

IN THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION

Civil Action No. 540 of 2007

BETWEEN

DIANA GIESBRECHT

Plaintiff

AND

ROWENA GRACE CROSS (also known as GRACE  
BAMLETT, also known as GRACE RAVENCREEK) and  
DOUGLAS BAMLETT

Defendants

Coram

The Hon. Mr Justice David Alfred

Counsel

Mr A. Rayawa for the Plaintiff  
Mr I. Fa for both Defendants

Dates of Hearing

8, 9, 10 and 11 August 2017

Date of Judgment

24 August 2017

JUDGMENT

INTRODUCTION

1. This is a matter which one of the Plaintiff's witnesses has described as a PONZI SCHEME. I am informed by the Librarian of the High Court, Suva that she has no record of any litigation in Fiji on this subject. It is also a matter where both

Defendants participated in the entire hearing via Skype as the first in is the United States and the second in Canada.

### PLEADINGS

2. The Amended Statement of Claim is, if I may so, a prolix document indeed. A précis of this would be the following :
  - (1) On 4 May 2006, the Plaintiff and the Second Defendant entered into a written agreement (agreement) prepared by the Second Defendant whereby the Plaintiff was to pay Investment Monies to the credit of the Second Defendant to invest for the Plaintiff as her trustee.
  - (2) Pursuant to the agreement the Plaintiff paid Investment Monies to the Second Defendant in the sum of USD55,962.80 as follows :
    - (a) USD25,000 on 6 June 2006
    - (b) USD25,962.80 on 9 February 2007
    - (c) USD2,500 on 6 November 2006
    - (d) USD2,500 on 8 May 2007
  - (3) By the agreement :-
    - (a) The Second Defendant would act as trustee and fiduciary for the Plaintiff and ensure the Investment Monies plus 20% p.a. minimum profits were secured with "Blue Chip" asset security.
    - (b) After 90 days, the Plaintiff was entitled to repayment of the Investment Monies plus profit on 30 days written notice to the Second Defendant.
    - (c) The Plaintiff was entitled to profits on the Investment Monies and to a minimum investment return of 20% p.a.

- (4) The First Defendant was the agent and/or partner of the Second Defendant and conspired with him to defraud the Plaintiff.
- (5) The First Defendant was a trusted friend and confidant of the Plaintiff, and introduced her to the Second Defendant and advised, influenced and persuaded her to give her Investment Monies to the Second Defendant, without giving her an opportunity to seek independent legal or financial advice regarding the agreement.
- (6) Both Defendants knew that the Second Defendant's investments in which the Plaintiff's Investment Monies would be kept including GDT Inc is a "scam" and that they had no intention of ever refunding the Investment Monies to the Plaintiff.
- (7) The Plaintiff gave the notice on 23 May 2007 to the Second Defendant requiring the refund of the Investment Monies by 24 June 2007. However the Defendants have not paid any part of the outstanding sum.
- (8) Among the False, Misleading and Fraudulent Representations allegedly :
- (a) made by the First Defendant are:
    - (i) That the First Defendant was registered with the Reserve Bank of Fiji (RBF) as a licensed Forex Trader.
    - (ii) That the Investment Monies would be secured against "blue chip" assets and safe from any risk of loss whatsoever.
    - (iii) That the Second Defendant had thoroughly researched the investments in which the Plaintiff's Investment Monies were to be invested.
    - (iv) That there was a guaranteed minimum return of 20% p.a.

(b) made by the Second Defendant are :

- (i) That he was registered with the RBF as a licensed Forex Trader
- (ii) That the Investment Monies would be secured against "blue chip" assets, and safe from any risk of loss whatsoever.
- (iii) That there would be a guaranteed minimum return of 20% p.a.
- (iv) That he was a competent private investment advisor with great expertise in making lucrative investments.

(9) Among the Particulars of Breach of Fiduciary Duty :

(a) By the First Defendant are ;

- (i) To take care of the Plaintiff and her Investment Monies.
- (ii) To provide information to the Plaintiff that the Second Defendant's Investments including GDT Inc was a "scam" and that she would lose her funds.

(b) By the Second Defendant are :

- (i) To ensure the Plaintiff received independent legal or financial advice before giving money to him for investment.
- (ii) To inform the Plaintiff that his personal investments including GDT Inc were a scam and that she would lose her funds.

(10) The Defendants invested or dealt with the Plaintiff's trust monies in breach of the trust.

