure Rules* ('CPR').
16. The grounds for the Application are that by paras 2(iv)(a) and (b) of the Application for Particulars, Mr Gil sought in the event more than one misappropriation was alleged, the factual allegations concerning each misappropriation that GS Finance would seek to be proved so that he would be in a position to defend each alleged misappropriation. Further, that GS Finance's particulars on 9 June 2023 stated that more than one misappropriation was alleged but provided none of the particulars sought by paras 2(iv)(a) and (b). It is submitted that as a result, Mr Gil's knowledge of how GS Finance intends to prove that he misappropriated the sums and his ability to defend this primary allegation against him is still zero and his application for particulars has been a complete waste of time and costs within rule 6.8(1) of the CPR.
17. In response, Mr Malcolm submitted (in Claimant's Submissions filed on 6 July 2023) that GS Finance answered each of the question posed in paras 2(iv)(a) and (b) of the Application for Particulars. He submitted with respect to Mr Sugden, that the wrong questions were asked. He submitted that it was suggested orally that Mr Sugden is requiring information leading the Liquidator to finding the Defendant misappropriated VT29,027,140 at the time he took physical and actual control of the company. Mr Malcolm submitted that that is a very different question than asked. Further, that GS Finance had filed sworn statements, which pursuant to rule 11.7(1) of the CPR had become evidence in the proceeding, as to the amounts individually



taken and where from. He submitted that Mr Sugden has more than enough evidence to have answered the questions that he should have asked.

18. In reply, Mr Sugden submitted (in Defendant's Submissions filed on 12 July 2023) that in light of the particulars, there is no indication of how stealing (which is different from misappropriation) is said to have occurred. He submitted that the Claim must clearly identify each alleged transaction of Mr Gil giving full particulars of what the transaction consisted of and how it is said to amount to either misappropriation or stealing. However, there is nothing in the Claim and Particulars that enables Mr Gil to defend even one of the unknown number of alleged misappropriation or stealing and the Claim is, therefore, critically deficient.
19. Mr Sugden submitted that Mr Malcolm's submissions admit that GS Finance does not know what Mr Gil did with the money. He submitted that to prove misappropriation by a director of the company's money it is necessary to plead and prove what was done with the money to show that it was not applied for the company's purposes. Similarly, in order to establish stealing it is necessary to plead and prove what has been done with the money in order to prove "an intention to permanently deprive" (i.e., stealing). He submitted that GS Finance did not have the evidence necessary to prove the allegations made, the Claim should never have been filed and it is a clear abuse of process therefore should be struck out.

D. Discussion

20. Rule 6.8 of the CPR provides as follows:

6.8 (1) *If:*

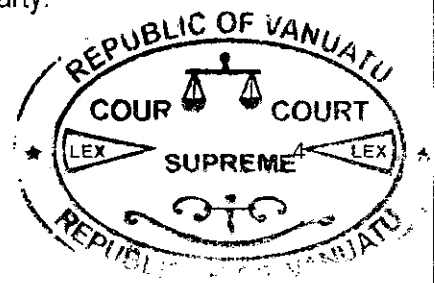
(a) *A party does not comply with an order made at a conference by the time fixed for complying; and*

(b) *another party incurs expense because of this;*

the judge may order costs against the non-complying party or his or her lawyer.

(2) *If a party or his or her lawyer has failed to comply with an order made at a conference without reasonable excuse, the judge may order that the party's claim or defence be struck out.*

21. The Orders dated 30 May 2023 granting the Application for Particulars and requiring GS Finance to provide the particulars sought were not made at a conference. Those Orders were made following the Court's determination of the Application for Particulars on the papers.
22. It may simply be that the wrong rule was referred to – the CPR also contains rule 18.11 which provides if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding, the Court may make an order against the non-complying party.



23. In answer to question 2(i) of the Application for Particulars, GS Finance answered by way of the Particulars filed on 9 June 2023 that, "There were a number of misappropriations."

24. The following question was posed at para. 2(iv)(a) of the Application for Particulars:

2.
(iv) *If the alleged misappropriation was of more than one sum:*
(a) *As to each alleged sum, how, when and where is the Defendant alleged to have dealt with the sum?*

25. The answer given in the Particulars was as follows:

- 2.iv a) *The Claimant has no knowledge how the Defendant dealt with the VT29,027,140 he misappropriated since that he did not repay the funds to the company.*

26. I consider that the question put at para. 2(iv)(a) of the Application for Particulars has been answered. It was asked how the Defendant dealt with each sum allegedly misappropriated. The Claimant answered that it has no knowledge how the Defendant dealt with the money he misappropriated and has therefore answered the question.

27. The question posed at para. 2(iv)(b) of the Application for Particulars was as follows:

- 2.iv
b) *As to each alleged dealing how is it alleged that the dealing amounted to misappropriation.*

28. The answer given in the Particulars was as follows:

- 2.iv ...
b) *He stole the company money.*

29. I consider that the question put at para. 2(iv)(b) of the Application for Particulars has also been answered. The Claimant's answer is that the company money was stolen; following on from the preceding particular that the Defendant has not repaid the misappropriated funds to the company.

30. In his reply submissions, Mr Sugden stated that there is no indication of how stealing (which is different from misappropriation) is said to have occurred. I note that no particulars have been sought of para. 11 of the Claim which set out the allegation of theft. It is a matter for the Claimant how it pleads its case – it must bear the consequences if ultimately its pleading of its case is deficient.

31. In the circumstances, I decline to strike out the Claim.

E. Result and Decision

32. For the reasons given, the Defendant's Application filed on 13 June 2023 is **declined and dismissed**.

33. The Defendant is to pay the Claimant's costs of the Application as agreed or taxed by the Master.

DATED at Port Vila this 7th day of August 2023
BY THE COURT


Justice Viran Molisa Tria

