

**IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**CIVIL CASE NO. 06 OF 2008**

**BETWEEN: ROBERT M. BOHN**  
Claimant

**AND: THE REPUBLIC OF VANUATU**  
Defendant

**Coram: Justice Mary Sey**

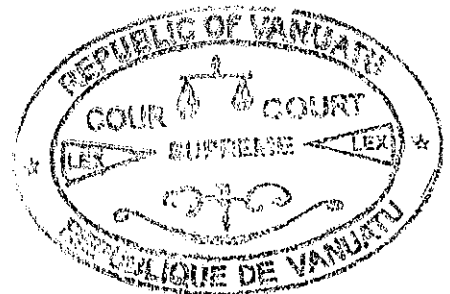
**Counsel:** Nigel Morrison for the Claimant  
Florence Williams (SLO) for the Defendant

**Date of Judgment:** 6 August 2015

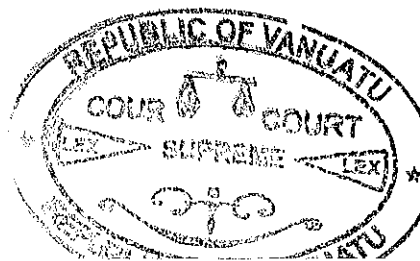
**RESERVED JUDGMENT**

**Background**

1. This case has its origin in Civil Case No. 115 of 2000 between **Robert Murray Bohn** trading as **Western Pacific Marine** and **Vanuatu Maritime Authority [VMA]**. Mr. Bohn and VMA had entered into a contractual agreement on 31 May 1999 for the salvage of two derelict vessels, namely, M/V Lih Peng and M/V Laudorek. The total remuneration for salvage work under the agreement was VT27,000,000. Half of the remuneration was paid up front leaving an outstanding balance of VT13,500,000.
2. By Summons dated 3 November 2000, Mr. Bohn claimed the amount of VT13,500,000 due and owing from VMA pursuant to the agreement and/or on the basis of quantum meruit.



3. On 9 September 2002, the Chief Justice made the following Orders:-
  1. *That, the plaintiff is entitled to the payment of VT20,000,000 on the total agreed contract price of VT27,000,000 which means that he is entitled to the payment of VT6,500,000 for the work done on quantum merit basis in his claim in Civil Case No. 115 of 2000.*
  2. *That the plaintiff is entitled to interest to be paid out of that amount of VT6,500,000 at 10%.*
  3. *That the costs are awarded for the plaintiff and costs to be taxed failing agreement.*
  4. *That the written reasons will be provided in due course."*
4. An appeal numbered 19 of 2002 was instituted by VMA against the said Orders but no progress on the appeal could be made because the Orders were not accompanied by reasons.
5. On 29 April 2003, the Chief Justice delivered reasons dated 28 April 2003 for the Orders of 9 September 2002.
6. Mr. Bohn was not happy with the reasoning therein but he reserved his rights to cross appeal whilst negotiation to settle out of Court proceeded. Both parties dispensed with the services of their lawyers to minimize costs.
7. An agreement to settle was reached on or about 25th September 2003 between Mr. Christophe Emelee (Chairperson of VMA Board) and Mr. Guy Benard (as agent for Mr. Bohn) for payment of VT18 Million.
8. On 26 September 2003, the Appeal proceeding was formally discontinued by VMA and dismissed at a conference before Treston J.
9. The VMA held a provision in their budget for VT 6,500,000 so that amount was paid on 30th October 2003 to Mr. Benard for Mr. Bohn under the Emelee/Benard

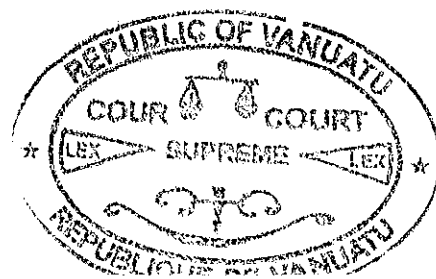


agreement. No further payments under the Emelee/Benard agreement were made and the outstanding balance of VT11,500,000 under the agreement remained unpaid.

