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

Civil
Case No. 24/1855 SC/CIVL

BETWEEN: DAVID LEY OUTHRED
Claimant

AND: BERNICE EILEEN MUNRO, as the Executrix of the Estate of late Andrew Ross Munro
Defendant

Date of Trial:	20 and 21 November 2024
Submissions:	4 December 2024
	10 December 2024, 22 January 2025
Date of Decision:	7 March 2025
Before:	Justice M A MacKenzie
Counsel:	Mr N Morrison for the Claimant
	Mr M Fleming for the Defendant

DECISION

Introduction

1. Mr Outhred and the late Andrew Munro met in 1989 and were close friends and business associates. Mr Munro was a partner in an accounting firm, Moore Rowlands and Mr Outhred was the Manager of the Investors Trust.

2. Mr Munro had various business interests and in 1995 incorporated two companies, Gaming Services International Inc ("GSI Inc") and a locally registered company, Gaming Services International Limited ("GSI Ltd").

3. GSI Inc was incorporated on 26 July 1995 as an International Company. GSI Ltd, a local company, was incorporated on 26 September 1995. The purpose of GSI Ltd was to

pursue opportunities in the gaming sector. It is common ground that GSI Inc was the holding company for GSI Ltd, as GSI Inc was the beneficial owner of the 250,000 shares in GSI Ltd pursuant to a nominee declaration. This was the position when Mr Warmington, the auditor for GSI Ltd reviewed the physical records at the Vanuatu Financial Services Commission (VFSC) on 1 August 2012.There is evidence that on 1 January 2012, GSI Ltd passed a resolution cancelling the declaration of trust in favour of GSI Inc and resolved that new declarations of trust be issued in favour of Mr Munro as beneficial owner of the shares in GSI Ltd.[1] There is no evidence as to the circumstances or whether that nominee declaration was lodged at VFSC. So, I will proceed on the basis that the shares in GSI Ltd were beneficially owned by GSI Inc.

4. In the claim, Mr Outhred asserts that he had an oral agreement with Mr Munro to acquire a 10% shareholding in GSI Inc.[2] For the shareholding, he says he paid Mr Munro VT 1 million. Mr Outhred says that the VT 1 million payment for the shares was made in April 1998, although Mr Outhred believed initially that the payment was made in 1995, at the time of incorporation. The agreement was that he would be a passive shareholder with no input into the management operations.

5. Mr Outhred said that Mr Munro offered him shares in GSI. For many years Mr Outhred believed that he had been offered shares in GSI Ltd. He said so when cross examined and on a number of occasions before the claim was filed. He says that it was not until after Mr Munro's death that he became aware that his asserted shareholding was in GSI Inc.

6. No declaration of trust was ever issued for the shareholding.[3] However, Mr Outhred relies, in part, on a declaration of trust, disclosed to him after he notified his claim for shares in GSI Ltd. The declaration of trust will be considered in more detail later in the judgment, but briefly on 30 April 2004, an Allan Palmer signed a declaration of trust to the effect that he held 100 shares in GSI Inc beneficially for others, including 10 shares for Mr Outhred.

7. Mr Outhred asserts he was paid dividends by GSI Ltd between 2011 and 2020. It is not in dispute that GSI Ltd made payments of VT 30,000 per month to Mr Outhred over that period. They were in fact coded as director's fees, although Mr Outhred was never a director.[4]

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[1] *D3*

[2] *At paragraph 10 of the claim.*

[3] *Paragraph 7, Mr Outhred's Sworn Statement filed on 18 June 2024*

[4] *Evidence of John Warmington*

8. Mr Munro passed away on 27 September 2022. Mr Outhred became aware of this when he saw a notice in the Vanuatu Daily Post inviting persons with claims on the estate to lodge such claims. Mr Outhred then notified a claim that he held shares in GSI Ltd, and that Transpacific Trust was his nominee.

9. In the claim filed on 18 June 2024, Mr Outhred seeks a declaration that he held a 10% shareholding in GSI Inc. The claim is disputed by Bernice Munro, the executor of Mr Munro's estate. The defence position is that Mr Outhred did not have a 10% shareholding in GSI Inc, and points to a lack of documentary evidence to support the claim.

