

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

Civil
Case No. 17/3613 SC/CIVL

AND: MOCHA LIMITED t/as VANCORP
CONSTRUCTION
Claimant

AND: ANZ BANK(VANUATU) LIMITED
Defendant

Before: Justice Saksak

In Attendance: Mark Fleming for the Claimant
Garry Blake for the Defendant

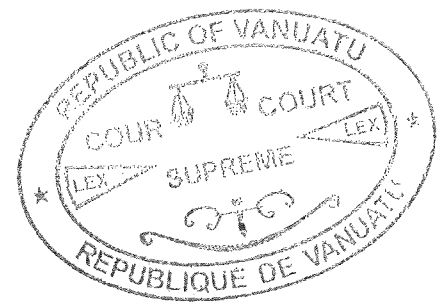
Dates of Hearing : 18th -19th June 2019

Date of Decision: 28th June 2019

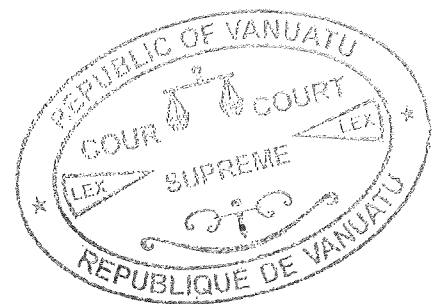
JUDGMENT

Background

1. This claim arose out of Civil Case No. 461 of 2016 instituted by Iririki Island Holdings Limited (IIHL) as claimant and Mocha Limited as defendant (now Claimant).
2. In April 2015 the Claimant and Defendant entered into a written contract whereby the defendant agreed to do repairs and restoration of damaged apartments and other areas at the Iririki Island Resort post Cyclone Palm. The Claimant alleged breaches of contract and claimed for damages in its claim filed on 2nd March 2017.
3. The defendant denied the claim and filed a defence and counter-claim on 22nd August 2017 claiming orders that (a) the claim of IIHL be struck out, (b) unpaid debt in the sum of \$ 1.419.200.47 AUD, (c) interest of 8%, (d) VT 80.000.000 damages for loss of opportunity and interest thereon, costs and any other orders deemed fit by the Court.



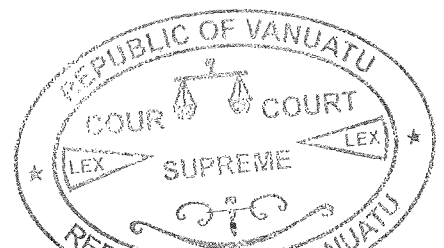
4. On 29th August 2017 Justice Geoghegan struck out the claim of IIHL and ordered its liquidation. IIHL appealed the judgment to the Court of Appeal. In the meantime on 31st August 2017 IIHL applied for an order staying the judgment pending appeal. The judge granted an interim order on the basis of Mr Pettiona's sworn statement that Mr Pettiona was to pay the sum of AUD \$ 1,386,017 personally and not the company IIHL.
5. The Interim Order stated in paragraph 11(b) –
“ the Interim Order is conditional upon the sum of AUD 1, 386,017 being paid into the trust account of the Chief Registrar of the Supreme Court by or on behalf of Iririki Island Holdings Limited no later than 4pm on Monday, September 11th and is to remain there on interest bearing deposit until further order of the Supreme Court or Court of Appeal.”
6. On 9th November 2017 the Court of Appeal allowed the Appeal of IIHL and set aside paragraphs 73 (c), 73(d) and 74 of Geoghegan's J Judgment of 29th August 2017 and paragraph 58 of the orders of 12th October 2017. But at paragraph 4 the Court of Appeal ordered-
“ that the \$ 1,386,017 paid into the Trust Account of the Chief Registrar of the Supreme Court pursuant to the Orders of Geoghegan J dated 31st August 2017 in Company Case No. 16/3841 SC/COMP, in decision at paragraph 11 (B) be paid and/or released within 7 days to the Respondent with any interest that may have accrued.”
7. On 11th September 2017 following the Interim Orders of 31st August the defendant Bank received an inward credit advice from Westpac Australia in respect of a transfer from Mr Pettiona in the sum of AUD 1,386,017.00.
8. On 26th September 2017 the defendant converted the sum of AUD 1,386,017.00 into vatu in the sum of VT 114,623,606 and credited the Chief Registrar's Trust Account accordingly using the conversion rate published for that day at 82.50 but using a more beneficial rate of 82.70.