10. Mr. Benard commenced work for the VMA at the end of 2003 so he no longer pursued Mr. Bohn's interests.
11. Mr. Bohn was out of the country from 2003 until 2007. Upon his return to Vanuatu in 2007 he pursued final resolution of the out of Court settlement that had been reached under the Emelee/Benard agreement but not satisfied.
12. Mr. Bohn communicated with Mr. Napuati who had by then been appointed Commissioner of the VMA and Mr. Napuati entered dialogue with Mr. Bohn and agreed for the VMA to make final settlement with Mr. Bohn for the sum of VT14,500,000. This amount was arrived at by applying 10% interest on the principal sum for the period 2000 to 2007 and then adding legal costs.
13. This agreement between Mr. Napuati and Mr. Bohn was given effect by a Deed of Settlement dated 5 October 2007 and a Final Agreement dated 9 October 2007.
14. This will suffice for the background. Without doubt, the chronology of events will assist with an understanding of this judgment as it progresses.

### **The Claimant's Case**

15. The Claimant relies on his Amended Supreme Court Claim filed 1 August 2012 pursuant to Orders of 27 June 2012.
16. By that claim the Claimant pleads inter alia:
  - (i) There was a proceeding involving the Claimant and VMA being CC 115 of 2000.
  - (ii) That proceeding was finally resolved by a Deed of Settlement dated 5 October 2007 between the parties.



- (iii) By that Deed the VMA agreed to pay the Claimant the amount of VT 14,500,000 in full and final settlement of all outstanding matters.
- (iv) Subsequently Mr. Bohn received a cheque and thought he had been paid. When that cheque was not paid upon he became aware from Mr. Simeon Athy that the latter had never understood he was making a cheque for salvage but only for something else (airbags) in the same amount.
- (v) The Claimant understood he had received a cheque from the Defendant for settlement under the Deed and Final Agreement on or about 9 October 2007 but the cheque was returned by the bank unpaid due to insufficient funds.
17. The Claimant now seeks to recover the sum of VT 14,500,000 never paid under the Deed of Settlement and Final Agreement together with interest and his costs.

### **The Defence**

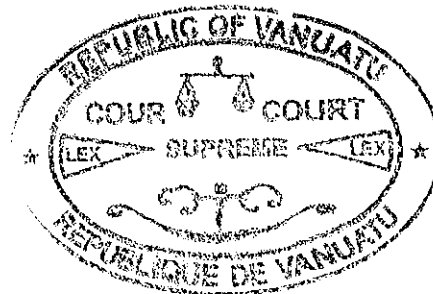
18. By its defence, (in paragraph 4 b of the Defence to Amended Supreme Court Claim dated 24 August 2012), the Defendant says that the Deed of Settlement of 5 October 2007 and the Final Agreement dated 9 October 2007 were induced by the fraud or misrepresentation of the Claimant.

19. The Defendant further pleads that it will rely upon the following documents:

- "i. Letter from Robert Bohn to Less Napuati dated 17 April 2007.*
- ii. Letter from Less Na puati to Robert Bohn dated 18 April 2007.*
- iii. Letter from Less Napuati to Robert Bohn dated 30 April 2007."*

20. In paragraphs 4 c, d and e the Defendant pleads as follows:

- "c. Says that the Deed dated 5 October 2007 and the Final Agreement dated 9 October were fraudulent in that the transaction they purport to record is a sham.*



- d. Says that the Judgment sum in Civil Case 115 of 2000 was paid to the Claimant's agent Guy Benard on or about 31 October 2003;

*Particulars*

- i. NBV cheque #019472 in the sum of VT6.5m drawn in favour of Guy Benard.
- e. Says that the Judgment sum in Civil Case 115 of 2000 together with the appeal therefrom numbered CAC 19 of 2002 were agreed to be compromised in full by the payment of the amount mentioned in particular (d)(i);

*Particulars*

- i. The said agreement was to be implied by the conduct of the VMA and the Claimant.
- ii. The cheque mentioned in particulars (d)(i) was given to, and accepted by Guy Benard in October 2003 and, thereafter, the Claimant took no steps to recover any other or additional amount in respect of the said judgment for a period of several years."

21. For ease of reference both the Deed of Settlement and the Final Agreement are set out below:

**"DEED OF SETTLEMENT**

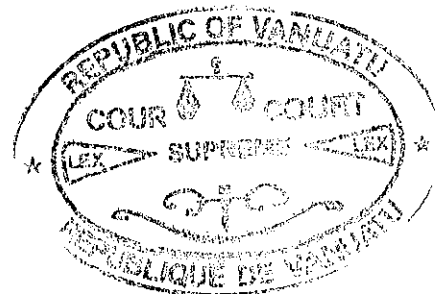
***This deed is made between the following Parties:***

