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

Civil Case No. 226 of 2011

BETWEEN: PAUL SAVENKOV
Claimant

AND: ALAN CORT
First Defendant

AND: DAVID CORT
Second Defendant

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

Counsels: *Mr. G. Blake for the Claimant*
Mr. D. Thornburgh for the Defendant

Date of Judgment: *27 March 2017*

JUDGMENT

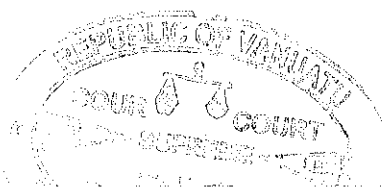
Introduction and Background

1. There have been 2 interlocutory Rulings in this case in Savenkov v. Cort [2013] VUSC 170 dated 4 October 2013 where the defendants unsuccessfully sought an order for "*security for costs*" and a later unreported Ruling delivered on 4 March 2016 wherein the defendants again unsuccessfully sought to strike out the claim on the basis that there was "*no reasonably arguable cause of action against* (them)". There has been no appeal against either Ruling.

2. During the course of the proceedings the second defendant passed away in Brisbane on 8 April 2015. Claimant's then counsel filed an application to substitute the second defendant with his surviving widow Jan Court on 8 September 2016. On 11 October 2016 the application was granted making the first defendant the representative of his deceased father in the action ie. the first defendant is sued personally and as the representative of the second defendant.

3. For convenience and brevity I repeat what the court said in its first Ruling about the nature of the claim and defence pleaded in the case:

> *"The claim is based on a payment of* ***$AUD500,000*** *by the claimant into an Australian bank account nominated and controlled by the defendants. The amount was paid following representations and inducements made by the defendants and after agreement was reached by the parties. In brief, the claimant seeks a refund of the money or an accounting and/or a declaration of a constructive trust and equitable compensation*



for breach of trust. The principal basis for the claim is an asserted "complete failure of consideration" on the defendant's part.

In particular, the claimant pleads inter alia in his claim:

> *"3. In or about June 2007, the 1st and 2nd Defendants (jointly and severally referred to as the "Defendants") entered into discussions with the Claimant with a view to joining together in a business enterprise involving the acquisition and development of real estate in Vanuatu, with specific projects to be determined and agreed upon.*
>
> *4. In the course of those discussions, the Defendants induced the Claimant to remit to an account of their Australian Company Aljan Enterprises Pty Ltd ("Aljan"), at the direction of the Defendants, the sum of AU$500,000 by falsely and misleadingly representing to the Claimant that:-*
>
> *(a) the consideration for the payment of AU$500,000 was the acquisition by the Claimant of an interest in real property in Vanuatu; and*
>
> *(b) that documentation to reflect the acquisition and ownership of the said interest would be produced by the Defendants in terms acceptable to the Claimant for signing by the Claimant.*
>
> *5. In reliance upon the aforementioned representations and inducements, on or about 4 July 2007, the Claimant transferred AU$500,000 (the "payment") to an account in the name of the Aljan as nominated by the Defendants which account was held with the Hong Kong Bank, Brisbane City Branch, BSB 344-031, Account Number 203193-071.*
>
> *6. Prior to making the payment, the Defendants advised the Claimant that the payment would be was used as a payment of a deposit on the purchase of a property in Vanuatu known as Aese Island.*
>
> *7. Some months later, the Defendants advised the Claimant that the purchase of Aese Island had run into difficulties and that the payment would instead be used for a different joint business enterprise namely for the subdivision and development for sale of leasehold title land on leasehold titles 04/2621/008 and 04/2621/030 (the "leasehold titles") owned by Dolphin Resort Limited, a company which the Defendants represented to the Claimant was owned and controlled by the Defendants. The Defendants agreed to prepare documentation for the proposed arrangement and to submit it to the Claimant for his consideration."*

Certain things are immediately clear from the above – (1) the dealings between the parties was not a loan or a straight-forward agreement to purchase land in Vanuatu; (2) there were at least two different sets of dealings or negotiations between the parties both before and after the claimant paid over the money; and (3) the monies were paid into an Australian bank account."