(11) And finally the Defendants fraudulently converted USD 55,962.80.

(12) The Plaintiff claims punitive damages to discourage the Defendants from seeking to defraud others by marketing the scheme.

(13) Wherefore the Plaintiff claims:

- (a) USD66,877.80 as restitution for the loss
- (b) An Inquiry on investment profits earned on the principal sum
- (c) Interest at 20% p.a. on the outstanding sum from the date of filing to date of payment.
- (d) Damages for conversion
- (e) Punitive Damages of USD 200,000.

3. The Amended Statement of Defence states, inter-alia, the following:

- (1) The Second Defendant states the agreement was entered into on 6 April 2006 (sic) and not on 4 May 2006 as alleged by the Plaintiff.
- (2) The Defendants admit receiving the monies (USD25,000 and USD25962.80) particularized in the Amended Statement of Claim. The (other) monies (USD 2,500 and USD 2500) were the investment returns that the Plaintiff received from GDT, which were put back into the scheme at the Plaintiff's request to generate more returns.
- (3) The Second Defendant's duties and/or obligations were to forward funds from the Plaintiff to GDT and to forward to her funds that GDT sent to him which were derived from her investment in GDT.
- (4) The Plaintiff in her various emails to the Second Defendant acknowledgement that her funds were at risk.
- (5) The Second Defendant's account with GDT guaranteed a minimum of 20% return by GDT.
- (6) It is admitted that the First Defendant introduced the Plaintiff to the Second Defendant.
- (7) The Defendants say they are not responsible for returning the Plaintiff's funds.

- (8) The First Defendant says that the First Defendant and the Second named Defendant was registered with the RBF as a duly licensed Forex Trader. She did not promote the Second Defendant as an investment advisor.
  - (9) The Defendants say the fund is called "the blue chip fund which is an internal label that GDT applies to name the investment it made available to a handful of people.
  - (10) The Second Defendant "denies any representation to the Plaintiff that he was registered with the Reserve Bank of Fiji as a duly licensed Forex Trader".
  - (11) The First Defendant says she told the Plaintiff that the Second Defendant "had researched GDT extensively and based on his research, they had invested in GDT themselves".
  - (12) The Second Defendant did not represent that he was responsible for GDT's guarantees.
  - (13) The Second Defendant says the Plaintiff did obtain independent advice from her licensed investment advisor and (the donee of) her power of attorney in Canada and denies he was responsible to give her independent legal or financial advice.
  - (14) The Second Defendant says the contract with the Plaintiff contained all relevant information relating to her investment and denies that GDT is a scam.
  - (15) The Defendants pray the Plaintiff's claim dismissed with costs.
4. The Plaintiff's Reply to the Amended Defense essentially reasserts her contentions in the Amended Statement of Claim and state, in addition, the following :

- (1) The Defendants knew that the GDT assets did not exist from the outset and they knew that it was a fraudulent scheme.
  - (2) The Plaintiff says "that GDT was never part of the agreement as they were not party to the agreement. The agreement was a trust arrangement between the Plaintiff and the 2<sup>nd</sup> Defendant and that the funds were secured against the 2<sup>nd</sup> Defendant personally and against the Defendants personal assets through the fiduciary relationship".
5. The minutes of the Pre-Trial Conference held on 2 April 2014 record:
- (i) Agreed Facts, which are not relevant.
  - (ii) Disputed Facts - These are stated categorically as if they were admitted facts.
  - (iii) Issues for Determination are worthy of the Court's consideration and include:
    - (a) Did the Defendants make false, misleading and fraudulent representations to the Plaintiff to induce her to enter into the investment agreement and hand them her life savings?
    - (b) Were the Defendants engaged in a legitimate private investment scheme?
    - (c) If approvals were required then did the Defendants have the requisite approvals from the Fijian authorities?
    - (d) Are the Plaintiff and the Defendants in a fiduciary relationship and did they receive the Plaintiff's savings on trust?
    - (e) Were the Defendants supposed to invest the Plaintiff's savings on her behalf as her trustees.
    - (f) Did the Defendant (sic) breach any fiduciary duties to the Plaintiff?
    - (g) Are the Defendants liable to the Plaintiff for losses and/or damages?