1. The Vanuatu Maritime Authority represented by its Commissioner
2. Mr. Robert M. Bohn of Western Pacific Marine

*The above mentioned Parties agree as follows.*

*In order to give final settlement to CC 115 of 2000, the VMA shall pay to Mr Robert M. Bohn the following sums:*

- Principal: 6,500,000Vt



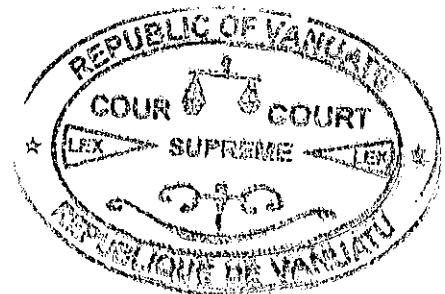
- Interests: 10% of principal as calculated and approved hereinunder
- Legal costs: 566,680Vt

2000	Interest 10% on 6,500,000Vt 6,500,000 + 650,000=	7,150,000	650,000Vt
2001	Interest 10% on 7,150,000 7,150,000 + 715,000=	7,865,000	715,000Vt
2002	Interest 10% on 7,865,000 7,865,000 + 786,000=	8,651,000	786,000Vt
2003	Interest 10% on 8,651,000 8,651,000 + 865,150=	9,516,650	865,150Vt
2004	Interest 10% 9,516,650 9,516,650 + 951,665=	10,468,315	951,665Vt
2005	Interest 10% on 10,468,315 10,468,315+1,046,831=	11,515,146	1,046,831Vt
2006	Interest 10% on 11,515,146 11,515,146+1,151,514=	12,666,660	1,151,514Vt
2007	Interest 10% on 12,666,660 12,666,660+1,266,660=	13,933,320	1,266,660Vt
COSTS 566,680Vt As agreed			
		<b>TOTAL</b>	<b>14,500,000 Vt</b>

Date: 5<sup>th</sup> October 2007

VMA Commissioner  
Less J Napuati

For: Western Pacific Marine  
Robert M. Bohn"



22. The Final Agreement reads:

*“Vanuatu Maritime Authority  
Republic of Vanuatu  
P.O BOX 320  
Port Vila, Efate*

*Phone: 23128/23768  
Fax: 22949  
Email: vma@Vanuatu.com.vu*

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**FINAL AGREEMENT**

*In the matter of CC 115 of 2000 – Ref. VMA Board resolution of 28/01/2000 and subsequent agreement.*

*This agreement is made between the following Parties:*

1. *THE VANUATU MARITIME AUTHORITY (VMA)*

*Represented by the Commissioner of Maritime Affairs Less John Napuati  
PO BOX 786 Port Vila (Vanuatu)*

*And*

2. *Monsieur Robert M. Bohn*

*As the owner of the business registered as Western Pacific Maritime (WPM)  
P.O BOX 786 Port Vila (Vanuatu)*

*The above mentioned Parties agree to give final settlement of the matter under reference in the sum of VT 14,500,000 payable by the VMA to Robert M. BOHN (WPM).*

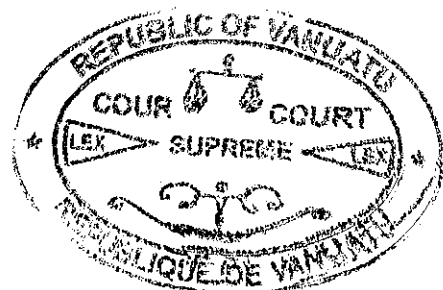
*Dated 9<sup>th</sup> October 2007*

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*Less John Napuati  
Commissioner of Maritime Affairs  
On behalf of the VMA*

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*Robert. M. Bohn  
in his personal name  
and on behalf of WP”*



## **The Evidence**

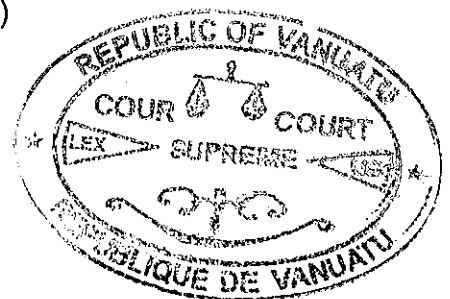
23. The evidence adduced was by way of sworn statements and cross-examination of the deponents of the statements.