9. Following the Court of Appeal Orders of 9th November 2017 the Chief Justice and the Chief Registrar instructed that the sum of VT 114.623.606 be paid by Bank Draft to Mocha Limited AUD Account at the Bred Bank. The sum of VT 114.623.606 was converted back in to Australian Dollars at the conversion rate of that day being 87.29 but the defendant Bank adopted a more beneficial rate of 87.00.
10. On 24th November 2017 the defendant Bank acting on the instruction, arranged a SWIFT transfer of AUD 1,317,513,00 to the nominated account of Mocha Limited at the Bred Bank. Mr Foots however stopped this transaction and advised he did not want Australian Dollars but that the funds be paid in Vatu. The funds were returned by BRED to its correspondent Bank in Australia.
11. On 27th November 2017 Mr Foots communicated with the Chief Registrar and BRED to have the funds returned to the defendant Bank. Subsequently on 30th November 2017 the Chief Justice and Chief Registrar issued a final instruction not to convert the transferred funds but to issue a cheque in the sum of AUD 1, 317, 488,87 to Mocha Limited instead. The claimant finally accepted this sum of money but reserved their right to take legal action. This sum was resent by SWIFT transfer to the claimant's account with the BRED Bank.

Complaints of the Claimant

12. The Claimant complained that they were paid AUD 1,317,488,87 instead of the sum ordered by the Court of Appeal of AUD 1,383,017 and that they suffered loss of \$ 68,504,29 as a result. As such they say the defendant failed to comply with the second order. Further, the claimant complained that the defendant had breached its obligations and duties by unconscionable, unjust and unfair conducts towards the claimant by (a) receiving money under the first order with knowledge the money would be diminished due to exchange rates, resulting in depletion of funds without the knowledge of the beneficiaries, (b) obtaining money using its superior position and power to the disadvantage of the claimant, (c) wrongfully obtaining money belonging to the claimant under a constructive trust, (d) not warning the claimants of the prejudices they would suffer upon using the 8.7 exchange rate, failing to warn or



advise the claimant of the available alternatives, and (d) engaging in misleading and deceptive conduct in breach of section 138 of the Companies Act.

Relief Sought

13. The Claimant seeks-

- a) A declaration that the money paid pursuant to the first order was held on constructive trust
- b) \$ 68,540.29 being the balance of \$ 1,317,512.71.
- c) Interest at 8% per annum on the loss, and
- d) Any other orders deems suitable.

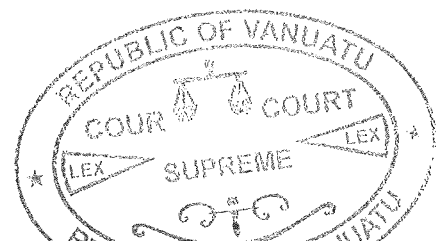
14. The defendant filed an amended defence on 26th June 2018. They admit some facts pleaded but denied specifically that it owed any equitable or fiduciary obligations or duty of care of any kind to the claimant, and denied any losses by the claimant and breach of section 138 of the Companies Act. The defendant denied any constructive trust existed and non- compliance with the second Court order.

Evidence

15. The Claimant relied on the evidence of Mr Ryan Fouts in support of their claim and produced evidence also from Mr Micheal Fimeri as an expert witness for the assistance of the Court. The claimant sought also to produce expert evidence from Mr Din Covo but due to objections raised by Mr Blake which the Court accepted, Mr Din did not give evidence. Written objections were filed by Mr Blake to certain parts of the sworn statements of Mr Fouts, Mr Fimari and Mr Covo on the basis of hearsay, speculations and irrelevance and opinion.