6. The hearing commenced with the Plaintiff's first witness (PW1) giving her evidence. She was Ms Maopa Wati Seeto, the then manager, licensing, regulation and compliance with the Capital Markets Development Authority (CMDA). She said the Plaintiff came to query whether the Second Defendant had been licensed. She checked their data base and confirmed he was not. She gave the Plaintiff a letter (dated 4 September 2008) which was tendered as Exhibit P1.
7. Under cross-examination, PW1 said a licence was required to undertake investment advisory activity. They did not call up the Second Defendant nor institute a prosecution against him. That was the end of the matter.
8. The next witness was Ms Mereia Volavola (PW2). She was in CMDA from 2007 to 2009. The Plaintiff came to lodge a complaint against the Second Defendant, that her funds in USD had been taken by him and she was not able to get her funds back. The Plaintiff said she was approached by the Second Defendant and told that he was running an investment scheme and she made some payments. CMDA tried to establish whether the Second Defendant had a licence to deal in foreign exchange.
9. Under cross-examination, PW2 said the Plaintiff complained verbally and she did not have any note of the complaint. They did not call the Second Defendant. They did an investigation of the Second Defendant's activity but she did not have its findings.
10. The next witness was Inspector Aiyaz Ali of the Criminal Investigation Department. He said in September 2008, he was the Investigating Officer of this matter. He received the Plaintiff's complaint that the Second Defendant had



defrauded her on the pretext of investing in Vanuatu, and had been promised a dividend of 20%. He identified both the Defendants on the screen. After administering cautions, he interviewed both Defendants on the nature of the allegations against them.

11. At this juncture, Counsel for the Defendants objected that the evidence of PW3 was about the criminal and not the civil matter. Counsel for the Plaintiff replied that the fraudulent allegations are those in the statement of claim.
12. As a result of the objections of the Defendants' Counsel the Court ruled that the evidence that was irrelevant to the matters pleaded in the statement of claim are inadmissible.
13. Counsel for the Defendants did not cross-examine PW3.
14. The next witness was the Plaintiff herself (PW4). She said she came to Fiji in 2004. She had been a court reporter in British Columbia. In 2004 she met the First Defendant at the American Women's Association and she became the Plaintiff's confidant and she came to trust her. On 3 March 2006 she met the Second Defendant at their home. He made a presentation and told her the more shares others had in his private account the higher the returns. He explained the blue chip investment was not open to the public and that he was the only Forex dealer licensed with the RBF. The minimum investment was USD 50,000. He informed her that Mr Peter Knight had performed some work for him and had reviewed agreements with others. Exhibit P3 is the agreement dated 4 May 2006. She transferred USD 25,000 and asked the Second Defendant where is the mortgage free property and who is the C.E.O. of GDT. He said it would breach

his non-disclosure requirements to disclose the mortgage free properties and the name of the C.E.O.

15. PW4 said she believed him because she trusted his wife and extended her trust to him. She said it must be a trustee agreement and the trust clause is at the bottom of page 25. Mr Knight's response after he received her email was that she must trust the Second Defendant. She trusted Mr Knight and she wrote the trust clause he dictated to her. She was concerned about sighting the mortgage free properties securing her investments. She signed the agreement and then the Second Defendant signed and he received her payment.
16. She gave instructions first verbally and then by e-mail to liquidate her GDT investment. When, the funds were not received by her she went to the Police. She found out later that the Second Defendant had no licence and no authority from GDT. She concluded by saying if she knew the Second Defendant was not a licensed broker and there was a court case she would never have entered into an agreement with him.
17. Under cross-examination, PW4 said the presentation was not related to the investment but to her buying a property. She signed the agreement and when paras 1 to 8 were read she said she understood that the money was going into the Second Defendant's account on her behalf; that he was GDT's representative; that there were shared other funds; that GDT was guaranteeing the assets. She could not find in the agreement any reference to mortgage free assets.
18. PW4 looked at Exhibit P4, the email of 13 April 2006, read para 2 and said this is correct. She then read para 15 of the agreement and said the Second Defendant is

her trustee and his estate will be liable. Mr Knight is her lawyer and so she rang him for advice. The agreement concerns herself, the Second Defendant and his estate. She sued the First Defendant, knowing she was the wife of the Second Defendant because the First Defendant did all the administrative work. She agreed the agreement was between the Second Defendant and herself and that the First Defendant's signature was not on it.