10. Mr Outhred maintains that Mrs Munro acknowledged that he held shares in GSI. Mrs Munro disputes any such acknowledgement. It is unnecessary for me to resolve that factual conflict as it is not material to the claim..

Issues

11. There are three issues to determine:

    a) Evidential objections

    b) Should the Court make a declaration that Mr Outhred held a 10% shareholding in GSI Inc at the date of Mr Munro's death?

    c) If so, is the claim nevertheless statute barred?

Evidential Objections

12. Shortly before the trial, Mr Fleming filed an application objecting to a large number of aspects of Mr Outhred's sworn statements.[5] Mr Morrison took a pragmatic approach to the objections and agreed that various aspects of the evidence could be excluded.

13. Nevertheless, I was required to determine a number of disputed parts of the evidence, at the outset of the trial. After hearing from counsel, I ruled on the disputed evidence. In my view, this was an unnecessary step and a distraction from the real issues. The Court would have been able to consider the evidence, determine relevance and weight and

[5] *Mr Outhred filed two sworn statements – 18 June 2024 (C1) and 28 October 2024 (C2)*

make factual findings without needing to resort to a line-by-line analysis of the relevance and admissibility of parts of the evidence.

14. Evidence is admissible if it is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding, subject to any other exclusionary rule. The threshold for admissibility of evidence is low. Bare relevance is required. What the Court needs to decide is whether Mr Munro held a 10% shareholding in GSI Inc on trust for Mr Outhred. The requires an assessment of what was agreed (or not) in 1995 and whether Mr Munro did offer shares in GSI Inc in exchange for a VT 1 million investment of seed capital by Mr Outhred.

15. Mr Fleming objected a lot of Mr Outhred's evidence on the basis that it was hearsay, as Mr Munro is unavailable as a witness as he is deceased. Yet, ironically, parts of the defence evidence fell into the same category. Mr Morrison submitted that the background and discussions come within the "*res gestae*" - incidents in the transaction. While the evidence is hearsay,[6] I tend to agree that the evidence is part of the res gestae and is admissible. There would be an air of unreality if Mr Outhred was unable to give evidence about the lead up and background circumstances of what he says was an offer to acquire shares in GSI Inc which would be held on trust by Mr Munro. The weight to be given to the evidence is another matter, bearing in mind that it cannot be tested by cross examination.

Mr Outhred's sworn statement filed on 18 June 2024

Paragraph	Objection as per list of objections filed on 15 November 2024	Admissibility Decision
Paragraph 4	Hearsay, speculation, conjecture.	Admissible. It is relevant background information. It is a matter of weight.
Paragraph 5	Hearsay, irrelevant, conjecture.	Admissible. This is what Mr Outhred says was the agreement between he and Mr Munro. It is aprt of the res gestae. It is a matter of weight.
Paragraph 6	Hearsay, speculation,	Admissible, with a handwritten amendment. Part of the res gestae. It is a matter of weight. It is certainly

[6] *It is hearsay because there is evidence of statements made on an earlier occasion by Mr Munro and offered to prove the truth of their contents*

	irrelevant. Attempts to give a legal opinion on the main issue' which is for the Court to decide.	relevant that Mr Munro is said to have used the word "*GSI*" interchangeably to refer to both GSI Inc and GSI Ltd.
Paragraph 7	Hearsay, speculation, irrelevant, conjecture	Admissible. It is not hearsay, and is clearly relevant because Mr Outhred explains why there was no declaration of trust.
Paragraph 8	Hearsay, speculation, irrelevant, conjecture. For Court to determine if shareholding.	Admissible as is relevant as it relates to the payment of the shares, except from the sentence commencing "*However...*" That evidence is inadmissible because it is irrelevant and contains inadmissible opinion.
Paragraph 9	Hearsay, speculation, irrelevant, opinion, conjecture	Inadmissible as it is irrelevant to the claim. Whether or not Mr Outhred was offered more shares in the early 2000's is immaterial to the issues to be decided.
Paragraph 10	Two objections- Hearsay, speculation, irrelevant, opinion, conjecture. Attempts to draw legal conclusions.	First objection – admissible. Perhaps inelegantly worded but is relevant as it relates to Mr Outhred's asserted VT 1 million payment and when it was made. Second objection – the evidence is irrelevant and therefore inadmissible
Paragraphs 11	Opinion, hearsay, irrelevant, and attempts to give legal conclusion only Court can decide, is derogatory and speculative	Agreed that part of the paragraph can be struck out, from the sentence starting with "*I learned that Mr Fleming...*"
Paragraph 13	Opinion, hearsay, irrelevant, and attempts to give legal conclusion only Court can decide, is speculative conjecture	Agreed that paragraph is to be struck out.

