

*(Criminal Jurisdiction)*

**BETWEEN: Public Prosecutor**

**AND: Ryan Foots**  
Defendant

*Date:* Friday, 24 August 2018  
*Before:* Justice G.A. Andrée Wiltens  
*Counsel:* Mr S Blessing for the Public Prosecutor  
Mr N Morrison for the Defendant

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**JUDGMENT**

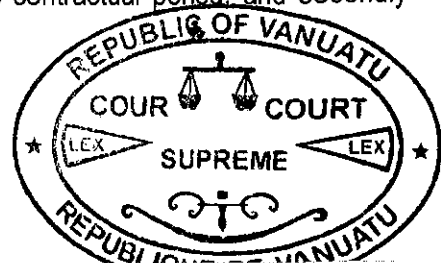
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**A. Introduction**

1. Mr Foots faced trial before me on 20 – 23 August 2018 on an information comprising of four separate criminal charges. He was acquitted of all the charges, and I now expand on the oral reasons given at the time.

**B. History**

2. Mr Foots was committed for trial on 29 September 2017 on 3 counts of obtaining by deception, 1 count of theft, and 1 count of failing to pay NVPF contributions – primarily on the basis of a sworn statement by Mr Sumith Yaddahige, an employee of Iriki Island Holdings Limited (“IHL”). The obtaining by deception charges alleged that Mr Foots paid his employees at a certain rate but held out to IHL that the rate was much higher and thereby dishonestly sought payment from IHL at the higher rate, over firstly the entire contractual period, and secondly over two distinct periods in August 2015 and October 2015.



3. Mr Foots was bailed to appear in the Supreme Court on 20 November 2015; but no pleas were entered on that occasion, as counsel were attempting to resolve the matter. The prosecution had by then, dropped the charge alleging a failure to pay VNPF contributions. He entered pleas of not guilty to the remaining 4 charges on 5 December 2017 and was further remanded on bail to a pre-trial conference on 31 January 2018. The charges pleaded to were essentially still of the same nature (3x obtaining by deception, and 1x theft), but the obtaining by deception allegations had been amended. Now what was alleged is that

- (i) Mr Foots dishonestly over-charged IHL more than what he paid his employees;
- (ii) Mr Foots charged IHL for work done by some of his employees who did not actually work at all on site as and when claimed; and
- (iii) Mr Foots charged IHL for more hours worked by some of his employees than was actually the case.

4. At the pre-trial conference Justice Geoghegan discussed with prosecuting counsel: "...the need to focus on the essential elements of the theft charge and to consider whether or not the evidence will be sufficient to discharge the onus and burden of proof." I have little doubt that Justice Geoghegan was concerned at the wording of the charge, referring as it did to "assorted construction tools" and referring to a schedule annexed to Mr Sumith Yaddhegige's statement. A further pre-trial conference was scheduled for 29 March 2018.

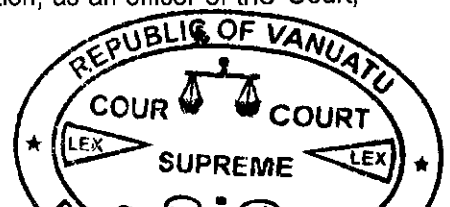
5. At the second pre-trial conference I was advised that the case was taking shape and that counsel were co-operating to refine the issues in dispute. I adjourned the conference to 4 May 2018; and when the matter was then called, I scheduled the trial for 4 days running from 20 to 23 August 2018.

### **C. Trial**

6. On the first morning of trial, on the basis that two prosecution witnesses were unavailable to be in Vanuatu over the entire period of the trial, Mr Blessing sought an adjournment. In fact he had attempted to fore-warn the Court by e-mail of Thursday 16 August 2018, but I only saw that just minutes prior to the trial commencing.

7. Mr Morrison opposed the adjournment – his client wanted the trial over and done with. He indicated that the statements of the two prosecution witnesses could be read by agreement.