And (at para. 14):

"In response, defence counsel highlights 3 defences in the defendants' pleading including (1) the lack of "privity" on the claimant's part to the agreement sought to be

sued upon; (2) the existence of an express "non-refundable" clause in the relevant agreement; and (3) the failure of the contracting corporation (not the claimant) to complete the terms of the agreement."

4. Later in its second Ruling the Court, after considering the sworn statements, identified several factual matters as "*common ground*" as follows:

"(1) That a sum of AUD$500,000 was paid by the claimant's wife into an Australian bank account at the direction of the defendants;

(2) The written share purchase agreement which the defendants rely on and assert as the basis for the payment was never executed by any of the corporate parties thereto or by the claimant and the defendant;

(3) The claimant and defendant were relative strangers at the time of the payment and the claimant has never accepted that the payment was in part-performance of the share purchase agreement;

(4) AESE island figured prominently in the email exchanges between the parties leading up to the payment;

(5) The defendants as "*the lawful owners of 100% of the shares* (in the vendor companies)" in the share purchase agreement have never sought to perform or enforce its terms since the alleged breach or non-completion of the agreement; and

(6) The AUD$500,000 has not been refunded or returned to the claimant despite a demand for the same".

5. Furthermore by way of clarification concerning Aese Island this Court said in the second Ruling:

"... it is a matter of public record that on 22 July 2011 almost exactly four years after the payment of AUD$500,000 by the claimant, the Court of Appeal in the case of Colmar v. Rose Vanuatu Ltd. [2011] VUCA 20 in which Aljan (Vanuatu) Ltd. one of the named companies in the share purchase agreement was the Fifth Respondent, made the following material declarations:

"(a) (i) ***On 14 August 2007, Aljan obtained a registered title as proprietor of the 001 lease by fraud****;*

(ii) At all times while it remained the registered proprietor of lease 001, Aljan held its registered interest as a constructive trustee of the Valele Trust;

(iii) ***Surrender of the 001 lease and registration of Aljan's interest as proprietor of the new 003 lease on 13 June 2008 occurred at a time when Aljan had knowledge of Valele Trust's prior claim to the 001 lease. In consequence Aljan holds the 003 lease as a constructive trustee for Peter Colmar in his capacity as trustee of Valele Trust ...***

(b) Pursuant to s. 100(1) of the Act the Director shall amend the Land Leases Register to record that the capacity in which Aljan holds the registered title to the 003 lease is as "a trustee for Peter Colmar in his capacity as trustee of the Valele Trust; and

(c) ***Aljan is forbidden from dealing in any way, with lease 003 pending further order of the Supreme Court.***"

For completeness see also the judgments and minute of the Court of Appeal both before and after the above judgment namely:

(1) *Colmar v. Rose Vanuatu Ltd. [2009] VUCA 40;*
(2) *Aljan (Vanuatu) Ltd. v. Colmar [2014] VUCA 3; and*
(3) *Aljan (Vanuatu) Ltd. v. Colmar – Memo [2015] VUCA 44*

*Suffice to say that as a consequence of the above decisions the lease over Aese island referred to in a schedule of the share purchase agreement as: "**AESE LEASE – No. 04/2624/001**", no longer exists and its replacement Lease Title No. 04/2624/003 is held: "... as a trustee for Peter Colmar in his capacity as trustee of the Valele Trust."*

(my highlighting)"

The Evidence

6. Turning to the evidence in the case the claimant relies on two (2) sworn statements the first, dated 21 January 2014 and a further sworn statement dated 5 October 2015 ["**Exhibits C(1) & C(2)**" respectively] annexing a number of emails that were exchanged between the parties in June/July 2007 and several unsigned contracts.

7. The defendant for his part filed one sworn statement by Alan Cort dated 23 October 2014 **[Exhibit D(1)]** annexing a copy of an undated and unsigned Agreement For Sale & Purchase of shares between several companies including "*Aljan (Vanuatu) Limited*" and Palm Bay Corporation ("*the Agreement*").

8. For present purposes I refer to the following features in the unsigned Agreement:

Clause 2(a) which reads:

"*One payment of FIVE HUNDRED THOUSAND AUSTRALIAN DOLLARS (AUD 500,000) to be paid to the vendor upon 29 June 2017 such payment to be non-refundable notwithstanding anything contained within this Agreement*".