Paragraphs 14 & 15	Opinion, hearsay, irrelevant, and attempts to give legal conclusion only Court can decide, is speculative conjecture	Admissible. It is not hearsay. The evidence has relevance to the Claimant's case. Whether it is ultimately relevant to the issue to be decided is another matter.
Paragraphs 18, 19 and 20.	Opinion, hearsay, irrelevant, and attempts to give legal conclusion only Court can decide, is derogatory, scandalous and speculative conjecture	The first sentence of this paragraph is admissible, apart from the ethnicity of the buyer. The evidence is relevant to the Claimant's case. The ethnicity of the purchaser is irrelevant and therefore inadmissible. Note: it was agreed that the balance of paragraph 18, and paragraphs 20 and 21 were inadmissible and struck out.
Paragraph 21	Hearsay, speculative conjecture, irrelevant, opinion.	Parts of this paragraph are irrelevant and therefore inadmissible. The bank's requirements are irrelevant to the issues to be decided. -the sentence starting " *The bank's requirement..*" and the words "*to comply ..*" in the last sentence are struck out. The fact that the shares in GSI Inc were transferred into Mr Munro's name in 2004 is uncontroversial and relevant.
Paragraph 22-26	Opinion,irrelevant, and attempts to give legal conclusion only Court can decide, is derogatory, scandalous and speculative conjecture	Paragraphs 22-26 are struck out by agreement.

Mr Outhred's sworn statement filed on 28 October 2024

Paragraph	Objection	Admissibility Decision
Paragraph 8	Irrelevant, conjecture and opinion.	Admissible. It has bare relevance in terms of the asserted circumstances leading up to the filing of the claim. The word "*refused*" is replaced with "*failed*". Whether it has any relevance ultimately is another

		matter.
Paragraph 9	Opinion, irrelevant, and attempts to give legal conclusion only Court can decide, is derogatory, scandalous and speculative conjecture.	Admissible as amended. Mr Outhred was responding to Mrs Munro's sworn statement. There is bare relevance to the Claimant's case. Mr Outhred's view as to whether the caution was or was not unlawfully removed is inadmissible opinion, so the word "unlawfully" is struck out. Note: The second sentence of this paragraph was struck out by agreement.
Paragraph 10	Irrelevant, opinion and attempts to give legal conclusion only Court can find.	Admissible as it is relevant. The word "*refused*" is replaced with "*failed*". An issue in the proceeding is the fact that GSI Inc is the holding company and GSI Ltd is its subsidiary, and the legal effect of that.
Paragraph 11	Not evidence	Struck out by agreement.
Paragraph 17	Irrelevant, speculative conjecture, opinion and attempts to give legal conclusion only Court can find.	Admissible as it is relevant to the issue of the asserted shareholding, except from the words, "*Andrew spent....*" That sentence is irrelevant.
Paragraph 17 C.6/7/9.	Attempts to give legal conclusion only Court can find.	Paragraph 17 C.6- Admissible. Relevant to the issues. Paragraph 17 C.7- Struck out by agreement. Paragraph 17 C.9- Struck out by agreement.

Issue Two: Should the Court make a declaration that Mr Outhred held a 10% shareholding in GSI Inc at the date of Mr Munro's death?

16. In the claim Mr Outhred asserts that there was an oral agreement between he and Mr Munro that he would acquire a 10% shareholding in GSI Inc for VT 1 million. Mr Outhred believed he paid the VT 1 million in 1995 at the time of incorporation. After a review of banking records (which ANZ bank confirmed did not go as far back as 1995), Mr Outhred says he paid the VT 1 million for the shares in 1998. He accepts it was a mistake not to have any documentary evidence, such as a declaration of trust, to support the agreement reached between he and Mr Munro, explained by their close personal and business relationships.