19. She was investing personally in the Second Defendant. The trust clause covers the Second Defendant's objections to have security provided. She was happy and did not pull out as she believed his promises.
20. PW4 said Jan is her (power of) attorney. She did not ask Jan because Mr Knight was here. Jan knew about this and did not tell her to pull out. Andy is her broker and she put the Second Defendant's questions to Andy. She had Jan and Andy as her advisors.
21. She did not take up the Second Defendant's offer to return her money. On 9 February 2007, she freely put in another USD25,962.80. She was confident so she put the money in.
22. With regard to Exhibit P6 (letter from Copperwaite), the letter was correct because she was investing in the Second Defendant. The letter confirms she is not one of their investors. It does not mention the Second Defendant.
23. The next witness was Edward Philip Anderson (PW6) the common law partner of the Plaintiff. He knows both Defendants. The Plaintiff and the First Defendant

were very friendly meaning they visited frequently. They visited occasionally on a monthly basis.

24. The final witness was Kenneth Alexander Chambers (PW7), a law lecturer in the University of the South Pacific. He knows the Plaintiff and of the Defendants. The Plaintiff asked him to look at the proposal for the investment prepared by the Defendants. He saw the agreement and in his opinion it was a Ponzi scheme based on : (1) the money was not attached to any particular security (2) The investment once made went to Vanuatu, a tax haven. He told the Plaintiff to ask for some of the money back and if it did not, that would be a good indication that nothing was coming back. His advice was not to invest in the next opportunity which was called Diamond. Both Defendants came uninvited to his house. They were quite determined to persuade him that Diamond was a legitimate investment but he was not persuaded.
25. Under cross-examination PW7 said he was not an expert in finance and not in a position to say something is a scam or not. The Defendants came to tell him his opinion was wrong.
26. In re-examination PW7 said the investment of USD 25,000 was made before his advice.
27. With that the Plaintiff closed her case and the Defendants opened theirs.
28. The First Defendant (DW1) now gave her evidence. She said she is married to the Second Defendant. She knows the Plaintiff. They met in the American Women's Association luncheon with other people. They became friends but not

business friends. The Plaintiff asked her what they did and she told her they had investments. She never told the Plaintiff that she could invest with her and her husband. She introduced the Plaintiff to the Second Defendant at her request. The Plaintiff wanted to ask him about his investments. She knew the Plaintiff invested in GDT. What she (DW1) knew about GDT, she got from the Second Defendant. It is not true she was the Plaintiff's trusted friend. They were just acquaintances. She never told the Plaintiff that she was a business advisor or a consultant or a financial advisor. She never advised her on finance or on GDT. She had no business relationship with her. She never persuaded and never induced her to invest money with the Second Defendant. She did tell her the Second Defendant had done research. She was not a fiduciary to the Plaintiff. She never did trustee duty for her. The Plaintiff never demanded the return of the money. She is not liable for damages nor for any sum to the Plaintiff.

29. Under cross-examination DW1 said she had no business relationship with the Plaintiff and did not induce her to enter into the investment. She did not invest her money in GDT; she invested in land. She knew the Second Defendant invested in GDT and had spent whole days in research. She (DW1) was not aware that GDT had no assets and that there were winding up proceedings against GDT in Vanuatu. She denied all the allegations against her.
30. In re-examination she said land was her investment. She is not an investor in GDT. The meeting with the Plaintiff was not a business meeting but one between friends.
31. The Second Defendant (DW2) then gave evidence. He said the First Defendant told him she was inviting the Plaintiff to their home. He did not know why but

took it to be social. The Plaintiff told him she wanted to know how they made money. She asked him about investing money and he told her what he was investing in. It was of great interest to her. She asked if she could invest in him. He was hesitant as he did not really know her. The agreement between him and the Plaintiff exempted him from liability. Para 1 thereof means the Plaintiff invests in GDT in his account and GDT was guaranteeing her a 20% return.

32. The Plaintiff was aware he was not guaranteeing her return. As, at the time, the minimum investment was USD 50,000 in GDT, she was satisfied to go in his name. He did not give her any personal guarantees. GDT was the guarantor. In his incapacity or death the Plaintiff would be able to recover her funds from GDT. Para 10 protects him from any responsibility for GDT's liability. He was only responsible for funds given to him by GDT and not giving them to her.
33. By Para 13, the Plaintiff was not holding him responsible. She knows it is not a conventional investment. He is not her trustee. The Plaintiff did not inform him she was unhappy with the agreement. She became nervous and unconfident. He was prepared to cancel the agreement and return the money. She apologized and said everything was o.k. She did not cancel the agreement and did not take out her money. Later she invested more money in further investment. He did not ask her to put in more money. He said GDT was and is a genuine company, and referred to the Vanuatu Certificate of Good Standing for GDT Inc. (Tab 39).
34. The Plaintiff wanted her funds liquidated and DW2 signaled this to GDT. It did not pay refunds to the Plaintiff because it did not have funds to pay her. He took steps to assist the Plaintiff to recover her money. He wanted to go to Vanuatu

but was prevented from leaving Fiji. A year later he left for the United States. It was too late to go to Vanuatu as the assets were sold.

