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

Civil Appeal
Case No. 19/1802 CoA/CIVA

BETWEEN: **Mocha Limited t/a Vancorp Construction**
Appellant

AND: **ANZ Bank (Vanuatu) Limited**
Respondent

Before:	***Chief Justice V. Lunabek*** ***Justice J. von Doussa*** ***Justice J.W. Hansen*** ***Justice D. Aru*** ***Justice G.A. Andrée Wiltens*** ***Justice V.M. Trief***
In Attendance:	*Mr M. Fleming for the Appellant* *Mr G. Blake for the Respondent*
Date of Hearing:	*11 November 2019*
Date of Decision:	*15 November 2019*

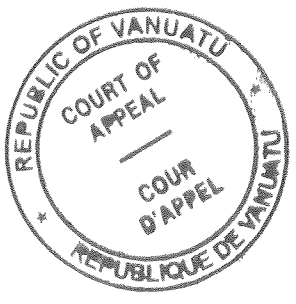
JUDGMENT

A. Introduction

1. Mocha Limited ("Mocha") is a construction company, which was owed a large sum of money for work done following the ravaging effects of Cyclone Pam on Iririki Island. Funds were paid into Court under an order of the Court. By the time the funds were paid out to Mocha, by dint of currency conversions, the final sum was considerably reduced. Mocha sought to attribute liability for that to the ANZ Bank (Vanuatu) Limited ("ANZ") for its participation in the process of clearing the funds.

2. At first instance, Mocha was unsuccessful. It therefore launched this appeal against the whole of the decision below.

3. Following the initial decision, the matter of costs between the parties was also dealt with; and the parties have conflicting views as to what should occur in respect of that.



B. Background

4. On 29 August 2017 Justice Geoghegan ordered the liquidation of Iririki Island Holdings Limited ("IIHL") due to its inability to meet its current liabilities, the largest of which was a debt owed to Mocha in the amount of AUD $1,419,200.47 for repair works done at the resort following Cyclone Pam.

5. There was a prompt application to stay Justice Geoghegan's judgment pending appeal supported by a promise by an IIHL director to pay AUD $1,386,017 into Court within 10 days. On the basis of the promise, the effects of the judgment were stayed. The funds were directed by the Court to be paid into the trust account of the Chief Registrar of the Supreme Court, and to remain on interest bearing deposit until further order of the Supreme Court or the Court of Appeal.

6. Within the permitted time, namely on 11 September 2017, ANZ received the requisite amount from Westpac Australia. In order to deposit that sum in the Chief Registrar's ANZ trust account it had to be converted into Vanuatu vatu ("VT"), there being no AUD account into which it could be transferred. That was done on 26 September 2017, at an exchange rate of VT 82.70 to the dollar. The result was that VT 114,623,606 was placed on deposit in the Chief Registrar's ANZ trust account. It remained there for some 2 months.

7. The Court of Appeal overturned Justice Geoghegan's judgment on 9 November 2017, but as a result of consent orders agreed to by the parties, directed the AUD $ 1,386,017 funds held on deposit in the Chief Registrar's ANZ trust account, together with any interest earned in the interim, were to be paid within 7 days to Mocha.

8. On 23 November 2017, the Chief Justice and the Chief Registrar instructed ANZ to prepare a bank draft in the sum of VT 114,623,606 to be credited to Mocha's AUD account at Bred Bank – Mocha held no accounts with ANZ. This instruction required a conversion to be made, and resulted, at the exchange rate of VT 87.00 to the dollar, on 24 November 2017 in the amount of AUD $1,317,513 by way of a SWIFT transfer to Mocha's Bred Bank AUD account.

9. Mr Foots, the principal of Mocha, intervened on 27 November 2017 and indicated that he did not want the amount to be paid in AUD and stated that he wanted to be paid in VT – he took exception to the exchange rate offered. The AUD funds were accordingly returned by Bred Bank to ANZ. There were then on-going discussions which followed.

10. On 30 November 2017, the Chief Justice and the Chief Registrar formally instructed ANZ to not convert the AUD funds back into VT but to issue a cheque to Mocha in the sum of AUD $1,317,488.87, which amount Mr Foots accepted subject to reserving his rights to take legal action to recover the difference between what he received and what he was owed.