17. As noted, Mr Outhred says he was offered a 10% shareholding in GSI in exchange for VT 1 million. Mr Outhred's evidence is that Mr Munro used the word "GSI" interchangeably to refer to both GSI Inc and GSI Ltd. Mr Outhred believed he agreed to acquire a 10% shareholding in GSI Ltd, and not GSI Inc. In his evidence during the trial, Mr Outhred said he had always believed he was a shareholder of GSI Ltd. He had communicated that belief on a number of occasions are set out below.

18. In an email dated 27 October 2022 to Mr Fleming, Mr Outhred said:

> *"In 1995 Andrew registered a local company named GSI Limited (GSI)[Co. No. 5269].*
> *GSI's purpose was to act as Manager and operate Club De Sanma in Luganville, Santo.*
> *GSI still acts in that manner.*
> *I was a founding shareholder of GSI.*
> *I still have a shareholding of 25,000 shares or 10% of the Company.These shares are held by Transpacific Trust Limited, which acts as my Nominee.*
>
> *I regularly received a monthly dividend from GSI until the covid lockdowns in 2020."*

19. In another email dated 13 May 2023 to Mr Fleming, Mr Outhred said:

> "I *have an interest in only one entity, being GSI Ltd"*

20. On 30 May 2023 Mr Outhred lodged a caution against a property owned by GSI Ltd. The basis for registering the caution was that Mr Outhred claimed an interest in the assets and shares of GSI Ltd.[7]

21. On 15 June 2023 Mr Morrison sent an email to Mr Fleming confirming that he had been instructed by Mr Outhred who, "*is a shareholder of GSI Ltd.*"

22. Finally, on 18 July 2023, Mr Outhred signed a statutory declaration setting out in detail the background to the acquisition of shares in GSI Ltd. He explained that GSI Ltd was incorporated in September 1995, when Mr Munro pursued a business opportunity in Santo. The Club De Sanma approved GSI to manage and operate the Club's gaming facilities. Mr Outhred said that at the time of GSI's incorporation, Mr Munro was short of

[7] *D4*

funds so asked him if he would provide the seed capital in exchange for a 10% shareholding in GSI. He accepted. He said that he requested that his shareholding be kept discreet because at the time he was employed by an opposition trust company, and so it was agreed that he would be a silent shareholder of GSI.

23. He further said that GSI was incorporated using two of Moores Rowlands corporate nominees (Transpacific Trust Ltd and Equity Holdings Ltd) as shareholders.[8] The agreement was that Mr Outhred was the beneficial owner of 10% of the shares. Further, he said that he travelled to Santo with Mr Munro on numerous occasions to overview the GSI operations and to attend Club De Sanma annual general meetings. Mr Outhred said that in 2011, GSI was in a position to start paying dividends to its shareholders, and dividends were paid up until March 2020.

24. Mr Outhred says he paid VT 1 million for the 10 % shareholding in GSI Inc in 1998 and annexed a bank statement showing a cheque withdrawal for VT 1 million on 14 April 1998.[9] He believed he made the payment in 1995 at the time of incorporation but subsequently discovered that the payment was made in April 1998. He was unable to obtain a copy of the cheque from the ANZ bank.

25. As Mr Outhred noted in his email to Mr Fleming, he received VT 30,000 per month from GSI Ltd between 2011 and early 2020. In the company accounts, the payment was coded as director's fees but it is not in dispute that Mr Outhred was never a director of GSI Ltd, so the payment was not for director's fees. Then, Mr Warmington's evidence was that Mr Munro told him that the payments were for services rendered. However, Mr Outhred said in cross examination that believed these were dividend payments for his shareholding in GSI Ltd. It was suggested to Mr Outhred also in cross examination that he could not give one valid reason why he was paid VT 30,000 a month. Mr Outhred's response was that it was his shareholding and that GSI Inc is the holding company of GSI Ltd.