35. Under cross-examination DW2 said he did due diligence on-line. He paid two trips to Vanuatu to see if the assets were real. He saw 3 different properties but there was no name to the property. There was a building there with no signs. He did not do a title search. He was satisfied as he saw a document that authenticated that. He received 2 payments of USD 25,000. He wired the money to New York because GDT had an account there and instructed that money be wired there. The Plaintiff invested in GDT and not in him.
36. It is correct that the Plaintiff receives money from him and not from GDT. GDT had no bank account in Vanuatu. He was never acting for GDT. His agreement with GDT allows the Plaintiff to invest in his account. The agreement covers the second payment. Nowhere does the agreement require a second USD 25,000 payment.
37. The second USD 25,000 is part of the agreement. GDT quarantees funds in the blue chip account against their security. Both payments are protected by GDT's statement of security. Both of the Plaintiff's payments are secured. The emails cover the second payment. He saw his friend's search at the Registry and accepted it. There is no connection between the Plaintiff and Trading Potentials and Trading Potentials had nothing to do with GDT.
38. In re-examination DW2 said Vanuatu is the headquarters of GDT. He never saw any evidence that it had a bank account in Vanuatu. His trip to Vanuatu was to satisfy his own questions. He saw a hotel and 2 properties. There were several

container loads of hotel equipment. He did not ask the Plaintiff to invest the second USD 25,000. She voluntarily put the second USD 25,000 in.

39. With that the Defendants closed their case and oral submissions began.
40. The Plaintiff's Counsel submitted their case is that the Plaintiff was misled by the Second Defendant that he was a licensed dealer. He knew there were no assets in Vanuatu but represented to the Plaintiff there were. This is a fraudulent agreement and the money should be returned to the Plaintiff.
41. Counsel for the Defendants then submitted. He said this is all about the agreement between the Plaintiff and the Second Defendant and nothing could be clearer. The Plaintiff entered into the agreement to invest USD 25,000 in the Second Defendant's blue chip account in GDT. GDT is a registered company of good standing. The agreement states that only GDT is giving the guarantees. The Plaintiff agrees to keep the Second Defendant harmless if GDT defaults. The Second Defendant is only paid expenses. The Plaintiff acknowledges she is at risk if GDT defaults. The Second Defendant is a trustee of the Plaintiff subject to the provisions of the contract. The agreement does not contain any representations and is conclusive. The Plaintiff had investment in Canada and was advised by her accountant and Peter Knight. Caveat Emptor applies. The First Defendant is not a party to the agreement. The Second Defendant never disputed the funds belonged to the Plaintiff and that she was informed of the risks. The claim should be dismissed with substantial costs.
42. The Plaintiff's Counsel replied the Plaintiff had been proffered a poison apple and said the agreement was fraudulent.



43. At the conclusion of the arguments I said I would take time to consider my decision. Having done so, I now deliver my judgment.
44. This is a matter which ought not to have been protracted. It is after all rather a straight forward case when all the verbiage and voluminous pleadings and irrelevant documents and red herrings are disregarded.
45. The root of this case is the agreement between the Plaintiff and the Second Defendant (Exhibit P3) and I shall now direct my attention to its salient terms. These may not have been expressed in Chancery Lane legalese but they do have the virtue of being readily understood by the man/woman in the street.

(a) Para 1 provides that "In consideration of the sum of 25,000.00 to my Canadian Royal Bank account denominated in US dollars, I hereby agree to invest that sum on behalf of Diana Giesbrecht in my personal blue chip account number 113118 of the DXinone Blue Chip currency payment system of Global Digital Transfers Inc. of Port Vila, Vanuatu. (hereafter known as GDT Inc.)".

(b) Para 2 provides "These funds are being forwarded to GDT Inc. for the purpose of financial return. GDT Inc. guarantees a minimum return of 20 percent per annum on the sum invested. According to documentation provided to Douglas Bamlett the principal and income from principal is secured against the assets of GDT Inc. and its associated companies".