24. The Claimant relies on the following sworn statements:

- Mr. Robert M. Bohn dated 17 January 2008 (Exhibit C1)
- Mr. Robert M. Bohn dated 23 April 2009 (Exhibit C2)
- Mr. Robert M. Bohn dated 24 June 2009 (Exhibit C3)
- Claimant's Affirmed Declaration dated 3 September 2014 (Exhibit C4)
- Mr. Guy Marcel Alain Benard dated 27 February 2009 (Exhibit C5)
- Mr. Guy Marcel Alain Benard dated 16 March 2009 (Exhibit C6)
- Mr. Guy Marcel Alain Benard dated 5 June 2009 (Exhibit C7)
- Mr. Guy Marcel Alain Benard dated 17 July 2009 (Exhibit C8)
- Mr. John Less Napuati dated 26 February 2008 (Exhibit C9)
- Mr. John Less Napuati dated 23 April 2009 (Exhibit C10)
- Mr. John Less Napuati dated 24 June 2009 (Exhibit C11)
- Mr. John Less Napuati dated 21 July 2009 (Exhibit C12)
- Mr. Dimitri Malvirlani dated 23 April 2009 (Exhibit C13)
- Mr. Dimitri Malvirlani dated 24 June 2009 (Exhibit C14)
- Mr. Dimitri Malvirlani dated 20 July 2009 (Exhibit C15)
- Mr. Dimitri Malvirlani dated 29 July 2009 (Exhibit C16)
- Mr. Christophe Emelee dated 26 February 2009 (Exhibit C17)
- Mr. Christophe Emelee dated 23 April 2009 (Exhibit C18)

25. For its part, the Defendant relies on the following sworn statements:

- Mr. Simeon Athy dated 3 June 2008 (Exhibit D1)
- Mr. Simeon Athy dated 14 January 2013 (Exhibit D2)
- Mr. Bennen Sahe dated 22 June 2009 (Exhibit D3)
- Mr. Daniel Morris dated 22 May 2015 (Exhibit D4)

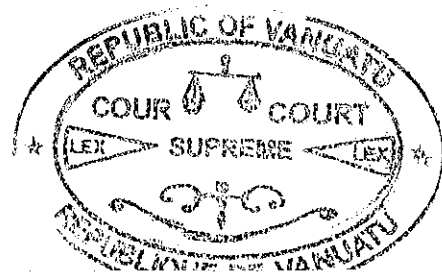




- Mr. Nigel Grant Morrison dated 14 September 2009 (Exhibit D5)
- Mr. Mark James Hurley dated 31 October 2008 (Exhibit D6)
- Mr. Mark James Hurley dated 18 May 2009 (Exhibit D7)
- Mr. Eric Puyo-Festa dated 20 July 2011 (Exhibit D8)

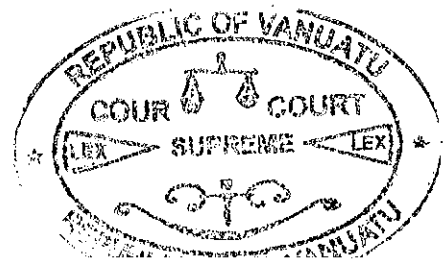
### **Evidence For The Claimant**

26. Mr. Bohn gave evidence in support of his claim. He said he was the sole owner of the business registered under the name Western Pacific Marine (WPM). He said at the request of the Court, he had filed an Affirmed Declaration (Exhibit C4) outlining the chronology of the facts which occurred since 1999 within the context of the operations for the salvage of the wrecks "Lauderek" and "Lih Peng" in the Port Vila Harbour area at the request of the then VMA and the sale of airbags to the same entity in 2007.
27. He said as remuneration for the salvage works completed he had entered into an agreement with the Authority on 9 October 2007 and as a result, they issued a bank instruction on the same day for payment of VT14.5M. He said the Bank Order dated 9/10/07 should have been paid from the VMA/MPIF accounts at the National Bank of Vanuatu (NBV) in Port Vila. He said that on several occasions he personally attempted to obtain payment without success. He said he was told by the then DG of Finance, Mr. Simeon Athy, that the VMA/MPIF bank accounts at NBV had insufficient provision to cover the payment but that later in December 2007 he discovered that this was not true.
28. Mr. Bohn said that in a totally different matter, his invoice of 18.09.07 concluded the sale and purchase agreement with the Authority for the delivery of airbags and that, as a result, two bank instructions dated 5<sup>th</sup> November 2007 ref:097 104-3 and 25<sup>th</sup> January 2008 ref:098 104-3 were issued by the VMA in his favour. He said the first VMA bank instruction for payment of the airbags was paid to him by ANZ cheque no. 879696 on 6 November 2007. He went on to say that also on the same



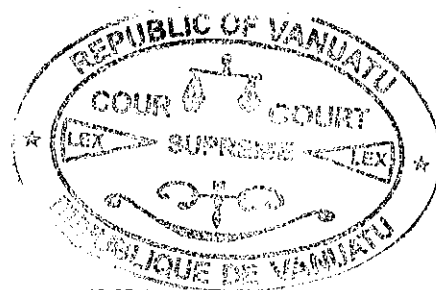
6 November 2007 he did deliver the air bags as per his invoice and the VMA Commissioner signed receipt of the air bags (annexure 3RMB7).

