

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

CIVIL CASE NO. 130 OF 2012

BETWEEN: JEREMY DICK
Applicant

AND: AND PROPERTY LIMITED
First Respondent

**AND: MISSION DEVELOPMENT GROUP PTY
LIMITED ATF THE SALTER
SUPERANNUATION FUND NO 2**
Second Respondent

Coram: Justice Mary Sey

Counsel: Mr Dane Thornburgh for the Applicant
Mr Mark Hurley for the Respondents

Date of Hearing: 23rd October 2012

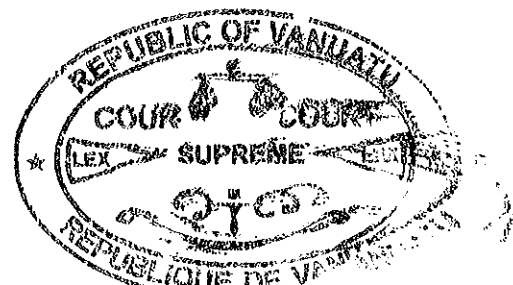
Date of Decision: 26th October 2012

RULING

1. In an application filed on the 3rd day of August 2012 the Applicant sought the following Orders:-

“That until further Order of the Court, the First & Second Respondent and or any agents servants thereof be restrained from;

- i. Dealing with the 1st Respondent Company in any manner without the Applicant's written consent.



- ii. Dealing with any funds held in any bank accounts under the name of the 1st Respondent without the Applicant's written consent.
 - iii. Filing the 2012 Annual Return with the VFSC without the Applicant's written consent.
 - iv. From dealing with any property, assets, negotiable instruments or cash of the 1st Respondent Company.”
2. The Application is brought pursuant to **Rule 7.5 (1) of the Civil Procedure Rules No. 49 of 2002** which provides as follows:

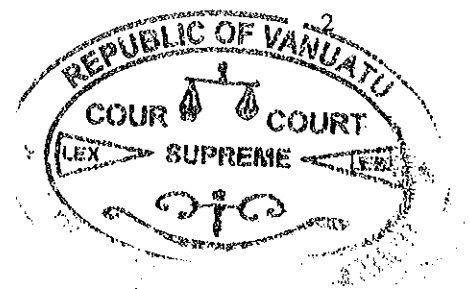
“A person may apply for an interlocutory order if:

- (a) the applicant has a serious question to be tried; and*
- (b) the applicant would be seriously disadvantaged if the order is not granted.”*

Rule 7.5 (3) states that:

“The Court may make the Order if it is satisfied that:

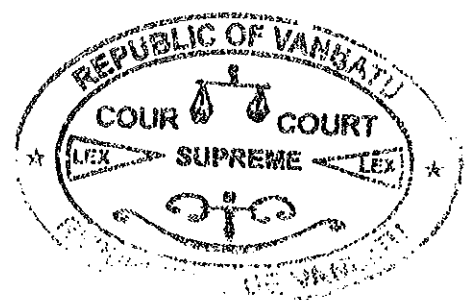
- (a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and*
- (b) the applicant would be seriously disadvantaged if the Order is not made.”*



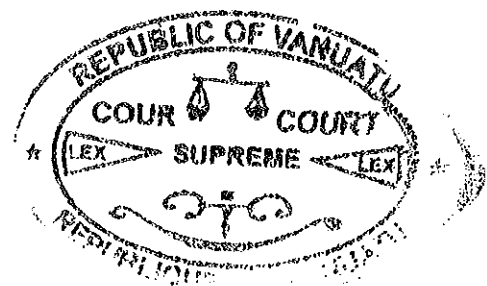
3. The criteria to be satisfied in Rule 7.5 (3) reflect the criteria to be considered by the Court for the granting of an injunctive relief as established by the Privy Council in **American Cyanamid Co. (No 1) v Ethicon Ltd [1975] AC 396**, as applied in **Valele Family v Touru [2002] VUCA 3** where the Court of Appeal of Vanuatu stated at page 10 as follows:

“Even when there is an interim injunction made in the first instance, the issue before the Court when an inter-parties hearing for an interlocutory injunction occurs is whether there is a serious question to be tried. If so, the Court must then consider the balance of convenience between the parties having regard to the seriousness of the issues in question, and whether the position of the defendant can be appropriately protected, by an undertaking from the plaintiff as to damages or otherwise, in the event that the plaintiff ultimately fails at trial.”