(c) Para 3 provides "After 90 days from the original date of investment in the Blue Chip portfolio, the entire amount invested, or any portion thereof (in 2500.00 increments) may be withdrawn upon 30 days written notice by

Diana Giesbrecht, or her nominee, such as an executor or person with verifiable power of attorney. Such notice must be served to Douglas Bamlett who is currently residing in Fiji at : P.O. Box 253, Navua, Fiji Islands”.

- (d) Para 5 provides “Two thirds of whatever returns are received from GDT Inc. will belong to Diana Giesbrecht and will be forwarded to the account(s) Diana Giesbrecht designates or retained in a holding account awaiting direction from Diana Giesbrecht”.
- (e) Para 6 provides “In consideration of permitting Diana Giesbrecht to participate in this private portfolio and also in consideration of Douglas Bamlett performing related administrative functions such as managing the portfolio, and imparting information about the correct use of the DXIO retail system, Douglas Bamlett (or his nominee) will retain one third of the returns that the funds generate as compensation for the aforementioned services”.
- (f) Para 7 provides “While the Blue Chip fund mentioned herein contains the designated funds mentioned here on behalf of Diana Giebrecht - there are also other funds in that account to which Diana Giesbrecht has no legal interest.....”.
- (g) Para 8 provides “The only promises or guarantees of earnings and/or protection of principal that are enforceable with this arrangement are the ones that GDT Inc. has made. They guarantee minimum 20 percent returns plus the return of principal. Should GDT Inc. fail to perform as

promised the only recourse Diana Giesbrecht has for the recovery of funds will be through the due process of recovery of those funds by Douglas Bamlett or his nominee acting to recover them from GDT Inc. This shall be undertaken by Douglas Bamlett on a best efforts basis”.

(h) Para 10 provides that “In every event Diana Giesbrecht (or her nominee) will save Douglas Bamlett harmless from any responsibility for any failure of GDT to perform as promised - except a best efforts basis to assist Diana Giesbrecht in any action to recover his (sic) funds from GDT Inc. Such recovery may involve expenses and trips to Vanuatu as well as legal fees and Douglas Bamlett will be saved harmless from liability for these expenses where they would be incurred in assisting Diana Giesbrecht to recover funds”.

(i) Para 11 provides that the Second Defendant “is receiving compensation only for the administrative duties he performs” and “such remuneration is not to be construed as carrying any liability for the failure of GDT to repay principal or forward earnings whatsoever. The extent of liability from Douglas Bamlett will be to forward any earnings that Douglas Bamlett receives from GDT Inc. and to forward any requested principal that Douglas Bamlett receives on behalf of Diana Giesbrecht as delineated in this document. In short Douglas Bamlett shall be personally liable for his failure to forward funds as agreed herein but only to the extent of the unremitted funds.....”

(j) Para 12 states “Diana Giesbrecht fully acknowledges that her funds are at risk to the extent of GDT’s ability to perform and the value of assets GDT

Inc has elected to secure her funds against. Further Diana acknowledges that she may also be at risk for any professional fees or related disbursements required to recover her principal and/or earnings should GDT fail to perform as guaranteed."

(k) Para 13 states that "Further Diana Giesbrecht acknowledges that the DXIO blue chip portfolio is not a securities offering nor is it shares in any company or collection of companies. It is a unique, strictly private, and unregulated portfolio of profit centers within the DXIO system whereby the "DX blue chip portfolio" participates in the respective earnings of these profit centers".

(l) Para 15 states that "Douglas Bamlett acknowledges that the funds invested by Diana Giesbrecht pursuant to this letter of agreement are held by Douglas Bamlett as trustee for Diana Giesbrecht, but subject to the provisions hereof."

46. There will be two parts to my judgment. The first is (A) whether this is a fraudulent/Ponzi scheme into which the Plaintiff's money has fallen, never to be seen again. And the second (B) is if this is indeed the case whether she was beguiled into it by the alleged false, misleading and fraudulent representations of the Defendants and their breach of fiduciary duty.

A. 47. I start with the first part. According to my research a Ponzi scheme is named after Charles Ponzi who perpetrated such a scheme in 1919-20 in Boston, USA. It is a form of fraud in which belief in the success of a non-existent enterprise is

fostered by the payment of quick returns to the first investors from money invested by later investors (Oxford Dictionary).