8. It seemed to me that the concession made completely eliminated the need for an adjournment, but Mr Blessing disagreed. It transpired that he had no witnesses available, and wouldn't have until the following day. Reluctantly, I allowed Mr Blessing the indulgence of commencing his case at 9am the following day – but I made plain that I did not approve of his assumption that his application would be granted; and I reminded him his obligation, as an officer of the Court,



was to be ready to proceed when the case was called. He should have had his other witnesses available

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9. At the commencement of day two, Mr Blessing sought leave to file an amended information, which was not opposed by Mr Morrison. Leave was granted and Mr Foots pleaded not guilty to the four charges in the new information. The allegations had again shifted. Now, Mr Foots was alleged to have obtained by deception by:

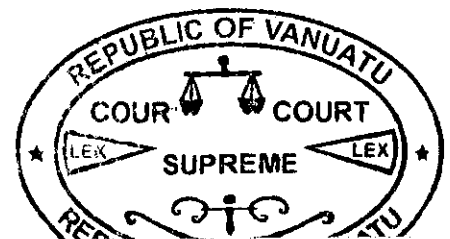
- (i) Claiming for hours of work over a distinct period in August 2015 for employees who had not worked at all on the days claimed:
- (ii) Claiming for more hours than his employees actually worked, over the same period; and
- (iii) Claiming for more hours than his employees actually worked, over a specific period in October 2015.

10. The theft allegation was better pleaded and it now involved a schedule of tools and a value ascribed to them, but it was otherwise the same.

11. There was a fairly large body of evidence which was agreed – in the form of witness statements and documentary exhibits. The background to the case was uncontested, and fully set out in that material. The crux of the matter followed Cyclone's Pam devastating visit to Vanuatu in March 2015; and the damage caused to IHL's properties on Iririki Island. Mr Foots' construction company VanCorp was engaged by IHL's insurers to make good all the damage. The terms of VanCorp's engagement were settled following negotiations, and are set out in correspondence produced. As the work progressed, VanCorp made monthly claims for progress payments, which were vetted by a Quantity Surveyor and a Loss Adjustor prior to being settled by IHL's insurers, QBE Insurance. It is in the course of the progress payment claims that the alleged obtainings by deception were said to have been perpetrated. The theft charge was said to have occurred towards the end of the project.

(i) Theft

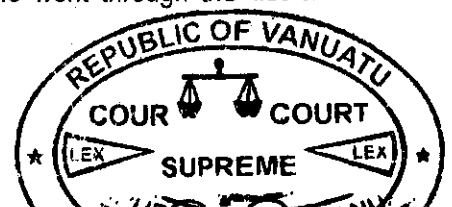
12. I heard evidence from Mr Stockley, an IHL Director, mainly regarding the theft allegation. He told me that the issue of construction tools was twice discussed with Mr Foots, at the commencement of the works and again on the Gala Opening night towards the end of the work. The first event was in April 2015, when Mr Stockley noticed what he considered to be unusual – namely that tools were to be purchased for the use of the contractor. Mr Stockley advised that ordinarily contractors provide their own tools. He raised this at a meeting with Mr Foots, when Mr Vaccaro, a member of staff of Crawford's (the Loss Adjustors), was also present. Mr Vaccaro was said to have told Mr Stockley that the arrangement "was fine with him". Mr Stockley then asked if the tools would remain the property of IHL at the conclusion of



the property, and he was told they would. Mr Stockley then asked Mr Foots the same question and received the answer: "Yes, of course mate."

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13. Mr Stockley confirmed that the tools then discussed were those in the schedule which was produced as part of Exhibit 1. He said the tools were purchased by IHL, invoiced to IHL and paid for by IHL.
14. Mr Stockley raised the issue of tools again with Mr Foots at the Gala Opening night on 13 May 2016 – he asked Mr Foots where his tools were. The answer received was: "Perishable – you know Vanuatu." He asked that as the job was finished and no tools had been left behind.
15. Mr Stockley accepted that as VanCorp wanted to do the work expeditiously, several sets of tools were required to be purchased. He accepted also, having read a letter by the Quantity Surveyors Roberts (Exhibit 1), that only at the end of the works could an assessment be made regarding the life and end value of the tools, in conjunction with VanCorp. He did not know if that had occurred.
16. Mr Stockley was challenged as to which entity actually paid for the tools, and he ultimately accepted that although IHL had paid for them, it claimed the costs back from their insurers QBE. In fact, IHL had pre-approval from QBE to purchase the tools.
17. Mr Stockley agreed that from the time of purchase until October 2017 there would inevitably be a depreciation of value for the tools. He agreed that local workers are "hard" on their tools; but he asserted that they also knew how to repair them.
18. Mr Stockley further accepted that in fact the project was only completed by 17 October 2016 – well over the agreed time to complete. He accepted he had not written to VanCorp or Mr Foots asking for the return of the tools. He told me it was correct that IHL sued VanCorp; and VanCorp also sued IHL in early 2017. In the midst of that litigation, Mr Stockley could not recall Mr Foots advising that some tools were still held by VanCorp and were available to be collected.
19. Mr Stockley also gave some evidence about how contractors' employees could and did get to work at Iririki Island – it was unspecific and generic in nature, and really did not greatly assist me.
20. The only other material evidence on this charge came from the defence, namely Mr Foots and Mr Roberts.
21. Mr Foots told me that IHL wanted their resort to open as quickly as possible after Cyclone Pam; and after he had been engaged as the contractor, he was asked how the works might be expediated [sic - I feel he perhaps meant "expedited"] – his response was to suggest several sets of tools would enable employees to be more efficient in all working on different sites at the same time. Hence the schedule of tools was agreed upon. He went through the list and