4. In support of the present application before this Court is a 39 paragraph Affidavit sworn to by Jeremy Dick on 2nd August 2012 and attached thereto are “Annexures A, B, C, D, E, F, G, H, I and J” respectively.
5. It is submitted by counsel for the Applicant that when recourse is had to the sworn statement of Jeremy Dick that the following are serious questions to be tried:

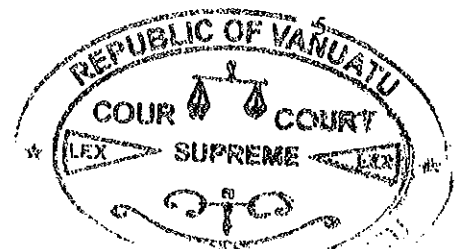


- a. Recourse to Annexure "C" discloses the so called Agreement between the parties, for this venture.
 - b. Paragraph 3 of the document shows that consideration was to be paid for the transfer of the shares from the Applicant to the Respondent.
 - c. Paragraph 11 of the sworn statement of Jeremy Dick deposes that he never received the consideration under the Agreement.
 - d. At Paragraph 11 of the sworn statement of Salter he clearly deposes that no receipt was given. There is no evidence of the transaction, how it was paid or any independent confirmation of payment.
 - e. The claim that no consideration was paid is a serious question for trial.
 - f. It naturally flows from the no consideration issue that if the contract lacks consideration it may well fail entirely.
6. Counsel further submitted that:
- a. If it is accepted that there is an issue re consideration under the Agreement, as it clearly must be, given the lack of evidence to the contrary and the contract fails, then the issue of a resulting trust being formed in the Applicant's favour



further entrenches the seriousness of the question of no consideration.

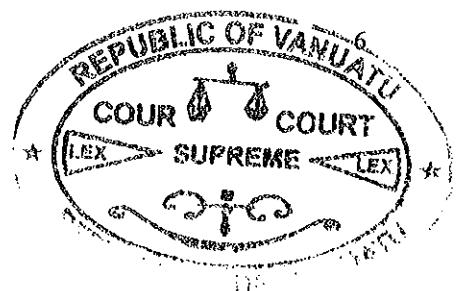
- b. The effect of the failing of the consideration question is dealt with at the highest level of Courts of Common Law jurisdiction: **Re Vanderwell's Trusts (No 2) [1974] Ch 269**;
 - c. The effect of the resulting trust is that the Second Respondent holds his interest in the Company as on trust for the Applicant.
 - d. The effect of the holding on trust enlivens the legal and fiduciary duties that are well known to this Court.
 - e. Recourse to the sworn statement of Jeremy Dick at **paragraphs 17, 18, 20, 22, 26, 27 – 39** that the fiduciary duty as owed to the Applicant is being breached and is a serious question to be tried.
7. Furthermore, it is submitted by counsel that a further serious question to be tried is the effect of the wording of Annexure "C".
- a. That recourse to **paragraphs 4 - 6, 10, 11** of Annexure C clearly shows that the result of the development is dependent on the Second Respondent's actions ie:
 - i. Sharing of Profits
 - ii. Transfer of shares



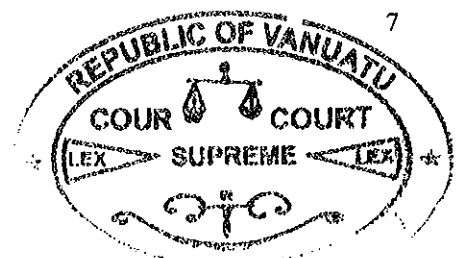
iii. Payment of loan

iv. Payment of interest

- b. That recourse to the above clauses also shows that the financial veracity and success of the development is in the most part reliant on the actions of the Second Respondent.
- c. That it is clear from the face of the mentioned paragraphs, that there is a clear intention that the second Respondent holds the interest in the First Respondent and the associated property and profits derived from same on trust for the Applicant.
- d. That therefore the Second Respondent holds the shares on a constructive trust as found in the document itself.
- e. That the Second Respondent holds the shares, property and any profits derived from same on trust for the Applicant. To buttress his point, counsel referred the Court to the High Court of Australia's decisions in **Mushinski v Dodds [1985] 160 CLR 583; Belmont Finance Corporation Ltd v Williams Furniture Ltd [1979] Ch 250.**
- f. That the above two matters are serious questions to be tried, when read in context with alleged activities of the Second Respondent as deposed, namely;