According to the Agreement the "*vendor*" is comprised of 3 named international companies and a holding company (**not** including "*Aljan Enterprises Pty Ltd.*"). Plainly the claimant's payment was not made under the above clause which the defendants seek to rely upon in their defence.

9. The second recital to the Agreement reads:

"AND WHEREAS the Companies are the proprietors or will at completion be the proprietors of the Leasehold Titles as set out and referred to in Schedule 1".

10. First among the "*leasehold titles*" in Schedule 1 is:

As already pointed out the Court of Appeal declared that: "*on 14 August 2007 Aljan obtained a registered title as proprietor of the 001 lease by fraud*". (my underlining)

11. Returning to the evidence as a result of David Cort's unfortunate demise on 8 April 2015 no sworn statement was filed by him, however ,Alan Cort's sworn statement which was deposed and sworn on 23 October 2014 before his father's demise clearly states:

"*I am the First Defendant herein.* ***I am also authorized by my father, the second defendant herein, to swear this statement on his behalf.***

I make this sworn statement on the basis of ***facts within my own knowledge and my review of correspondence passing between the claimant and the defendants the subject of these proceedings***".

(my highlighting)

12. The "*correspondence*" annexure "**AHC1**" comprises fourteen (14) pages of emails and a copy of a telegraphic transfer dated 04 July 2007 evidencing the transfer of AUD$500,000 by the claimant's wife Gail Savenkov to the account of "*Aljan Enterprises Pty. Ltd.*"

13. Despite the deposed authorisation, the first defendant went to quite great lengths both in-chief and in cross-examination to distance himself from the numerous emails that he claims were written by his father using his name. The lengths included denying personally sending any emails; denying any knowledge of how to send an email until the last 1 to 2 years; denying putting together any deals or any involvement in drafting any sale and purchase contracts and he even denied discussing much with his father or seeing him though they lived on the same island.

The Emails

14. None of the first defendant's assertions or denials in his oral testimony are deposed in his sworn statement as might be expected, but, in any event he does admit to the authorship of the first email to the claimant dated 27 June 2007 attaching the draft Agreement for Sale & Purchase of Shares. The body of the email reads:

"*Hi Paul, can you read and ring us please today as we need the $500,000 tomorrow.*
Regards,
Alan".

The urgency of the defendant's need for $500,000 is clearly apparent in this very first email in the series.

15. Alan Cort also admits in his oral testimony to having discussions with the claimant on Bokissa Island where he was the manager, around June 2007 about potential property deals in Vanuatu. In his own words: "*we became friends and had drinks together*". In particular, he agreed that the claimant asked about Aese Island and he had estimated it was worth 4 to 5 million AUD$. After that his father took over negotiations with the claimant and there was a lot of "*toing and froing*" with emails.

16. He accepted the claimant had deposited AUD$500,000 into an account in Australia and that there had been problems with their acquisition of Aese Island in about September 2007. He also learnt that there was an agreement put together by his father with a "*non-refundable deposit*" clause. He accepts the Agreement was never signed.