16. The defendant's only witness was Mr Sheng Lee, Country Head of the defendant Bank. Mr Fleming filed written objections also to certain parts of Mr Lee's evidence on the basis of they being hearsay, irrelevance and opinion.

17. After discussions with Counsel, both were agreeable that all sworn statements be received into evidence subject to those objections, and it would be entirely in my



discretion to place due weight on them, accept them or reject them. All witnesses were cross-examined except for Mr Covo.

Issues

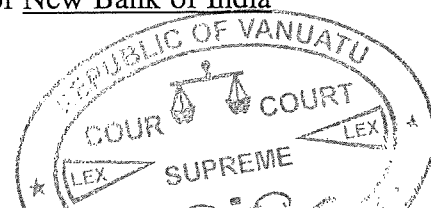
18. Mr Fleming for the claimant raised 9 questions to be answered in his pre-trial submissions which counsel relied on in his final submissions to the Court on 19th June.

These are-

- a) What is the nature of the Court Trust fund?
- b) Was the defendant Trustee of the money paid under the first Order and did it breach its duties?
- c) At what time did the Claimant become the beneficiary of the Trust?
- d) Did a fiduciary relationship exist between the Claimant and the defendant?
- e) Did a constructive trust exist to create the fiduciary relationship?
- f) Did the defendant owe a duty of care to the claimant to ensure they would not be prejudiced by factors not known or in their control, under the second order, and did the defendant breach those duties?
- g) If so, is the benefit being held by the defendant as constructive trustee for the claimant as beneficiary ?
- h) Did the defendant comply with the order of the Court in respect of money held in trust?
- i) Did the defendant engage in misleading and deceptive conduct contrary to section 138 of the Companies Act?

Submissions

19. In relation to the nature of the Court Trust fund Mr Fleming relied on the letter dated 15th July 1988 disclosed by the defendant and submitted the Trust then created had all the five attributes of a Trust. As such counsel submitted the money paid into the Court Trust Account were held by the Chief Registrar for the benefit of the Claimant. As such the defendant had equitable duties to preserve the money as trust property, to exercise reasonable care, not to make a profit out of the money and to provide information. Counsel submitted also that the relationship between the defendant and its customer was one of contract, making the defendant bank a trustee and not simply an agent of the customer. Mr Fleming relied on an Indian case of New Bank of India

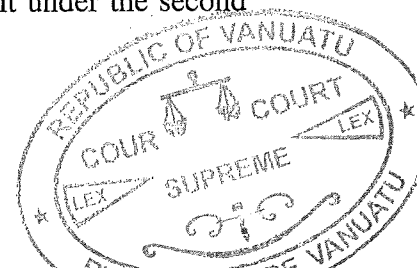


Limited.v. Pearey Limited 1962 AIR 1003 where the Court held amongst other things that-

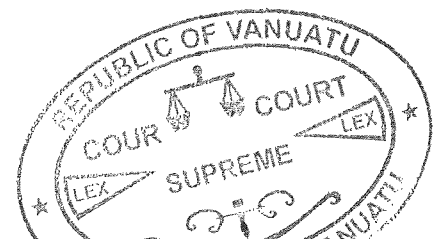
“..... [W]hen money is paid to a bank with special instructions to retain the same pending further instructions, a trust is created..... And further, “ that the money delivered by the Respondent remained in trust with the bank and was not held by it as a deposit....”.

Based on those principles Mr Fleming submitted that a Trust fund establishing the Chief Registrar’s Trust Account in 1988 made the defendant become trustee under the first order. Counsel relied also on the case of Reserve Bank of India.v. Bank of Credit and Commerce [1993] 78 CompCas 207 to support his submission that the money delivered to the defendant bank was for a specific purpose and therefore it created a relationship not of debtor and creditor, but of bailee and bailor or trustee and beneficiary. Counsel relied also on Barclays Bank Limited.v. Quistclose Investment Limited [1968] UKHL 4 in support of his submissions that asset given to another party for specific purpose was held on trust.