explained that very few items were still in existence at his workshop – the remainder had been discarded due to wearing out and breakages. ~~The items still remaining he had offered to IHL to come and collect them;~~ and he had also spoken to a Mr Jason Jones at QBE Insurance, but Mr Jones told Mr Foots to hold onto the remaining tools.

22. Mr Foots had no recollection of the conversation with Mr Stockley in the presence of Mr Vaccaro, and similarly their conversation on the Gala Opening night. Mr Foots explained that in all matters, including tools, he and VanCorp only dealt with the Quantity Surveyors and the Loss Adjustors, not directly with IHL.
23. Mr Foots denied deliberately keeping tools – he maintained that most were perishable, and also that those that remained were in fact the property of the insurers, not IHL. He told me the process set out in Exhibit 1 to assess what value any left-over tools had at the end of the project has not taken place. He also confirmed he has not been asked by IHL to return any tools.
24. Mr Roberts confirmed that VanCorp's monthly claims were presented in a pro forma fashion to him, as the Quantity Surveyor. Once he had gone through every item of the claim, and was satisfied it was all correct he would make a recommendation that the claim was appropriate to be paid – he did not know if IHL or QBE paid it. He confirmed the tools were part of a progress payment claim by VanCorp, and that the tools listed in the schedule attached to Exhibit 1 were the only tools purchased. He confirmed also that prior to the works being completed, as QBE had settled with IHL, his services were terminated before the matter of assessing any residual value for the tools left at the end of the job was undertaken.
25. He has had personal experience in such assessments. Looking at the schedule which is part of Exhibit 1, it was his view that most of the items were perishable and would not have survived the works done. Of those that might have still been of use at the end of the contract, it was his view that perhaps 10% of their original value might remain.
26. I was surprised that Mr Vaccaro was not called to testify. Indeed, there was no indication that he had even been interviewed as part of the investigation.
27. I took careful note of the fact that the whole matter of tools was not included in any of the correspondence relating to the negotiations entered into between the parties. Nowhere can I find a condition of the agreement reached as to this construction work, that the tools purchased were the property of IHL and that they were to be returned to IHL at the conclusion of the works. The only evidence the prosecution could point to was the two oral statements allegedly made by Mr Foots. Only one witness gave this evidence – and he was obviously not unbiased. Indeed, it was a concern to me that his evidence before me was enhanced, when compared with his witness statement – I thought that was significant in demonstrating a determination, an animus. I decided it was not safe to rely on the uncorroborated evidence of Mr Stockley regarding these verbal statements. On that basis alone, the prosecution case fails.

28. However, there are other problems with the prosecution case. The most significant of those was the complete lack of evidence regarding Mr Foots' intention to permanently deprive. While it is common to have to infer intent from the surrounding circumstances, in this case that was not possible. On the prosecution case, Mr Foots was overcharging to an enormous extent – at one point the allegation was to the extent of more than VT 97 million. The tools listed in the schedule were valued new at VT 1.9 million. At the end of the job, they were something like 18 months old; and they had been extensively used. Even if they had all survived, using Mr Roberts' expertise, they might be worth VT 190,000. Here, the evidence provided by the defence, was that only some 4-5 items actually survived the work. The pathetically small value of that pales into insignificance, and militates strongly against drawing an adverse inference of dishonest intent against Mr Foots. Further, he has demonstrated a desire to return the surviving tools – not only in the witness box, but earlier during the 2017 civil litigation, a fact which went unchallenged.

29. Although the suggestion was made by the defence that the tools were never the property of IHL, that is really not significant. The real point the prosecution made was that they were never VanCorp's. However, the correct process, as evidenced in Exhibit 1, is at the end of the contract for the parties to assess what value, if any, is left in any of the remaining tools, and for that sum to be a credit against the final claim. That process was never undertaken – hence, in my view, there was no legal obligation on Mr Foots to return any of the tools. It also went unchallenged that no formal request for the return of the goods was made to VanCorp.