17. The next email is the claimant's first email dated 29 June 2007 which reads:

> "***Dave/Alan,***
>
> *Thank you for the sale and purchase agreement. I am sorry for responding so late in the night, but it has been one of those days. Dave please note that it has been one and a half weeks since you first called me to talk about the whole development and I only got the documents yesterday afternoon, and this is not a complaint.*
>
> *Firstly I would like to say that the overall the agreement looks fine, but I must say that I have a few concerns for which I need some answers, I am sure that we can work these out very quickly, you or your lawyer may want to attend to them.*
> *Please appreciate that from my side we are talking about a big commitment with a large amount of money, and I need to make sure that things are relatively convered, as I have never done anything in Vanuatu before. Listed below are some of the issues that need some explanation. They are not necessarily in any particular order.*
>
> - ***What security do I get over the money paid?***
> - ***How do I make sure that I get all legal approvals in place for my investment with the Vanuatuan Authorities?***
> - ***You have listed title particulars, should we have the area (size) of each title specified as well and the water rights specified and the area?***
> - ***What is the term of each lease?***
> - ***Can you confirm proof of ownership of each property?***
> - ***If the Doctors come on board, how will this effect our present deal?***
>
> *We also need to have some sort of mechanism of security in place for me. If I paid $2.5m, or lets say $4.0m, and the balance was late, what happens to my equity?*
> *I am also concerned that the penalty interest of 15% is very high.*
> *Can you please let me know if we should use the same lawyer for this transaction? If not can you recommend a lawyer that I should use.*
> *Dave/Alan. In all other deals I have entered into in the past, we always had a J. V. agreement in place or a relationship agreement. This helps to make sure that we all understand what the intent is and the responsibilities/commitments are etc.*
> *I also need to speak to a lawyer and accountant to get my legal and accounting structure right, can you please recommend.*
> *Gents, I have the $500,000 in my account ready to be transferred, but please let's get some of the legal and J. V. aspects in order.*
> *If settlement of Aese Island is a problem and it needs to be done quickly, it may be best that we first do all our documentation for it and we can do the others at latter date. I will leave this up to you to decide.*

I will be in meetings tomorrow until mid afternoon. Can you please think about the above and respond in writing. I will also call you in the afternoon to discuss further, I am sure that we work through all this quickly.
Best regards to all,
Paul Savenkov".

(my highlighting)

It is clear from the email that the claimant had "*concerns*" about the draft share purchase agreement and sought answers and assurances from the defendants about its various terms and what "*security*" was being provided for any monies he paid.

18. The defendants responded to the claimant's concerns in an email dated 29 June 2007 which reads:

"*Hello Paul,*

When we decided to do this deal I thought it was said lets get it done and that is what we are trying to do.
We also have to get AESE under way as it has to be done quickly for this deal. We are basically now in a position to do new lease.

PAUL WE WANT THIS JV TO GO AHEAD BUT WE ALSO NEED TO MAKE SURE YOU WILL BE IN A POSITION TO COMPLETE THE CONTRACT EVEN IF WITH EXTENDED TIME. YOU MAY HAVE TO HAVE A PRICE REDUCTION (AS YOU HAVE MENTIONED) FOR SOME OF YOUR PROPERTIES TO ENSURE THIS.

- ***What security do I get over the money paid?***

A) YOU GET SHARES IN THE SEPARATE INTERNATIONAL COMPANIES AS YOU PAY.
1ST – BEDELL INTERNATIONAL LIMITED. YOU PAY 2.5 YOU GET MATEVULU & MALANO 100% HA TERM –
2ND – ALJAN INTERNATIONAL LIMITED (AESE ISLAND) 680 HA. TERM 75 YRS.
3RD – WATANSA HOLDINGS LIMITED (REEF ISLANDS)
4TH – BOKISSA INTERNATIONAL LIMITED (BOKISSA ISLAND) 75 HA. 73 YRS + 75 YRS.
THE % WOULD BE UP TO 45% EACH AS PAID 2ND, 3D & 4TH. UNTIL COMPLETION & THEN 50% OF THE LOT.
WE WILL NEED A PAYMENT SCHEDULE FOR AFTER THE INITIAL .5M (500,000) AND THE 2 M. PAYMENTS.
WE DO NOT WANT ANY INTEREST PENALTIES TO COME INTO THIS AND IF YOU COME ACROSS ANY HICKUPS THEN WE WOULD EXPECT YOU TO CONTACT US AND WE CAN DISCUSS AND SORT BETWEEN US. BASICALLY AS LONG AS YOU LOOK AFTER US AND WE CAN GET ENOUGH TO GET US THOUGH WHAT WE HAVE OR MAY NEED TO GET THROUGH WHICH WE EXPECT FROM YOU AND VICE VERSA).