20. In regard to the question of fiduciary relationship Mr Fleming relying on Hospital Products Limited.v. United States Surgical Corporation [1984] HCA 64 in support of his submission that the defendant stood in a fiduciary position and used that position to its advantage to gain profit without the informed consent of the claimant.
21. As for constructive trust and equity Mr Fleming relied on the commentary “ Australian Commercial Law” Chapter 29 of the Law of Trust to submit that it is inequitable for a person to retain property for their own benefit. Baumgartner.v. Baumgatner (1997) 164 CLR and Board man .v. Phipps [1967] 2 AC 46 and the Vanuatu Case of Barrett & Sinclair.v. Mc Gormack [1999] VUCA 11.
22. In regard to counsel’s submission in relation to fiduciary’s breach from failure to disclose facts, Mr Fleming relied on Re Commonwealth Bank of Australia and R Dungan.v. Robert Smith and Marie Smith [1991] FCA 375 in support of his submission that the defendant had failed to warn the claimant of the losses to the Trust Fund when first receiving it, and subsequently transferring it under the second orders, which amounted to a fundamental breach.



23. Next Mr Fleming made submissions on the bank's liabilities relying on the Commentary ' Banking Law in Australia " 9th Edition (2017) to submit that where the Bank knew the account to be a trust one, it was beyond question that there is a duty owed to the beneficiary. He submitted the Bank had full knowledge the money received from Mr Pattiona was trust money from the first orders as the source document, and from the letter of 15th April 1998.
24. In regard to the unconscionable conduct, Mr Fleming relied on Bridgewater.v. Leahy (1998) 194 CLR 456 and Commercial Bank of Australia Limited.v. Amado [1983] HCA 14 to submit that the defendant Bank with its vast training about money markets and what is and is not a commercial transaction, and by not giving notice and/or warnings, the Court staff as the weaker party had their will overborne, so that there was no independent and voluntary act.
25. Finally on the misleading and deception conduct of the Bank, Mr Fleming submitted that their failure to warn the claimant of alternatives and not using advertised exchange rates and not referring the rate to the market was in breach of the Bank's own published guidelines, and was contrary to section 138 of the Companies Act. Counsel relied on the case law of Butcher.v. Lachlan Elder Realty Pty Limited [2004] HCA 60 in support of this submission.
26. I have considered also Mr Flemings's summary of legal principles and his summaries of the evidence both for the claimant and for the defendant, written and verbally.
27. In response, Mr Blake argued and submitted simply that-
- a) The Chief Registrar was the defendant's Bank's Customer and as such any duties owed by the Bank were owed to the Chief Registrar.
 - b) Duties owed to a customer by a bank are not fiduciary duties. It is a debtor/creditor relationship, not a trustee/beneficiary relationship. Mr Blake relied on the case of Robb Evans.v. European Bank Limited [2004] NSWCA 82 in support of this argument.



- c) Mocha Limited is not a customer of the Bank nor a party to the mandate contract between bank and customer and therefore no duties are owed to it.
- d) A bank does not owe any duty to beneficiaries of an account holder who is a trustee holding accounts with the bank on trust.
- e) If the Bank owes no duty to Mocha Limited, then the Claimant has no case.
- f) The only party having standing under the mandate, would be the Bank's customer, but on the evidence presented, not even the customer would have a claim against the Bank.

28. I have considered the further points and the detailed written closing submissions made by Mr Blake, including his oral submissions.

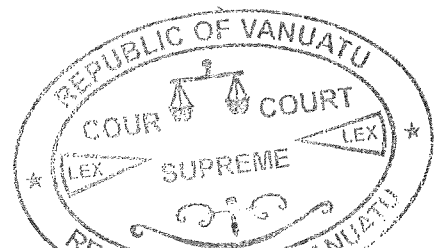
Discussion

29. I should stress at the very outset of my discussion of the issues that this is in reality a simple case but it has been deflated and made complex and complicated by the claimant introducing into it the principles of fiduciary relationship, constructive trust and equity, unconscionable, unjust, and unfair conduct and misleading and deceptive conduct.