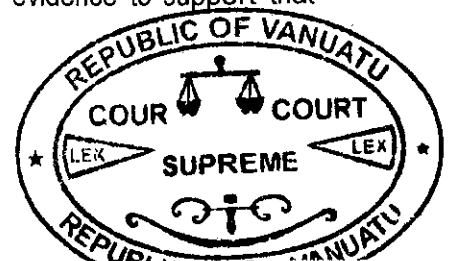
30. It seems to me that the nature of the tools is the critical point. It was obvious that they are perishable – tools of this type do not last for generations. Many are small items, easily stolen from work sites, despite reasonable precautions. Some are possible to easily misplace. It seems to me that any number of reasonable explanations might lie behind why 18 months after commencement of the work, there might only be a very small return, if indeed any.

31. Mr Foots struck me as a sound witness. He did not appear to exaggerate to the point of losing credibility. He could easily have told me that the remarks attributed to him were untrue, but he simply said he could not recall making them or even the second conversation taking place. He was sufficiently confident in his stance that he did not need to label Mr Stockley a liar, as many in his circumstances would have done. He appeared to be a good, reasonable, reliable and accurate witness. I believed him.

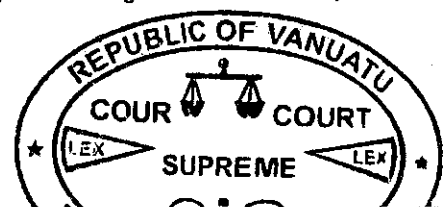
32. Mr Foots was acquitted of the theft charge immediately after the conclusion of the evidence. I noted that the prosecutor did not even make further submissions than those made at the “no case to answer” stage of the trial.

(ii) Obtainings by Deception (x3)

33. At the commencement of day 3 of the trial, Mr Blessing advised me the prosecution would offer no evidence in relation to charge 3. At that point, there was no evidence to support that allegation from any of the witnesses called. I dismissed that charge.



34. At the conclusion of the prosecution case, Mr Morrison made a "no case to answer" submission. Put succinctly, the entire allegation was founded on one very uncertain basis – that is that IHL maintained their own records of who, what and when VanCorp employees did on Iririki Island as part of the project, and when comparing IHL's records with the various monthly VanCorp progress payment claims, it is patently obvious that gross over-charging occurred.
35. Mr Morrison's point was that IHL's records were inaccurate and unreliable. As a direct result, the analysis completed by Mr Yaddehige could also not be relied upon, and that was the basis for the remaining charges.
36. Despite a valiant attempt by Mr Blessing to "shore up" the prosecution case, I acceded to Mr Morrison's submission that Mr Foots did not have a case to answer on the remaining 2 obtaining by deception charges, and I dismissed those charges as well.
37. The reasons for my decisions were overwhelming. Mt Yaddehige accepted, when I put the proposition to him, that if IHL's figures were inaccurate, then his findings could not be correct. His conclusions were unchallengeable, but they were based entirely on IHL's records.
38. The process that IHL adopted, was apparently designed to minimise theft from the island. Hence IHL imposed a rule that all those going to or leaving Iririki Island were required to sign a register. That rule was enforced by security personnel, who were based at an office at the end of the main pier or jetty. Separate registers were kept for IHL staff and each of the contractors' employees – in fact VanCorp had two registers for it's staff, one for those working on the apartments and another for those working on the Casino.
39. Mr Joe Iwai and Ms Nima Tetiano gave evidence about the rule, how it worked in practice, the registers, and possible inaccuracies. I considered both were dogmatic to a quite ridiculous degree – they were quite possibly in fear of losing their employment if they deviated in even the smallest way from their dogma. They were adamant that every visitor to Iririki signed in and out – no exceptions.
40. The problems were however insurmountable.
41. There are at least 3 entry/exit points on Iririki Island – and the registers were only kept at one such location. The explanations to try and circumvent that was that barges only came rarely, and those vessels did not take workers to the Island to work on VanCorp's projects. Photographs produced by the defence demonstrated that that was incorrect. Further, although IHL tried to control the flow of visitors, banana boats continued to ply their trade and of course they are able to drop off and pick up from anywhere along the shoreline – they are not reliant on a jetty.
42. The register, or at least what was still available to scrutinise, demonstrate that numerous persons who signed in did not later sign out. While Mr Yaddehige said he got around that by

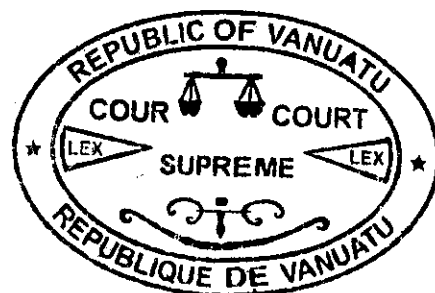


allocating those workers a full 8 hours, that cannot repair the credibility of the prosecution witnesses who said there were no exceptions to the rule of signing in/out. In short, both of those witnesses had no credibility. Further, if there are numerous actual register entries for people signing in but not also signing out, then what likelihood is there really that absolutely everyone signed in? In my view, that possibility cannot be ignored.