- ***How do I make sure that I get all approvals in place for my investment with the Vanuatuan Authorities?***

I WILL FORWARD THE NECESSARY DOCUMENTS AND YOU CAN CONTRACT LAURIE HARRISON FROM OORES ROWLAND PORT VILA, ACCOUNTANT, STRAIGHT AND HONEST NICE GUY WHO WILL GET DONE FOR YOU.
- ***You have listed the particulars, should we have the area (size) of each title specified as well and the water rights specified and the area?***
- ***What is the term of each lease?***

SEE SCHEDULE 4

- ***Can you confirm proof of ownership of each property?*** *YES AS PER THE CONTRACT SAYS WE GUARANTEE*

- ***If the Doctors come on board, how will this effect our present deal?***

- *IF WE DO A DEAL WITH THE DOCTORS IT WILL BE A NEW DEAL. THE NEW DEAL FOR THE DOCTORS WOULD BE 2.4 (500,000 NOW AND 1.9M E. O. AUGUST) + 3 BLOCKS OF LAND WHERE WE PICK 10% OF PROJECT TO US.*

SO IF WE DO THIS DEAL THEN YOU WOULD PAY US 1.3 LESS. WE WOULD TAKE BEDELL INTERNATIONAL LIMITED OUT OF THE J/V CONTRACT.
IF YOU WANTED TO PUT MONEY INTO THE DOCTORS SIDE THAT IS UP TO YOU AND WE WOULD DISCUSS WITH YOU BEFORE WE DO ANYTHING WITH THE DOCTORS AT THAT TIME.

We also need to have some sort of mechanism of security in place for me. If I paid $2.5m, or lets say $3.0m, and the balance was late, what happens to my equity *SEE ABOVE ANSWER AND WE WOULD DISCUSS AND MAKE ARRANGEMENTS.*

I am also concerned that the penalty interest of 15% is very high.
SHOULD HAVE BEEN 5% OUR LAWYER STANDARD IS 15% BUT WE TOLD HIM 5% SO THAT IS OK.

Can you please let me know if we should use the same lawyer for this transaction? If not can you recommend a lawyer that I should use.

YES I THINK SO AS WE WILL BE 50/50. AS LONG AS WE BOTH ARE HAPPY THAT ALL CAN BE ACHIEVED AND AGREE ON THE FINAL CONTRACT.

Dave/Alan, in all other deals that I have entered into in the past, we always had a J. V. agreement in place of a relationship agreement. This helps to make sure that we all understand what the intent is and the responsibilities/commitments are etc.

WE WILL HAVE WRITTEN AS ADD ON TO THE CONTRACT. (WE DID HAVE IN BUT THE LAWYER TOOK IT OUT).

CAN YOU DRAFT US SOMETHING BRIEF FOR OUR INFORMATION WHA TYOU WOULD KIE.

AS WE DID WAS PUT IN WHAT EACH PARTY SAW AS INDIVIDAL RESPONSIBILITIES, MONETARY IMPUT, MEETING FORMATS, DECISION MAKING.

I also need to speak to a lawyer and accountant to get my legal and accounting structure right, can you please recommend.

BEST LAWYER IS GEOFF. GEE PH. (678) 22067. geoffgee@ggp.com.vu
BEST ACCOUNTANT IS LAURIE HARRISON PH (678) 222291 harrison@vanuatu.com.vu

Gents I have the $500,000 in my account ready to be transferred, but please let's get some of the legal and J. V. aspects in order.

If settlement of Aese Island is a problem and it needs to be done quickly, it may be best that we first do all our documentation for it and we can do the others at latter date, I will have this up to you to decide.

PAUL WE ARE SUPPOSED TO PAY TODAY BUT WE WILL SEE IF WE CAN GET EXTENDED TO MONDAY 3RD JULY.

THE VENDOR IS BEING VERY GOOD WITH HIS ALLOWANCES & HELP ETC ETC.

HONG KONG BANK ACCOUNT DETAILS
ALJAN ENTERPRISES PTY LTD.

BSB 344-031
ACCOUNT No. 203193-071

Regards,
Alan".

Note: the highlighted passages are extracted from the claimant's earlier email of 29 June 2007.

Although this email is clearly signed "*Alan*", he claims in cross-examination that his father wrote it and used his name. That was apparently a common occurrence and although he told his father it was "*not right*", his father was a "*domineering*"-type and never sought his permission or discussed the contents of the emails using his name. This email is the first time that the payee's name and bank account details were provided to the claimant.