26. Mr Outhred said that it was only after Mr Munro's death that he became aware that the 10% shareholding he acquired was in GSI Inc. I infer that this can only have arisen when Mr Outhred was provided with a declaration of trust dated 30 April 2004, which relates to the beneficial ownership of the shares in GSI Inc.[10]

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[8] *Mr Outhred can only be referring to GSI Ltd as there were three shareholders of GSI Inc at the time of incorporation – Moores Rowland Corporate Services Ltd, Equity Holdings Ltd and Southpac Nominees Ltd*

[9] *Annexed to Mr Outhred's sworn statement filed on 18 June 20024 as DO3*

[10] *Annexure DO 11 to Mr Outhred's sworn statement filed on 18 June 2024*

27. Neither Mr Outhred nor Mr Munro are signatories to the declaration of trust. A Mr Allan Palmer records that he is registered as the holder of 100 shares in GSI Inc in Share Certificate 004, but that the shares are beneficially owned by three parties – Continental Investment Corporation Limited (70 shares), Keith Piper (20 shares) and David Outhred (10 shares).

28. There is no evidence at all as to who Allan Palmer is and why he executed the declaration of trust. Mr Palmer was not at the time registered as the owner of the shares. All 100 shares were transferred to Mr Munro on 1 January 2004, and he continued to hold them until his death.[11]

29. In the written submissions, Mr Morrison submits that there are various strands of evidence to support the claim. These include:

    a. Mr Outhred's evidence.

    b. Evidence of a payment of VT 1 million from Mr Outhred's ANZ bank account on 14 April 1998

    c. The ANZ bank statements which show receipt of VT 30,000 per month from GSI Ltd. Mr Outhred says these were dividend payments made between 2011 -2020.

    d. The declaration of trust.[12] Mr Morrison submits that it is consistent with Mr Outhred's claim, as it records that he is beneficially the owner of 10% of the shares in GSI Inc.

    e. The minutes of GSI Ltd dated 14 December 2011 recording that the company would have a prosperous future and that dividends would be paid.[13]

    f. The resolution made by the directors of GSI Ltd in relation to new declarations of trust for GSI Ltd. The declarations of trust in favour of GSI Inc were cancelled and replaced with declarations of trust in favour of Mr Munro. When Mr Warmington searched the records at the VFSC, the beneficial shareholder of GSI Ltd was GSI Inc. Mr Morrison points to the lack of evidence to show that the resolution on the Minutes of 1 January 2012 had ever been given effect to.

    g. Mrs Munro's evidence that Mr Outhred and Mr Munro were close friends, and that Mr Munro was not a trusting person.

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[11] *The share certificate is annexed to Mr Outhred's sworn statement filed on 18 June 2024 as DO 15*
[12] *DO 11*
[13] *Footnote- D2*

h. Mr Warmington's evidence provided support for the claim.

Consideration

30. GSI Inc was incorporated under the International Companies Act. Section 15 of the Act sets out the nature of shares. It says:

> ***15. Nature of shares***
>
> *(1) A share is a form of personal property which represents an entitlement in respect of the capital, income or control of a company and confers on the holder all or any of the following rights:*
>
> *a. the right to share in the distribution of income of the company;*
>
> *b. the right to share in the distribution of the surplus assets of the company upon its liquidation;*
>
> *c. the right to vote at meetings of the company;*
>
> *d. the right to repayment at a future date of any sum in consideration of which the share was issued;*
>
> *e. the right to be paid a return at a specified rate on the sum in consideration of which the share was issued together with such other rights and privileges and subject to such limitations or conditions as may be provided for in the constitution of the company or upon the issue of the share.*
>
> *(2) Unless otherwise specified in its constitution or upon the issue of the share, each share has attached to it the following:*
>
> *(a) the right to one vote at any meeting of the company (other than a meeting of a class of members of which the holder of the share is not a member) which is held to do anyone or more of the following:*
>
> *(i) to appoint or remove a director;*

(ii) to approve any alteration to the constitution;

(b) the right to an equal share in dividends authorized by the directors in respect of its class or series;

(c) the right to an equal share in the distribution of the surplus assets of the company.

31. There is no dispute that any shareholding owned by Mr Outhred was not reflected in GSI Inc's share register, which would have been prima facie evidence of an entitlement to shares in GSI Inc.[14] That is consistent with the company's constitution, and in particular clause 21. That clause simply demonstrates that beneficial interests or underlying equities are not recorded in the share register.[15]

32. It is uncontroversial that company shares can be held on trust. In order to determine whether the shares were held on trust, as claimed by Mr Outhred there are a number of relevant factors to consider.