43. It was accepted that there were times of congestion at the security office, with people lining up to sign in/out. Indeed, the rush hour at 7 – 7.30am often saw up to 200 persons arriving for their day's work. The possibility, likelihood even, of at least some of them not bothering to comply with IHL's rule was completely discounted by both prosecution witnesses – but not by me, or any other reasonable observer.
44. Then there is the issue that some persons would sign in/out for themselves, and also a colleague(s). If that occurred, and Ms Tetiano implied it did, how could it continue to be said the records were accurate. Ms Tetiano also told me that one of the security personnel, Kalsaf, would make entries into the registers. The whole process lacked integrity.
45. One final point as to the registers – it was accepted that VanCorp employees did work for the IHL project on the mainland – in obtaining, collating and supplying materials, for example. Those persons did not have to sign in/out of the register. So when Mr Yaddehige looked only at those who had signed in/out, and compared that information with VanCorp's claim, of course there would be a difference. But that difference is explicable, and understandable – and it is certainly not evidence of gross dishonesty, which is the thrust of the prosecution allegations.
46. One further factor needs to be taken into account here. Mr Foots was well aware of the process involved in making progress payment claims. He well knew that every item claimed would be carefully scrutinised by the Quantity Surveyors and the Loss Adjustors to ensure accuracy – it is their task to ensure that IHL and QBE were not asked to pay more than they should. In those circumstances, Mr Foots would be risking a great deal to attempt to over-charge in the manner and to the degree alleged – his whole career in fact. I did not accept that the prosecution had established any basis for suggesting that he had done that.

#### D. Costs

47. In other jurisdictions, where prosecutions are commenced or continued without a proper basis, the law provides for costs to be paid, in limited circumstances. The law in Vanuatu seems to be undeveloped. I note under section 98 of the Criminal Procedure Code [Cap 136] ("CPC") accused persons can be made to pay costs of up to a maximum of VT 100,000 on conviction; and pursuant to section 99, a private prosecutor can be ordered to pay up to a maximum of VT 50,000 if the accused is acquitted or discharged.





48. Section 101 of CPC states:

**“101. State not to pay costs**

Except where the Court is of opinion that a prosecution is unjustified or oppressive, the State shall not be ordered to pay costs in case of dismissal of any charge;....”

49. In this particular instance I am of the opinion that this prosecution was unjustified. In my view, the end result of the case was always obvious. In those circumstances, the persistence of the prosecution was inappropriate. A decision ought to have been taken to end the case either when the information was originally filed after the initial review of the available evidence, or when it was later amended. At both those stages, it should have been obvious that there was no realistic prospect of convictions being achieved – as required by the Prosecutor's Code, at paragraph 3.3 to 3.6.
50. The various changes to the allegations demonstrate that several times, the available evidence must have been carefully assessed – yet the fundamental obligation of a careful assessment of the realistic prospects was over-looked. That well have been as a result of pressure imposed by a persistent and/or forceful complainant – but the prosecutor's role is not to simply be an advocate for the complainant.
51. In this case, I am aware that Mr Foots was arrested and detained in the infamous Cell 6 prior to being granted bail. His name has been published in association with the general allegation of gross dishonesty. He has been facing a criminal trial for something in the order of 12 months. The impact of the stress created by all of those facts on him and his family should not be minimised or overlooked. It is exactly these types of considerations that compel the Public Prosecutor to make the decisions he is obligated to determine in a responsible and fair manner, taking into account the interests of the community and the individual concerned.
52. A private prosecutor is liable to face costs of up to VT 50,000. In my view, the costs that might be awarded against the State must be significantly greater. Without any Parliamentary guidance on the point, I would say the maximum could be as high as VT 250,000.
53. With that introduction to the issue, I invite Mr Morrison and Mr Blessing to file written submissions as to costs within 14 days. I shall hear them if they wish to be heard; or I can deal with the matter on the papers.

**Dated at Port Vila this 24th day of August 2018  
BY THE COURT**

*Justice G.A. Andrée Willemss*  
Justice G.A. Andrée Willemss