Starting Point

30. A good starting point is Company Case 16/3841. The defendant Bank was not a party and never has been a party to that proceeding. The Claimant (the defendant) counter-claimed for an initial debt of \$ 1, 419, 200 47, interest of 8% per annum, VT 80 million for loss of opportunity and costs.

31. The claim was struck out but on appeal which was allowed, the claims were restored. However Mr Pettiona offered to pay \$ 1,386,017 personally of the \$1, 419, 200.47 originally claimed. This prompted the parties agreeing to and executing a Consent Order on 9th November 2017. In effect and essentially the balance of \$ 33,183.47, VT 80 million, interest and costs were foregone.

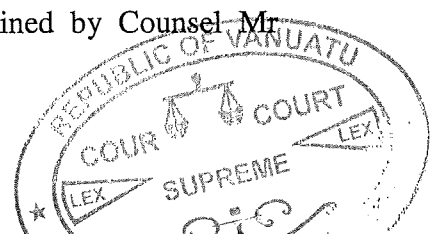


Claims for Australian Dollars

32. The claim was made for Australian Dollars and so Mr Pettiona had to pay in Australian Dollars. That was the choice of the claimant. For them to come along at the end (on 30th November 2017) when payment was made in Australia Dollars and transferred by SWIFT to Bred Bank and say they wanted Vatu instead of Dollars, it was too late. The best time to have asked was on 9th November 2017 when the Consent Order was executed or prior to it, but there is no evidence before me that the claimant made that request.
33. The amount offered and agreed was the amount paid by Mr Pettiona. It was, according to evidence, transferred to the defendant bank on 11th September 2017. And according to Mr Lee's evidence, it was put in a Suspense Account and was not earning interest.

Lack of Disclosure of Australian Dollar Account at BRED

34. There was no evidence from Mr Pettiona which would have been helpful to know (a) whether he had an Account in Vatu or AUD at the ANZ Bank and (b) whether he advised his lawyer Mr Thornburgh and/or Mr Fleming about the transfer of money, or (c) whether Mr Pettiona gave any special instructions that moneys he transferred be retained by the Bank until his further instructions. But in the absence, the money was kept in a Suspense Account with no interest. This is sufficient for me to infer there was no account operated by Mr Pettiona at the defendant Bank. And the New Bank of India Limited case cannot be of any assistance to the claimant.
35. Therefore under those circumstances for the period the money was held in Suspense Account, be it for 12 or 18 days, the defendant Bank owed no duty to the Claimant and no fiduciary relationship existed to create any duty of care. And it follows that where no such duty exists, there can be no breach.
36. I find it difficult to believe that on 9th November 2019 when the Consent Orders was executed, it could have been done without instructions obtained by Counsel Mr



Fleming from Mr Foots or someone else in a position of authority in the Claimant Company Mocha Limited. The very existence of the Order is evidence that counsel had obtained their clients' instructions before executing the orders. If that is not the case, which is highly unlikely, the claimant's complaint should really be directed elsewhere but not against the defendant Bank.

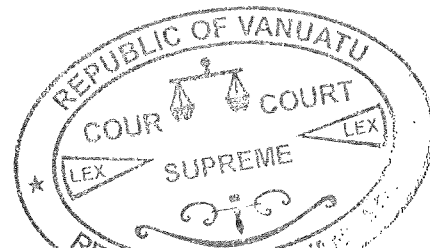
37. As at 9th November 2017, was it really necessary for the parties to execute the Consent Order requiring the money be paid into the Chief Registrar's Trust Account, when by the evidence the Claimant had a AUD Account at the BRED Bank? But who could have known this fact except Mr Foots. The question I ask myself is why was this fact not disclosed to Counsel on 9th November 2017 to avoid the making of the Consent Order? Or was it disclosed but not put forward by Counsel? There is no evidence on this point.

38. Had it been disclosed, there would have been no Consent Order and the money sent in Australian Dollars would have gone directly into the Claimant's Account at the BRED Bank at the same amount, and none of the problems now before the Court would have arisen. In my considered view, this failure and/or omission by the Claimant to disclose this important information can only be attributed to the Claimant and only the Claimant can take responsibility for that failure and/or omission. It cannot shift that responsibility to the defendant Bank in the way it has done or pleaded in its claims.