33. A preliminary but important matter is that pursuant to s 58A of the International Companies Act, a company must ensure that up to date records are kept of beneficial owners of the company. Section 58A says:

58A Company to keep up to date records of beneficial owners and nominators of nominee shareholders and directors

A company must ensure that up to date records are kept of:

(a) the beneficial owners of the company; and

(b) the nominators of nominee shareholders and nominee directors.

34. So, irrespective of friendships and business relationships, it was mandatory for GSI Inc to have kept a record of Mr Outhred's beneficial ownership of shares in the company. There is no evidence at all that the company complied with this obligation in regard to Mr Outhred's asserted beneficial ownership of shares.

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[14] *As per s24 of the International Companies Act*

[15] *See Material Resources and Trading Corporation v Registrar of Companies [2019] NZHC 286 and Re Forestlands [2020] NZHC 1683*

35. The first matter is to consider Mr Outhred's assertion that he agreed to acquire a 10% percent shareholding in GSI Inc for VT 1 million.

36. As Sey J said in *FR8 Logistics v Eagan* [2016] VUSC 152, in considering the law of contract (at 32)

> *"...There must be an offer by one party and acceptance by the other party. Also, there should be an intention to create a legally binding agreement and the parties must evince proper understanding and consent of what is involved. Acceptance must be unequivocal and communicated to the offeror: the law will not deem a person to have accepted an offer merely because they have not expressly rejected it".*

37. In contract law, the formation of agreement in absence of express written agreement will in many cases be inferred from the conduct of the parties.[16]

38. In the claim, Mr Outhred asserts that there was an oral agreement to acquire a 10% shareholding in GSI Inc. But on his own evidence, he believed he agreed to acquire a 10% shareholding in GSI Ltd- not GSI Inc. As I have said, Mr Outhred's evidence[17] is that Mr Munro asked him if he wanted to be a shareholder in GSI, noting that Mr Munro used the word "*GSI*" interchangeably to refer to both companies. At the time he believed he had acquired shares in GSI Ltd. That remained the position as is evident from the emails to Mr Fleming, the caution registered on the title, Mr Morrison's email to Mr Fleming and significantly, Mr Outhred's statutory declaration dated 18 July 2023. So, while on Mr Outhred's evidence there was an offer, which he accepted, it is difficult to see how there was a legally binding agreement for the acquisition of shares in GSI Inc in 1995, when Mr Outhred believed the offer he accepted was for shares in GSI Ltd. Mr Outhred's conduct is consistent with his view that that the offer was for shares in GSI Ltd.

39. Mr Outhred places emphasis on the fact that GSI Inc is the parent company of GSI Ltd. I infer that Mr Outhred sees no distinction between the two companies. Mr Warmington confirmed that GSI Inc was a holding company for its subsidiary GSI Ltd. He said that from his review of physical records held at VFSC, Transpacific Trust and Equity Holdings were holding the shares in GSI Ltd as nominees under a nominee declaration for GSI Inc.[18]

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[16] *Goiset v Blue Wave Limited [2001] VUSC 124*

[17] *Refer paragraphs 5 and 6 of Mr Outhred's sworn statement filed on 18 June 2024*

[18] *Refer also to annexure DO 12 to Mr Outhred's sworn statement dated 18 June 2024*

40. The fact that GSI Inc is the parent company of GSI Ltd does not mean that the two companies can be treated as one entity, which I infer is how Mr Outhred saw things.They are separate entities. It is a general principle of law that a company is a person of its own.[19] This principle extends to groups of companies. In *James Hardie Industries PLC v White* [2018] NZCA 580, the New Zealand Court of Appeal held that the principle that a company must be treated like any other independent person with rights and liabilities appropriate to itself extends to groups of companies. Relevantly, the Court said:

> *"[28] The central principle of modern company law is that a company has its own legal personality. As the learned authors of Company Law in New Zealand explain, to say that a company has its own legal personality is to say two things:*
>
> *First, the law treats a company as a legal person, capable of enjoying most of the rights and bearing most of the duties that can be enjoyed or borne by a natural legal person. Secondly, this legal personality is the company's own, in that it is separate from the legal personalities of those persons who hold shares in the company. "*
>
> *And further:*
>
> *"[30] The principle that a company must be treated like any other independent person with rights and liabilities appropriate to itself extends to groups of companies. Each company in a group of companies "is a separate legal entity possessed of separate legal rights and liabilities", even where, by reason the extent of control exercised over the affairs of the subsidiary, they are "creatures of their parent companies".*
>
> *[31] As a legal entity, a company can use agents to act for it and it can also act as agent for others. There is however, no presumption that a subsidiary company acts as the agent of its parent. A wholly-owned subsidiary is not, by that reason alone, the agent of the parent company, even where they have directors in common. Something more than the fact of control of the subsidiary by its parent is needed to constitute an agency relationship. "(Footnotes omitted)*

41. The declaration of trust dated 30 April 2004 appears to be a red herring. As I have said, it is incontrovertible that Mr Munro was the owner of the 100 shares in GSI Inc from 1 January 2004, as confirmed by share certificate 4. There is no evidence as to who Mr

[19] *See Goiset v Blue Wave Limited [2001] VUSC 124 and Estate of Stephen Quinto [2023] VUSC 216*

Palmer is or how the declaration came about. He cannot have been holding the 100 shares in GSI Inc beneficially for Mr Outhred and others, because Mr Munro owned the shares. The declaration of trust does not assist with establishing the claim.

42. I do not agree that the bank statement showing a VT 1 million cheque withdrawl on 14 April 1998 evidences payment for the shares. I accept that Mr Outhred was unable to get bank records for 1995, and that he could not get a copy of the cheque. But it seems improbable that Mr Outhred would have paid VT 1 million 3 years after GSI Inc was incorporated, when the purpose of investing in the company was because, according to Mr Outhred, Mr Munro was short of funds and so asked him if he would provide the seed capital in exchange for a 10% shareholding in GSI.[20] So it does not make much sense that the seed capital money would be paid 3 years later.

43. What of the fact that Mr Outhred received monthly payments of VT 30,000 from GSI Ltd between 2011 and 2020? The payments were coded as director's fees but Mr Outhred was never a director of GSI Ltd. Then there is Mr Warmington's evidence that he was told that the payments were for services rendered. Hoewever, as noted Mr Outhred believes they were dividend payments relating to his shareholding in GSI Inc, which ceased when covid hit. Mr Morrison submits that these payments support Mr Outhred's claim of a beneficial shareholding in GSI Inc.

44. Pursuant to s 30 of the International Companies Act, a company may, by a resolution of directors, declare and pay dividends in money, shares or other property. Further, by virtue of s 63, an international company shall keep minutes of all meetings and copies of all resolutions consented to by directors and is obliged to keep such accounts and records as are necessary to reflect its current financial position. There is no evidence at all that GSI Inc resolved to pay dividends to Mr Outhred, as required by legislation.

45. An obvious point is that the monthly payments were made by GSI Ltd and not GSI Inc. So, on the face of it, the payments could not be dividend payments made by GSI Inc. Mr Outhred would like the Court to accept that they were dividend payments from GSI Inc because GSI Inc is the parent company of GSI Ltd. However, each company is a separate legal entity. The two companies cannot be treated as one entity.

46. Mr Warmington's evidence was that from his review of the company records of GSI Ltd, there were no instances of declaration of dividend except for the end of 2013 and had been recoded by the accountant back to shareholders costs – and not declared as a dividend. He explained that the dividends are normally declared by way of minute and

[20] *See Mr Outhred's statutory declaration*

that quite often in closely held companies, it is common for directors or shareholders to receive payments during the year and then have them ratified. In his experience, most times dividends will be paid half yearly or yearly on review on review of the annual results. Ordinarily, he would expect a ratification of that dividend in the company's minutes and declaration of that dividend and a reference to the payment of the dividend would normally appear in the directors report of the company for that year. He said there was no reference in the minutes or directors report to the regular payment of a dividend. Interestingly, Mr Warmington also said when giving evidence that in 2010, GSI Ltd had a net operating loss in 2010 of VT 1,293,793 and thereafter the company did show profit in some years and losses in others.

47. Pursuant to s 29 of the Companies Act 2012, a company may pay a dividend to shareholders if that dividend is authorized by all shareholders, or by the directors (if the company's rules so provide). Consistent with the obligation in s29, in cross examination, Mr Warmington said that if any dividend was paid by GSI Ltd it would need to be paid to GSI Inc, which owned all the shares in GSI Ltd by way of nominee declaration. There is no evidence that this occurred.