19. Then followed four (4) emails in quick succession on 2 July 2007 which were mainly concerned with the purchase of Aese Island. The emails are not easy to follow but as far as I can discern they are in time sequence:

(a) 1.38pm - Savenkov to "*Dave/Alan*";
(b) 3.44pm - Savenkov to "*Dave*" only;
(c) 4.44pm - "*Dave for Alan*" to Savenkov;
(d) 5.07pm - "*Alan*" only to Savenkov;

20. The next set of email exchanges occurred on 3rd July 2007 as follows:

(i) **8.12am** - **"*Alan/Dave*" to Savenkov**

21. This lengthy email is signed off in the names of both defendants and refers in its body to separate dealings the claimant had had with "*Alan*" (*see:* **Item E**) and with "*Dave*" (*see:* **Item J**) and throughout the email the author(s) uses the plural "***we***" when referring to themselves.

22. Notable in this email of 3 July 2007 are the items marked (**A**), (**G**) and (**I**):

"*(A) Originally when I* (not 'we') *spoke to you about Aese I said it was worth AUD$6M your comentt was for that price I should get 50%.*
So that is what we have done but ***we got the island for $5m based on $500,000 deposit by 29th June*** *and the balance in 18 months*";

"*(G)* ***After you had left we thought and spoke about the whole thing and properties*** *as you were very keen to do more projects and had pushed us on Bokissa over a period of time*";

"*(I)* ***We then had more discussions about your payments to us and we had basically agreed that you need time*** *to sell some of your properties and terms for deposit for Aese by 29th June, $2m 90 days after that and we would sort the balance out as you sold some properties and you had agreed that you would be prepared to drop your asking price to get quick sales*".

23. In my view para. (A) refers to the discussions that the first defendant admits he had with the claimant (***see:*** para. 15 above) and paras. (G) and (I) clearly refers to "*discussions*" that occurred between the defendants themselves and the "*decisions*" that were taken by them jointly.

24. Also the sixth last paragraph which reads:

"Paul, we do not think it is fair or that it was in the context of the deal (the way we see it) but to get this done we will accept that we pay some of the purchase price of Aese, ***you pay the deposit****".*

(my highlighting)

(ii) **1.31pm** - **Savenkov to "*Alan/Dave*"**

25. In it, the claimant mentions the down-turn in the Fiji property market and his abiding concern about making payments without security and he ends the email:

"*Gents the $500,000 is available right now, but please think about the above, give me some comfort so that we can move forward together.*

I have preference to put thing on paper so that it is all clear and misunderstood, can you please respond to this e-mail, and I will call after to discuss".

(iii) **8.39pm** - **"*Dave, Jan and Alan*" to Savenkov**

26. This is the longest email from the defendants and Jan Cort to the claimant and although unverified, it does seem that "*Aljan*" is an amalgam of "*Alan*" and "*Jan*". The email again clearly identifies the bank account that the claimant was to deposit the AUD$500,000 into "*tomorrow*" (repeated 3 times), namely:

"*HONG KONG BANK ACCOUNT DETAILS:-*
ALJAN ENTERPRISES PTY. LTD.
BSB 344 – 031
ACCOUNT No. 203193 – 071"

27. Another thing that is also clear in the email is that there was much to be discussed, done, and agreed in order to finalise the new Aese lease and the terms of payment under the share purchase agreement which also needed to be signed. It is also clear that it was expected that the claimant would have to visit Vanuatu to attend to those outstanding matters.

28. The email makes the following "*representations*" about Aese Island:

- *"First of all we have done a very good deal with the vendor of Aese and we need to give him the deposit of $500,000 aud"; and*
- *The price of Aese is extremely good and fair as we also have the lease now in our company name and we have approvals to treat this property as if we own it*

(THIS IS WORTH A LOT AND TOOK A LOT OF WORK, OUR HONOUR, REPUTATION TO ACHEVE BY ALAN)".

(my underlining)

29. The email also liberally uses words and expressions such as: "... *our honour*"; "... *reputation*"; "... *both happy and relaxed*"; "... *no security but our word*"; "... *this deal is to* (sic) *big to be small minded*"; "... *we need to keep focussed on the big picture*" and finally, "... *this is a long term association and we need trust and good faith*".

30. I am satisfied that as at the date of this email there had been no final or executed contract concerning the share purchase agreement which had been somewhat overtaken by the parties common desire to acquire Aese Island.