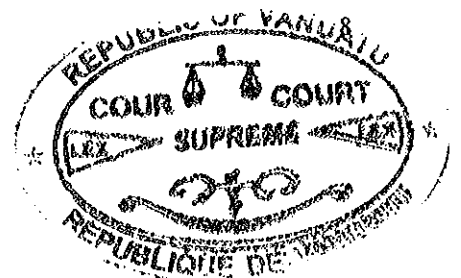


- a. Non-payment of consideration [Para 11]
 - b. Setting up of a rental company for rental of villas and not accounting to the Claimant for rental income as received [Para 18]
 - c. Unilateral removal of Dick as Director [Para 22]
 - d. Removal of Jeremy Dick as signatory to the Bank accounts.
8. The Applicant's counsel further contends that all the Orders that are being sought would do is to place the parties back in the original position as it would have been under the Agreement and to protect the assets from dissipation until the matter is determined judicially or otherwise and that they would not prevent the Second Respondent from renting, selling or marketing the properties.
9. The Respondents are opposed to this application. To this end they filed a 10 paragraph Affidavit sworn to at Port Vila on the 14th day of August 2012 by John Ernest Keith Salter described therein as a Director of the First and Second Respondents. Exhibited to this Sworn Statement is a bundle of documents marked as "JEKS1."
10. In opposing the application, assertions made by the Respondents in their Affidavit, as well as in written and oral submissions by their



counsel, are that:

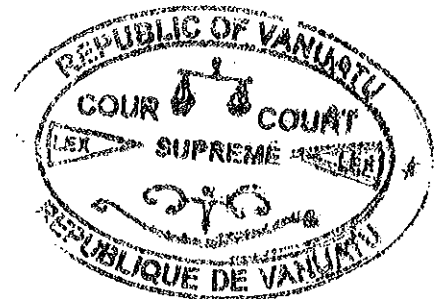
- a) the Applicant is not a shareholder of the first Respondent, AND Property Limited ("AND");
 - b) the Applicant is not a director of AND;
 - c) the Applicant is not an authorized signatory of AND's bank accounts;
 - d) despite the Applicant's "undertaking to file a Claim within fourteen (14) days" (item 2 on page 2 of the Application), the Applicant has failed to file any substantive claim;
 - e) it will be unduly prejudicial to AND and the Second Respondent if the orders sought in the Application are made;
 - f) clause 13 of the Agreement provides for the reference to arbitration of "any dispute, question or difference" arising between the parties "as to the meaning, operation or effect of any of the provisions of this Agreement or the rights or liabilities of any of the parties hereto"; and
 - g) under clause 14 of the agreement, the law of Victoria is the governing law "and the parties agree to submit to the jurisdiction of the Victorian Courts."
11. In paragraph 3.1 of the synopsis of Respondents' submissions in response to Applicant's application of 3rd August 2012, it is submitted that the evidence includes the following:
- a) the Applicant and the Second Respondent entered into an Agreement in June 2011 ("the Agreement") for the purpose of developing AND's leasehold title no. 12/0844/018 "into eight residential units plus



renovation of the existing house, for the purposes of resale ("the development")" (Annexure "C" of the Applicant's sworn statement);

- b) the Second Respondent through its director, John Ernest Keith Salter, funded 100% of the development (paragraph 4 (21) of the Salter statement);
- c) the Applicant transferred his shareholding in AND on 24 June 2011 (pp 5-6 of JEKSI to the Salter statement);
- d) the Applicant attended a directors' meeting on 2 July 2012 during which the shareholders' decision to remove him as a director (pp 13-14 of JEKSI) was ratified and he was also removed as a signatory on AND's bank account and internet banking access (pp 17-19 of JEKSI);
- e) on 20 July 2012 the Applicant and his partner attended at AND's property at Pango (Vale Vale Resort) and without any approval or authority from any member or director of AND, removed company assets (paragraph 6 of the Salter statement and pp24-25 of JEKSI);
- f) on or about 8 August 2012 the Applicant effected an internet transfer of the sum of VT1,785,607 from AND's account held with Bred Bank without authority (paragraph 7 of the Salter statement and pp 28-35 of JEKSI);"

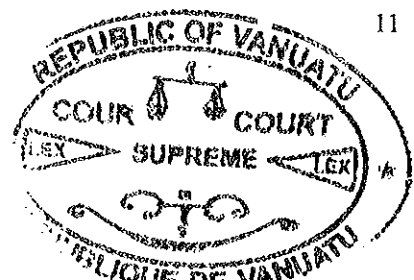
12. Furthermore, the Respondents blame the Applicant for various incidents of financial mismanagement as deposed in the Sworn Statement of John Ernest Keith Salter at **paragraphs 4(13), (15), (19), (21) and (22)**.
13. The Respondents submit that the balance of convenience is in favour of the Respondents and if the Application was granted they would be seriously disadvantaged for the following reasons:
- a) the transfer of the Applicant's shareholding is consistent with the Agreement, company law procedures and stamp duty has been paid;
 - b) the unchallenged evidence in the Salter agreement is that there were a number of concerns regarding the Applicant's financial mismanagement whilst he was still a Director(for eg. **Paragraphs 4(13), (15), (19), (21) and (22)** of the Salter statement);
 - c) even after the Applicant was removed as a Director of AND, he removed company assets without authority on 20 July 2012 and effected a transfer of VT1,785,607 from AND's account on or about 8 August 2012;
 - d) the evidence in the Salter statement demonstrates that the Applicant's behaviour is contrary to AND's best interests; and
 - e) AND's business as the proprietor of the Vale Vale Resort would be unfairly hindered.