48. In my view the best definition of a Ponzi scheme is provided by Wex Legal Dictionary which defines it as "a type of investment fraud in which investors are promised artificially high rates with little or no risk; original investors and the perpetrators of the fraud are paid off by funds from later investors, but there is little or no actual business activity that produces revenue. The scheme generates funds for previous investors so long as there is a consistent flow of funds from new investors. This gives the impression that the earlier investments drastically increased in value in a short period of time. The scheme inevitably collapses when too many investors demand redemption or the scheme fails to attract a sufficient number of new investments. The Ponzi scheme is named after Charles Ponzi, who in the 1920s defrauded thousands of investors in Boston".
49. It was the Second Defendant's own evidence and his Counsel's advocacy that convinced me this was indeed a Ponzi scheme. He informed the Plaintiff in his e-mail to her on 13 April 2006 that he is the only person who has personal contact with key officials running GDT; that he had spent in the neighborhood of more than 2000 hours of research into this business and has travelled to Vanuatu and met with senior officials of the company; that when he left Fiji a year later, it was too late to go to Vanuatu as the assets had been sold out.
50. To answer the question what assets did GDT ever possess in Vanuatu it is relevant to consider the authority cited by Counsel for the Plaintiff. This was the decision of the Court of Appeal of Vanuatu: in *Pierre-Jean Marie Brunet and*

Christine Marie Brunet and Westpac Banking Corporation, dated 1 June 2006 in Civil Appeal No.03 of 2006.

51. The judgment states at page 4 : "Submission were made in detail by the Appellants setting out what they considered was the relevant background of the funds that Mr. Copperwaite endeavoured to bring into Vanuatu to complete his proposed purchase. Among the funds that Mr. Copperwaite proposed to use to complete his transaction were those solicited through the internet from a large number of prospective investors investing in small amounts to make up the whole of a proposed purchase price of A\$22 million, which he had offered for the Hotel under an agreement dated 22 March 2005 through his Vanuatu registered international company Global Digital Transfers Inc".
52. And further on it states at page 5 : "The funds of hundreds of investors of small amounts solicited over the internet have not by any measure of means been accumulated into one account nor has there been any evidence adduced as to any trust deed in relation to the investments. Furthermore the funds appear to have been solicited on the basis of investment in a hotel property and not for use for the redemption of the mortgage commitments of the Appellants".
53. The Judgment of the Court is on an appeal against decisions made by the primary judge on 20 February 2006 and 27 February 2006. I note that these were made before the agreement was executed on 4 May 2006.

54. I have no reason to disregard what the Court in a sister nation to Fiji in the Commonwealth has to say authoritatively about something that pertains to the instant claim.
55. The above judgment shows that GDT had no assets and what the Second Defendant was running were indeed a Ponzi scheme. His own evidence satisfies me that this is so otherwise if the money of the investors could not be used to purchase the hotel why they were not returned to the Plaintiff and other investors and why did he testify GDT did not have funds to pay her?
56. The attraction of a Ponzi scheme is its wordy adornment. Here the words "blue chip" are used which the Oxford Advanced Dictionary of Current English defines as shares considered valuable because of their past record. There are other examples of specious verbosity in the agreement which I do not need to allude to here.
57. Thus I find on the evidence that the Second Defendant was running a Ponzi scheme and that was why the Plaintiff's funds could not be refunded to her. But this is not the end of the matter.
- B. 58. So I turn to consider whether the Plaintiff was lured into this scheme by the Defendants.
59. The Plaintiff's Counsel mentioned the poison apple proffered to Snow White by the disguised queen. Perhaps he thought what happened to the Plaintiff in real life mirrored what happened to Snow White in the fairy tale. Having been warned by the 7 dwarfs to be upon her guard and not to open the door to

anyone, in her naive innocence, Snow White fell prey to the disguised wicked queen who offered the poisoned apple. She longed for it – like Eve in the Garden of Eden – and ate it. The perpetrator of a Ponzi scheme like the queen tells the would be investor that he too has invested in it, but he does not inform the investor that he is being paid off first.