(iv) **5.21pm** - **Savenkov to "*Dave/Alan*"**

to the effect "... *my wife Gail will do the transfer tomorrow morning once this is done she will email to confirm*".

31. At 10.18am on 4 July 2007 a sum of AUD$500,000.00 was telegraphically transferred by Gail Savenkov from a Westpac South Yarra account No. BSB. 033083 to "*Aljan Enterprises Pty Ltd*" BSB No. 344031 Account 203193071 at Hong Kong Bank, Brisbane City in accordance with the defendants' instructions.

Consideration and Decision

32. I am satisfied from having carefully considered the emails exchanged by the parties that whilst there was an unsigned draft share purchase agreement sent by the defendants to the claimant on 27 June 2007, the defendants immediate concern as "... *the registered holders of one hundred percent of the share capital of the companies*" was not so much in finalising and executing the share purchase agreement, but in obtaining payment of the sum of AUD$500,000 from the claimant personally so that it could be paid over to the vendor of Aese Island by way of a deposit for the purchase of Aese Island.

33. Needless to say in such circumstances, I am unattracted by questioning relating to "*privity of contract*" and the "*identity of the parties*" to the share purchase agreement. In my view so long as the share purchase agreement remained un-executed, there was no valid or binding contract in existence that could bind the named companies. Equally, I am satisfied that until that event occurred, all negotiations were done by the claimant and defendants in their personal capacity and as majority/sole shareholder(s) of the companies named in the share purchase agreement.

34. In other words the share purchase agreement provides a backdrop and context within which the transfer of AUD$500,000 was made "*in trust and good faith*" by

the claimant personally at the direction of the defendants into a bank account nominated by the defendants whose own company "*Aljan (Vanuatu) Ltd.*" had already entered into an agreement to purchase the lease of Aese Island on or about 21 June 2007 from "*Rose Vanuatu Ltd.*" of which the principal was Dinh Van Than.

35. In this latter regard the judgment of the Court of Appeal in Colmar v. Rose Vanuatu Ltd. (op. cit) sets out the history of negotiations between the defendants as principals of "*Aljan (Vanuatu) Ltd.*" and Dinh Van Than (the principal of "*Rose Vanuatu Ltd.*" as follows (at paras. 12/13/14):

> *"[12] **In mid June 2007, Mr Alan Cort, a director of Aljan, attended a meeting** at Bokissa Private Island Resort with Peter Bouchart and Mr Than. Mr Cort's father was also present. During the course of that meeting the possibility of Aljan acquiring Rose Vanuatu's interest in the 001 lease was discussed. **Mr Cort was aware** that there had been proceedings in the Supreme Court at Santo between Mr Colmar and Mr Than. **Mr Cort asked Mr Than** whether the proceeding was over, to which Mr Than responded: "yes, I won the Court and its all finished a long time ago."*
>
> *[13] **Mr Cort arranged a further meeting**, to be held at the offices of Aljan's solicitors, Geoffrey Gee & Partners. The meeting was held on 21 June 2007. Mr Than was present. While there are minor differences between the accounts given by Mr Cort and Mr Gee of this meeting, it seems likely that Mr Gee was given instructions to draft an agreement for sale and purchase at its conclusion. .... While, at the time of this meeting, interests associated with both Mr Cort and Mr Than were clients of Mr Gee's firm, that firm had not represented the Rose Vanuatu's interest in the Supreme Court.*
>
> *[14] **An agreement for sale and purchase of the 001 lease was drawn and signed. It is dated 21 June 2007**, though it is likely to have been prepared and signed soon after that date. Once the agreement was in place, it was necessary for consent to be obtained from custom owners. ..."*
>
> (my highlighting)

36. Notable in that brief history is the active role played by "*Mr. Alan Cort*" in the negotiations leading to the acquisition of Aese Island by "*Aljan (Vanuatu) Ltd.*"

37. Equally it was necessary for the defendants as principals of "*Aljan (Vanuatu) Ltd.*" to pay a deposit and earnest for the acquisition of the Aese Island lease from the vendor of Aese Island who, in turn, is referred to throughout the defendants' emails as: "*he*" and as being the person "*... we need to give him the deposit of $500,000 aud*". No mention is made of "*Rose Vanuatu Ltd*" in any of the emails that were sent by the defendants to the claimant and the name of "*Aljan Enterprises Pty Ltd*" (not a company named in the share purchase agreement) was repeated in their final email sent the day before the AUD500,000 was transferred by the claimant's wife.