14. Having carefully considered the various submissions by both counsel, I find it apposite at this juncture to state that the Respondents' disputation and assertions are all issues for later consideration at the trial. A Court should be very wary about embarking on a merits assessment of disputed facts and difficult questions of law at the interlocutory stage. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. See **American Cyanamid Co. (No 1) v Ethicon Limited (supra) per Lord Diplock.**

See also **Valele Family v Touru (supra):**

“To establish that there is a serious question to be tried it is not necessary for the plaintiff to establish a prima facie case, or a probability of success. The evidence available to the Court at the hearing of an application for an interlocutory injunction is likely to be incomplete. It is given on affidavit and has not been tested by oral cross-examination. If the affidavits show that there is a serious question to be tried, the assessment of the merits of the plaintiff's claim is a matter for the trial at a later date. This can only be undertaken throughout the discovery process.”

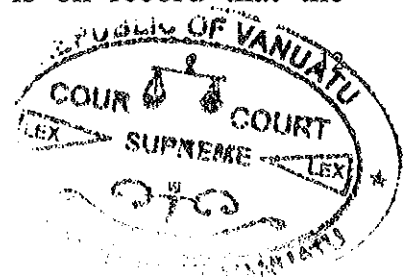


The Court then went on to state that:

“Generally speaking, it is not appropriate upon an application for an interlocutory injunction for the Court to finally decide disputed questions of fact. That is for the ultimate trial. At the interlocutory stage it is sufficient that there is evidence that could be accepted at trial which raises a serious question to be tried.”

15. In this present application, I find that the other issues raised as to credit, correctness of transaction, legality of documents and transactions and even the trust arguments are all questions for the trial judge and need not bother this Court greatly in deciding whether to grant the application and make the Orders being sought. I shall therefore not attempt to resolve these issues at this stage of the proceedings.

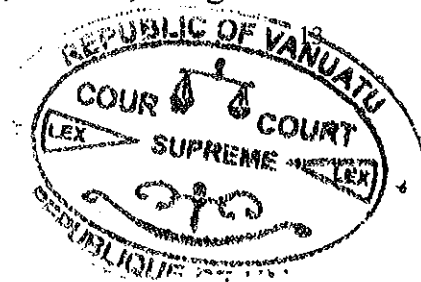
16. For now, the issues for determination will be confined to those arising under Rule 7.5 of the Civil Procedure Rules as aforementioned. I have also considered the balance of convenience between the parties having regard to the seriousness of the issues in question, and whether the position of the Respondents can be appropriately protected, by an undertaking from the Applicant as to damages or otherwise, in the event that the Applicant ultimately fails at trial. It is on record that the



Applicant has filed a Sworn Statement of Undertaking as to Damages. **Iririki Island Holdings v Ascension Limited [2007] VUCA 13; Livo v Boetara Trust [2002] VUCA 10.**

17. In the final analysis, having perused the documents filed and having heard both counsel, it cannot be doubted that the affidavit evidence shows that the Applicant has a serious question to be tried upon which the available evidence is incomplete, conflicting and untested. I am therefore satisfied that there are serious triable issues and that the Applicant would be seriously disadvantaged, if the Orders sought, were not granted. In the circumstances, I hereby make the following Orders:

1. That until further Order of the Court, the First and Second Respondents and or any agents servants thereof be restrained from;
 - i. Dealing with the 1st Respondent Company in any manner without the Applicant's written consent.
 - ii. Dealing with any funds held in any bank accounts under the name of the 1st Respondent without the Applicant's written consent.
 - iii. Filing the 2012 Annual Return with the VFSC without the Applicant's written consent.
 - iv. From dealing with any property, assets, negotiable



instruments or cash of the 1st Respondent Company without the Applicant's written consent.

2. The Applicant is to file a claim within 14 days from the date of this decision.

DATED at Port Vila, this 26th day of October, 2012.

BY THE COURT


M.M. SEY

Judge