Stoppage of SWIFT Transfer

39. Next, the stoppage of the SWIFT transfer by Mr Foots (para 52 of his sworn statement). Had Mr Foots not stopped this first SWIFT transfer, the sum as ordered would have been paid in satisfaction of the Court order. But the stoppage meant the money had to be sent back to the defendant's correspondent bank in Australia by the BRED Bank (see para. 19 of Mr Lee's sworn statement).

40. Then following the Chief Registrar's request on 30th November 2017 that the money be returned to Vanuatu, a cheque was issued in the sum of AUD 1,317,466.87 to the Claimant. It was also on this same date Mr Foots advised Mr Lee he did not want the



Australian Dollar amount but the Vatu amount. (see Mr Lee's sworn statement paragraphs 20-22).

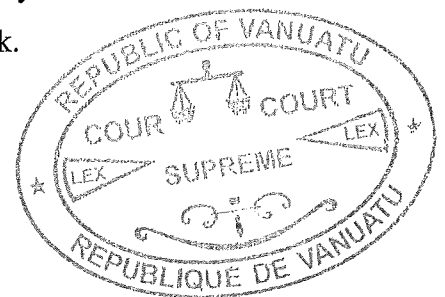
41. From all these, it is clear to me it was the Claimant who made it difficult for the defendant Bank to make payment of the sum as ordered. And by the time Mr Foots finally accepted payment, the amount had been reduced from \$ 1,386,017 down to \$ 1, 317,448.87 with a shortfall of \$ 68,569.13, the sum now claimed by the Claimant against the defendant. It is my considered view the defendant Bank cannot and should not be held responsible for the Claimant's agent's irresponsible acts and/or omissions.

Conversion of Australian Dollars to Vatu

42. The evidence of Mr Lee (para.7) shows the sum of \$ 1,386,017 was converted to Vatu and credited to the Chief Registrar's Account on 26th September 2017. The rate sheet for that day shows the applicable rate was 82.50 but the Bank converted at a more beneficial rate of 82.70 resulting in a vatu sum of VT 114, 623, 606. Then on 23rd November 2017 the sum of VT 114,623,606 was converted back to Australian Dollars at the conversion rate of or that day of 87.00 (see Annexure D to Mr Lee's statement) By this time the initial amount of \$ 1,386,017.00 had been reduced to \$ 1, 317,513.00 with a shortfall of about \$ 68, 569.00.

43. The defendant Bank was late in payment by about 14 days but the Bank had in essence complied with the Consent Orders of the parties endorsed by the Court. The delay was understandable. From the chain of emails correspondences going back and forth between the Office of the Court and the Bank and the processes involved, it was impractical for payment to have been made within 7 days. But the Bank did comply by paying out the sum of \$ 1, 386,017 at the published rate of the day and that should have been the end of the matter.

44. The shortfall came about as a result of the indecision of the Claimant or its agent not making up their minds about what currency they wanted the money received in. At one point they stopped the transfer of the money in AUD and at another they indicated they wanted it in Vatu. Under the circumstances only the Claimant and its agents can take responsibility for the shortfall and not the Bank.



No evidence of financial benefit by Bank

45. I find no evidence by the claimant making any substantial financial gain or profit. The only fee the Bank deducted from the initial amount of \$ 1, 386, 017.00 was \$ 32.00 (see 2A of Mr Foot's statement). This is a fee the Bank is legally entitled to.

No evidence of any Relationship between Claimant and Defendant

46. I find no evidence by the claimant showing they had a Bank Account with the defendant Bank to create a relationship between them and thus creating a fiduciary duty of care by the Bank as trustee to the Claimant.

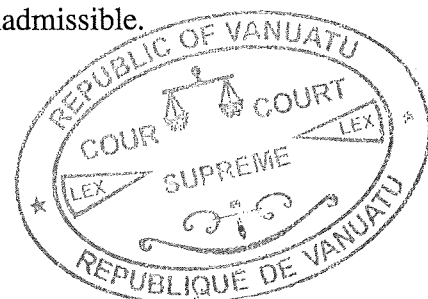
Objections to Evidence by Sworn statements.