11. Mocha maintained that it had suffered a loss of AUD $68,504.29 as a result of ANZ's actions and alleged ANZ had acted unconscionably and in breach of its fiduciary obligations to Mocha, using its superior position to obtain a healthy benefit.

C. The Decision

12. The primary judge considered that the payment by the IIHL director in AUD was made as a result of a decision by the parties to the earlier litigation, and any difficulties that arose from that particular currency being stipulated lay at the feet of Mocha. The likely conversion rate issue was something that could and should have been foreseen and rectified by Mocha at the time the consent orders were being negotiated.

13. When the first payment to Vanuatu was made, ANZ owed no duty to Mocha. It was simply not a party to that transaction, which involved the IIHL director, ANZ and its customer, the holders of the Chief Registrar's trust account.

14. The SWIFT transfer on 24 November 2019 was effectively unwound by Mr Foots' intervention. That required the funds to be returned, with further resultant costs. Only Mr Foots is responsible for that.

15. The primary judge concluded that Mocha/Mr Foots was the author of the alleged shortfall. Hence the primary judge concluded that ANZ could not be held responsible for the losses claimed.

16. The primary judge found that ANZ had essentially complied with all directions to it by the Court and by its client. Mr Foots was not a client of ANZ. The primary judge further found no substantial ANZ profit or gain arising from the transactions.

17. Accordingly, the claim was dismissed in its entirety.

D. The Appeal

18. The appellant contended that the primary judge had erred in making numerous findings of fact, and when those findings were applied to the legal aspects of the case, it resulted in the erroneous dismissal of the entire claim. Mr Fleming had prepared a large chart setting out the factual errors and what he submitted the evidence actually established.

19. Further, it was submitted that the primary judge had erred in law in not accepting that ANZ owed a duty of care to Mocha, and therefore concluded that ANZ had no need to have warned Mocha of the potential dire consequences of the various exchange transactions entered into. The primary judge should have held that Mocha was the beneficiary of the funds at least by 24 November 2017 when the Chief Justice and the Chief Registrar instructed ANZ to prepare a bank draft to be credited to Mocha's account, if not from the time the money was first paid into Court. The ANZ was therefore in a fiduciary relationship with Mocha, and as a fiduciary owed a duty to Mocha not to take an unfair advantage from its superior position in arranging the conversion of the money into AUD at an exchange rate that was unconscionably high.

20. Moreover Mr Fleming argued that as a matter of fact even on 27 November 2017 the money had not been irreversibly converted from VT to AUD and the transaction on which ANZ levied an unconscionable profit could have been reversed.

21. Mr Fleming also submitted that the primary judge had erred in the manner that he dealt with the evidence of many of the witnesses. Each witness had filed a written brief, and counsel had tendered written objections to all/parts of those briefs as being inadmissible for a variety of reasons such as opinion, hearsay, and irrelevances. It was agreed by counsel at trial that the primary judge would consider those objections prior to coming to his final decision. Mr Fleming submitted the primary judge had simply accepted all Mr Blake's objections and rejected his own; which meant that Mr Lee for ANZ was able to give entirely hearsay evidence which was relied on; and Mr Foots' and Mr Fimeri's evidence for Mocha was incorrectly truncated and given little if any weight.

22. Mr Blake submitted the case turned on whether or not there was a trustee or fiduciary relationship between ANZ and Mocha. He submitted there was no legal basis on which to find that there was. At all stages of the transactions up to and including the final instructions of the Chief Justice and the Chief Registrar to ANZ on 30 November 2017 to issue a cheque to Mocha in AUD the duties owed by ANZ were to the Court as its customer under the ordinary relationship of creditor and debtor. It therefore followed, according to Mr Blake, that the case was correctly dismissed.

23. Mr Blake also dealt with the issue regarding evidence. In his submission, the material used by Mr Lee was all business records and admissible as such. He submitted that Mr Foots had made numerous assumptions, and that had coloured his evidence; and Mr Fimeri's banking experience was limited and not particularly relevant to the issues in dispute. Accordingly, Mr Blake submitted the primary judge had not erred in his assessments.