48. As Mr Warmington also said, a dividend payment is an appropriation of profit. Mr Outhred accepted that dividends are based on declared profit. It is curious then that Mr Outhred received the same amount, being VT 30,000 per month between 2011-2020, when considered in the broader context of Mr Warmington's evidence that in the years after 2010, GSI Ltd showed a profit in some years and losses in others.

49. Given the matters set out at paragraphs 44-49, I do not accept that the payments of VT 30,000 per month between 2011 and 2020 to Mr Outhred were dividends on account of a 10% shareholding in GSI Inc. I accept Mr Outhred held a genuine belief that was so, but I do not share that view after taking all the relevant material I have referred to into account. I assess that a factor influencing Mr Outhred's view is that he believed that GSI Inc and GSI Ltd were one and the same.

50. After considering the factors detailed above, the claim is not proved on the balance of probabilities. I am not able to say that it is more likely that not that Mr Outhred was the beneficial owner of a 10 % shareholding is GSI Inc at the time of Mr Munro's death. I consider that there is insufficient evidence to make a declaration of trust as sought on the balance of probabilities. I recap by way of brief summary:

    a. It was mandatory for GSI Inc to have kept a record of Mr Outhred's beneficial ownership of shares in the company, irrespective of the fact that Mr Munro and Mr Outhred were close friends and business partners. There is no evidence about this or

whether the company complied with this obligation in regard to Mr Outhred's asserted beneficial ownership of shares.

b. While it is uncontroversial that shares can be held on trust, the starting point is the offer Mr Outhred asserts was made to him in 1995 to acquire shares in GSI in exchange for seed money. Mr Outhred's evidence is that he agreed to acquire shares in GSI for VT 1 million. Mr Outhred believed for many years that he acquired a 10% share in GSI Ltd. He was upfront about this. When the claim was filed, Mr Outhred asserted that the 10% shareholding in fact related to GSI Inc, the parent company of GSI Ltd. I infer that was based, at least in part, on the declaration of trust dated 30 April 2004. I reiterate the observations made at paragraph 39. There is little to no evidence that the offer to acquire shares related to GSI Inc.

c. The 30 April 2004 declaration of trust is something of a red herring, as I have explained. Mr Palmer could not have held GSI Inc's shares in trust for Mr Outhred and others because Mr Munro owned the shares.

d. I accept that Mr Outhred and Mr Munro had a close personal and business relationship, which might explain an apparently very casual arrangement. Notwithstanding that, it is difficult to understand why Mr Outhred would hand over VT 1 million without clarifying which company he was investing in. Both Mr Munro and Mr Outhred were experienced accountants, and this was a business deal.

e. As discussed at paragraph 43, I do not accept that the cheque withdrawl on 14 April 1998 evidences payment for the shares in GSI Inc.

f. While Mr Munro and Mr Outhred may have viewed GSI Inc and GSI Ltd interchangeably or as one entity, they are separate legal entities, and must be treated as such. The fact that GSI Inc is the holding company for GSI Ltd is not evidence that Mr Outhred had a shareholding in GSI Inc.

g. I do not agree that the regular monthly payments of VT 30,000 provide support for a declaration of trust, as I do not accept that the payments were dividends arising from a shareholding in GSI Inc.

51. For the reasons set out in the preceding paragraphs, the claim fails, and is dismissed.

Issue 3: Is the claim statute barred?

52. Mr Fleming submits that the claim is statute barred pursuant to s 3 of the Limitation Act, because the asserted agreement was entered into in 1998.

53. Mr Morrison submits that the claim is not statute barred. He submits that no cause of action arose until Mr Munro's death and the executrix of the estate invited the claims on the estate. Prior to Mr Munro's death, there was an arrangement with a close friend which he would have expected to be honoured and was being honoured by what Mr Outhred alleges were dividend payments.

54. Given that I have dismissed the claim after considering its merits, it is unnecessary to consider this issue.

Result

55. The claim is dismissed.

56. Costs are to be paid to the Defendant as either agreed or taxed.

DATED at Port Vila this 10th day of March 2025
BY THE COURT

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Justice M A MacKenzie