29. Referring to the sworn statement of Mr. Bennen Sahe which was filed on 22 June 2009 (Exhibit D3), Mr. Bohn said that his invoice of 18 September 2007, and other annexure documents related to the purchase of his air bags, had nothing to do with the Final Agreement he entered into with the Authority on 9 October 2007 concerning the settlement of the WPM salvage works on M/V Laudorek and Lih Peng in 1999.
30. In answer to questions put to him under cross examination Mr. Bohn said it is true that he did not get as much as he was seeking in the CC 115 of 2000 case. He felt the judgment awarded him 50% of his claim whilst the Chief Justice had seemingly determined that he had done 90% of the work. At page 2 of the reasons dated 28 April 2003 for the Orders of 9 September 2002, the Chief Justice said: *"The Lih Peng salvage was completed. The Laudorek salvage was completed other than approximately 10% ...."* and at page 8 *"- The Lih Peng was ..... disposed of in accord with the Contract"; by 6th January approximately 10% of the Laudorek remained ..."*.
31. Mr. Bohn said Mr. Benard was employed by WPM in 1999 and that Mr. Benard's negotiations with Government led to the VT18M settlement in 2003 on his behalf and that they had paid him VT6.5M leaving an outstanding balance. He said he was told that there would be a settlement of VT18M which he says is a fair amount for the VMA to pay considering that the interest was accruing. Mr. Bohn referred to annexure "GMB5" in the sworn statement of Guy Benard and he said that the letter dated Thursday 25<sup>th</sup> September 2003 is the letter of agreement that re-caps the settlement that was entered into by Mr. Benard and Mr. Emelee. He agreed that he never filed an appeal but he said he would not agree to the suggestion that the principal arose from the judgement of the Chief Justice in CC 115 of 2000. He said it is correct that VT6.5M was paid to settle the amount against the VT18M that was



agreed upon in 2003. He submitted that if the agreement for VT18M is sustainable then what had gone before in respect of the judgment sum of VT6.5M is irrelevant.

32. When it was put to Mr. Bohn that nowhere in his Supreme Court Claim filed on 17 January 2008 has he referred to the 5 October 2007 Deed, he said that there was no discussion of the Deed in 2007 and that he was just trying to collect on the bad cheque that had been given to him. Mr. Bohn referred to the REQUEST FOR BANK DRAFT (RFBD) attached as "RMB1" to Exhibit C1 and he said the document is the same as that which appears in the sworn statement of Bennen Sahe "BS1" except that his document has a notation stating "there were insufficient funds."
33. Mr. Bohn was shown the sworn statement of Dimitri Malvirlani (N0.3) and he agreed that documents "3 DM 11" and "3DM 12" are RFBD for an equal sum of VT7, 250,000 each. He said the first payment was received in November and the second was paid pursuant to Constitutional Case 1 of 2008 which he had filed against the Government in relation to the remaining payment of VT7,250,000 for the salvage airbags. When Ms. Williams suggested to Mr. Bohn that the amount of VT14,500,000 in the RFBD was for the purchase of air bags, and not for the purpose of what he had claimed, his response was that the VT14.5M does not arise from any invoice and that it arises from the Deed of Settlement. He also denied the suggestion that he intended to keep an amount of VT14.5M for a salvage which never took place.
34. He also denied counsel's suggestion that the answers he gave on 29 August 2008 in his "Reply to the Defendant's Written Questions dated 4 August 2008" are evasive and inconsistent. He said the phrase "out of Court resolve" is his expression and it is an attempt to give the State Law Office a full explanation and further and better particulars of what occurred in 2003. Mr. Bohn said he wants the Court to believe that the answers are not evasive and inconsistent and that he does not believe there are irregularities between the three answers: "(1) that I was sitting in America and I did nothing; (2) that my solicitors were dealing with it; (3) that Guy Benard was left to resolve the matter."