60. However, the evidence shows the Plaintiff was no Snow White though she might have been pollyannish.  
She had been a court reporter in British Columbia, Canada. She had crossed the Pacific to come to the South Seas paradise of Fiji. She had her life savings with her. She threw caution to the wind and parted company with them of her own volition. She elevated the First Defendant, who objectively viewed, was no more than a nodding acquaintance, into a bosom friend in whom she reposed her trust.
61. Treating the First Defendant as a confidant, she transferred her confidence to the First Defendant's husband, the Second Defendant. With the knowledge of the ways of the world and the wiles of people acquired from her court reporting days she placed her money in the hands of the Second Defendant after executing an agreement which should have manifestly been apparent to her was patently against her interests while going out of its way to shield the Second Defendant from all responsibility and liability for any loss of her funds.
62. She went into the investment with full visibility of all the warning signs and alarm bells (in the metaphorical sense) that the agreement put up.

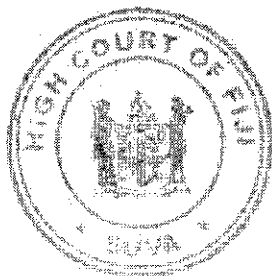


63. The Plaintiff obviously fell for the star feature of every Ponzi scheme viz the artificially high rate of return with little or no risk. The guaranteed minimum return was 20%. She should have realized this was a Utopian scheme when her savings would only have given her an interest rate expressed in a single digit.
64. If I may say so with respect her evidence showed her cupidity which caused her credulity to supersede her caution. And when advised by the Second Defendant in his email (exhibit P7) to withdraw her money and give the scheme a wide berth, she neither needed nor heeded his advice. Instead she put in a further and larger sum.
65. I reiterate the Plaintiff clearly walked into the lions' den with her eyes wide open and with full knowledge of the attendant risks, not once but twice. She did so because she was emboldened by the fact that her attorney, her stock broker and her legal advisor did nothing to dissuade her from doing so. Indeed it appears Mr Knight gave a sop to her in drafting a trust clause which could not be trusted to provide the protection she desired because it was subject to the provisions of the agreement.
66. Here it is necessary to state I am taking on board the English Contract Law position (see Chitty on Contracts volume 1) that there is no principle of good faith of general application. This is in keeping with the principles of freedom of contract and the binding force of contracts. As Lord Ackner said in: *Walford v. Miles* [1992] 2 A.C. 128, 138: "the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations" and "unworkable in practice". To my mind this means a party needs, in his own enlightened self-interest, to take care of himself.

67. This is why in my view of a Ponzi scheme, the watch words are not caveat emptor, but prevention is better than cure. This is because the caveat only comes into operation when a deal is struck. The better expedient is to avoid getting into such a situation. And here the best advice is only to be found in Proverbs 23 where v 4 says do not wear yourself out to get rich; have the wisdom to show restraint; and v5 says cast but a glance at riches and they are gone, for they will surely sprout wings and fly to the sky like an eagle.
68. That such schemes are alive and well in the land of the free is proved by the case of Bernie Madoff, a US financier and one time Chairman of the NASDAQ stock exchange who was convicted in 2009 of running a USD 65 bn Ponzi Scheme (Collins English Dictionary). He was sent to prison for a long term.
69. The above should close down the basis for the Plaintiff's claim for punitive damages, that such an award by the Court would discourage the Defendants and others from carrying out such schemes, as it would operate as a penalty to disincentivise them from marketing such schemes.
70. In any event the Plaintiff appears to have dropped this claim as no evidence was led to establish it nor did her Counsel make any submission on it.
71. The same must be said for the alleged breach of fiduciary duty on the part of the Defendants. A fiduciary is defined by Osborn's Concise Law Dictionary as the relationship of one person to another, where the former is bound to exercise rights and powers in good faith for the benefits of the latter. Here it is as plain as a pikestaff that the Second Defendant explicitly and expressly disclaimed any obligation to exercise anything for her benefit.

72. Tragically for the Plaintiff no one she turned to waved a red flag. Instead all appeared to have given her a green light. Even more regrettable is the fact that she threw in good money after bad. However for none of these can the Defendants be held responsible.
73. At the end of the day, I am satisfied on the evidence before this Court that this was a Ponzi scheme that the Plaintiff had invested in. But I am also satisfied that she was moved by her cupidity to do so. The Defendants were not, in the final analysis, responsible for her decision to invest not once but twice. The Plaintiff failed to satisfy me on the allegations made against the Defendants or that those had induced her to invest.
74. In the result, all the Plaintiff's claims against the First and Second named Defendants are hereby dismissed. However, in the circumstances, I shall order each of the parties to bear their own costs.

Delivered at Suva this 24<sup>th</sup> day of August 2017.



David Alfred

**JUDGE**

**High Court of Fiji**