47. To the evidence of Mr Michael Fimeri, I accept all the objections raised and filed by the defendant on 26th June 2018 and rule that paragraphs 6, 7, 10, 12 (a), 12 (d), 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 27 and 28 contain hearsay, speculative and irrelevant and opinion evidence. As such, they are inadmissible and are rejected as evidence.

The balance of the evidence bears very little or no weight at all to the Claimant's case.

48. To the evidence of Mr Ryan Foots, I accept all the objections raised by Mr Blake and filed on 26th June 2018. I rule that paragraphs 12, 13, 16,24, 25, 26, 33,34 38 & 48 are inadmissible on the basis they contain hearsay, opinion, speculative and irrelevant evidence. The balance of the evidence bears little weight to the Claimant's case.

49. To Mr Covo's evidence, he was not accepted as an expert witness by the Court on 18th June. As such there was no need for cross-examination. Mr Blake raised objections to the whole of his evidence as they were hearsay, speculations and opinions. I accept those objections and rule the whole evidence of Mr Covo to be inadmissible.



50. To Mr Sheng Lee's evidence, I overrule all the objections made by Mr Fleming. Although it is correct some of his statements contain opinions as to law, as Country Head of the defendant Bank and in his experience, he was entitled to express those views, whether he is right or wrong is for the Court to decide. I find Mr Lee was an honest and truthful witness and his evidence is credible. His evidence is admissible in its totality.

Answers to Issues

51. To the question in (a), the nature of the Court Trust Fund is no mystery. It is as styled, a Trust Account.

52. To the question in (b), the answer is in the negative.

53. To the question in (c), an interesting one but in my considered view and according to the evidence, it was from 11th November 2017 (see Annexure D to Mr Lee's statement). Mr foots was named on that Document but that is obviously an error which was corrected later in the Document Numbered 19 which is part of Annexure F to Mr Lee's statement.

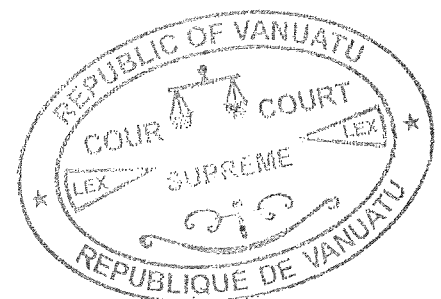
54. To the question in (d) the answer would be "yes", but only on and after 11 November 2017.

55. To question in (e) the answer would be "yes" also, but again only after 11 November 2017.

56. To the question in (f) the answer would be "yes", but again only after 11th November 2017. As to whether the defendant Bank breached its duties, the answer is "no" for reasons given earlier.

57. To question in (g), for the findings I have made earlier there was no evidence showing any benefits held by the Bank, the answer is "No".

58. To the question in (h) the answer is "yes" albeit late.



59. To question in (i), the answer is “no”, there was no misleading or deceptive conduct on the part of the defendant Bank.

Submissions and Case Authorities

60. I have considered the submissions made by Mr Fleming based on the authorities cited. Whilst all authorities and commentaries on the law of Trusts cited by Counsel provide sound legal principles, in the circumstances and based on the facts of this case, they do not assist the claimant’s case and contentions.

61. I am more convinced and persuaded by the arguments and submissions based on the case authorities cited and referred to by Mr Blake, to arrive at my conclusion that this claim should be dismissed.

Interest

62. I am mindful the claimant may have a valid claim as to interest when the money was held in the Court’s Trust Account. But I am not assisted by any evidence to make any finding on the point. The claimant may wish to take this matter further with the Chief Registrar for resolution.

The Result

63. The claims of the claimant fail in its entirety and are hereby dismissed.

64. Counsel will file further written submissions and costs for determination by the Court.

DATED at Port Vila this 28th day of June 2019

BY THE COURT


OLIVER.A.SAKSAK

Judge