38. Having heard and carefully observed Mr. Alan Cort during his testimony in Court I was left with the distinctly unfavourable impression that he was determined to distance himself as much as possible from the events and correspondence

leading up to and with the payment of AUD$500,000 by the claimant to "*Aljan Enterprises Pty Ltd*".

39. I disbelieve his claim that he didn't know how to use a computer or send an email until very recently and I am satisfied that Mr. Alan Cort was less than candid and truthful about the state of his knowledge and the nature of the role that he played in the negotiations with the claimant leading up to the payment of AUD$500,000 as a deposit for the acquisition of the Aese Island lease "*001*" by Aljan (Vanuatu) Ltd.

40. Be that as it may the claimant pleads two (2) alternate "*causes of action*" – (1) a total failure of consideration; and (2) fraudulent misrepresentation causing loss. The relief sought included:

    (a) Repayment of AUD$500,000;
    (b) An account;
    (c) An order that the defendants are the "*constructive trustee*" of the claimant for the sum of AUD$500,000; and, alternatively,
    (d) Equitable compensation.

41. The background to the claim which is admitted by the defendants is pleaded in the following terms:

    "3. In or about June 2007 the first and second defendants (jointly and severally referred to as the "Defendants") entered into discussions with the claimant with a view to joining together in a business enterprise involving the acquisition and development of real estate in Vanuatu with specific projects to be determined and agreed upon".

42. As to paras. 4, 5 and 6 of the claim which inter alia refers to the payment of AUD$500,000 by the claimant into an Australian bank account "*at the direction of the defendants*", the defendants deny making any false and misleading representations and plead that the consideration for the payment of AUD$500,000 (which is not denied) is the acquisition of 50% of the shares of named companies pursuant to an Agreement for Sale and Purchase of Shares.

43. In this latter regard it is common ground that the Agreement was never executed and remains unperformed as Alan Cort in cross-examination frankly answered **A:** "*No*" to the question: "***Qn:*** *Claimant has paid AUD$500,000 has he received shares in the international companies as promised under the share purchase agreement?*" .

44. As to the claim of fraudulent misrepresentation, I am satisfied that at the time the "*representations*" were made, the defendants had every intention of fulfilling their part of the bargain and further in relation to Aese Island, their representations at the time they were made in July 2007 about acquiring it and it being "*in our company name*" was strictly correct. The fact that four (4) years later that "*representation*" is proven to be incorrect does not alter the correctness of the

representations at the time it was made which is the relevant time when the AUD$500,000 was paid.

45. Having said that, I am equally satisfied that the claim based on "*a total failure of consideration*" must succeed on the facts and on the law as expounded in the judgment of the House of Lords in the leading case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Limited [1943] AC 32 where it was held inter alia:

> *"... the claim of a party who has paid money under a contract, to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances the law gives a remedy in quasi-contract to the party who has not got what he bargained for. Although in the formation of a contract, a promise to do a thing may be the consideration. In dealing with the law of failure of consideration and the right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but its performance".*

46. In the present case I am satisfied that the defendants had promised to acquire the lease of Aese Island for all their benefits in the performance of their agreement with the claimant (not the share purchase agreement) and under which the claimant paid over the sum of AUD$500,000. I am also satisfied that the defendants did not fulfill their promise and that there has been a complete failure of consideration. Accordingly, the claimant is entitled to recover the AUD$500,000 he paid to "*Aljan Enterprises Pty Ltd*" at the defendants' direction.

47. Judgment is entered against the defendants jointly and severally in the sum of AUD$500,000 with interest of 5% per annum calculated from 28 November 2011 until paid up in full. The claimant is also awarded costs to be taxed on a standard basis if not agreed.

DATED at Port Vila, this 27th day of March, 2017.

BY THE COURT

D. V. FATIAKI
Judge.