E. Discussion

24. The crux of this case is that at no time did Mocha have any accounts with ANZ.

25. When the funds were first converted in September 2017, this was necessitated as the funds transferred were in AUD, and the account receiving those funds, namely that of the Chief Registrar's trust account, only accepted VT. It was submitted that ANZ used an incorrect currency exchange rate in September 2017, which earnt ANZ a profit of some AUD 10,000. We cannot accept that submission. As a one-off transaction ANZ exchanged AUD for VT, at better than its advertised rate. There is no profit to be had from one such transaction.

26. When the funds were again converted in November 2017, this was necessitated as Mocha's account at Bred Bank was in AUD and the funds being transferred were in VT. Again the conversion from VT to AUD, was made by ANZ at better than its advertised rate.

27. When the two transactions are compared, then the discrepancy between what was originally transferred from Australia and the end amount that went to Mocha can be seen. This is what Mocha sought to claim from ANZ as its loss.

28. We agree with Mr Blake's submission that the documents used by Mr Lee in support of his evidence were business records properly admissible. Those records establish clearly that the exchange of the VT held in the Chief Registrar's account into AUD was completed on 24 November 2017. On 27 November 2017 it was not possible to reverse the conversion that had occurred on 24 November 2017.

29. The difficulty with Mr Fleming's assertions is that Mocha's only connection with ANZ was remote, as the ultimate beneficiary of funds transferred from Australia to the Chief Registrar's trust account with ANZ once they were transferred to Mocha. In order for that transfer to occur there had to be a currency conversion, as the funds initially sent were AUD and the Chief Registrar's trust account only accepted VT. There was no unilateral decision taken by ANZ to make the currency conversion – they had to be done. ANZ was simply acting according to the instructions of its account holder – it had no obligations to the owner of the account at Bred Bank receiving the funds. At all times ANZ acted in accordance with ts client's instructions. It was obligated in law to do so. It is only in exceptional circumstances that a bank can refuse to action a client's instructions. Such circumstances do not exist here. This accords with Mr Fleming's submission that he placed no reliance on the second limb of *Barnes v Addy* (1874) 9 Ch App 244.

30. As a result, we are of the view that ANZ never owed fiduciary or other obligations to Mocha.

31. We consider the claim to be misconceived and rightly dismissed by the primary judge.

F. Result

32. The appeal is dismissed.

G. Costs

33. Mr Blake submitted the claim to be hopeless, from the very beginning, with no prospects of success. He made his position patently clear to Mocha's counsel. As well, ANZ made an offer to settle the matter in June 2018, which was rejected.

34. On both bases Mr Blake submitted it was appropriate for indemnity costs to flow.

35. Mr Fleming submitted that Mocha's claims were largely successful in terms of the public policy issues debated at first instance. He also rejected the suggestion the case had no prospects of success.

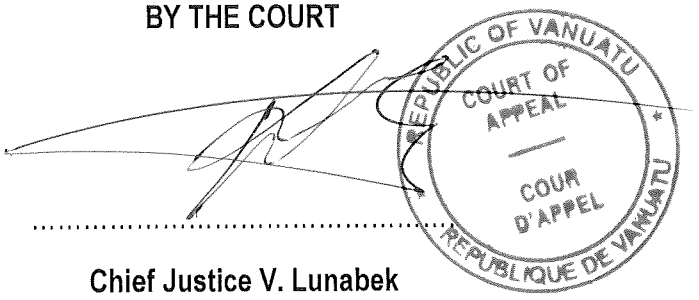
36. We consider, as stated above that the claim was misconceived. Mocha was never in a position to recover the costs of the currency conversions from ANZ. If anything its true claim was against IIHL for not meeting its obligations to pay the full cost of the repairs to Mocha.

37. Costs should, as ordinarily, follow the event. We are of the view that indemnity costs are appropriate in this case. They are imposed for the entirety of this litigation, not just from the date of the settlement offer. Mr Blake is invited to submit his account(s) for scrutiny by the Master, if not accepted by Mr Fleming.

38. The costs should be paid to ANZ within 21 days.

Dated at Port Vila this 15th day of November 2019

BY THE COURT



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Chief Justice V. Lunabek