35. Mr. Bohn was shown three letters dated 17<sup>th</sup> April 2007, 18<sup>th</sup> April 2007 and 30<sup>th</sup> April 2007 attached to Exhibit C2 as annexures "2RMB1" "2RMB2" and "2RMB3" respectively and he was asked whether he had drafted them but he denied. It was then put to him that he had lied to Mr. Napuati to get the Judgment sum. He denied this suggestion and said he did not lie to Mr. Napuati and that the latter had done his own research.
36. During re-examination by Mr. Morrison, Mr. Bohn said that he got the first payment for the air bags but he didn't collect the second payment because when he went to get it he was told the account had been closed. He confirmed that the settlement of 18 September 2003 was entered into between Guy Benard and Mr. Emelee and he said that during conversation with Mr. Benard he was looking forward to settling this matter as best as he could.
37. The second witness was Guy Marcel Benard. He said he was instrumental in negotiating on behalf of Mr. Bohn the out of Court settlement of the proceedings registered as CC 115 of 2000 and CAC 19 of 2002. He referred to a copy of the letter written to him by Christophe Emelee on 25<sup>th</sup> September 2003 (annexure GMB5 exhibited to his sworn statement dated 27 February 2009 i.e. Exhibit C5) and he said the letter clearly states that the Authority had accepted his offer of settlement in the amount of VT18M. The body of the letter reads:

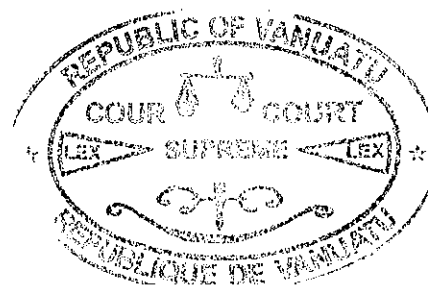
*"Dear Guy,*

*WITHOUT PREJUDICE*

*RE: SETTLEMENT OF CLAIM -*

*Further to our recent meeting in respect to the above claim. We would confirm that we are ready willing and able to settle the above claim on the conditions stated herein;*

*The Vanuatu Maritime Authority has accepted your claim in respect to this matter, and confirm that judgement was entered against the VMA. In point of fact the previous Board, prior to their being disbanded, resolved to settle this long*



*standing dispute. Ex Commissioner John Roosen, made a provision of 6.5 Million vatu in last year's budget specifically for settlement.*

*We accept that the courts have entered judgement against VMA for 6.5 Million Vatu, and that in addition there are costs and interest charges of another 5 Million Vatu.*

*We accept that any successful challenge in respect to an appeal via the courts would incur an additional 16 million vatu in costs and orders. This would make the total claim 27 million Vatu.*

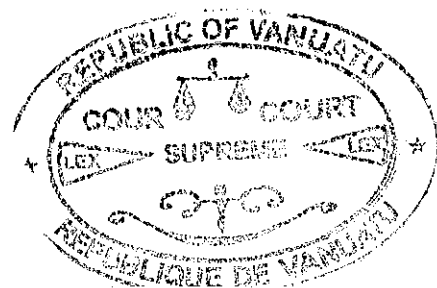
*We accept your "offer of settlement" in the amount of 18 Million Vatu.*

*Having said that, we will be making the funds available under the MPIF. In this respect our terms of settlement are as follows:*

- 1. A first payment of 6.5 Million vatu from the MPIF on or before the 30<sup>th</sup> October 2003*
- 2. A second instalment of 5 Million vatu from the MPIF on or before the 30<sup>th</sup> December 2003*
- 3. A third instalment of 3.25 Million vatu from MPIF on or before the 30<sup>th</sup> March 2004*
- 4. The Final payment of 3.25 Million vatu from the MPIF on or before the 30<sup>th</sup> September 2004. ...."*

38. Mr. Benard said he had received a NBV cheque # 019472 dated 31 October 2003 in the sum of VT6.5M as the first payment of the agreed settlement between the Authority and himself. He said this cheque was not issued as the full settlement of the judgment debt in CC115 of 2000 as it is alleged by the Defendant. He said the Defendant's interpretation of this payment is wrong and that there is confusion in regard to the first instalment payment which is in fact the same amount (i.e. VT6.5M) which was allowed by the Chief Justice in his judgment in CC115 of 2000. Mr. Benard further stated in Exhibit C5 that in total it was an amount of VT11.5M which was never paid by the Authority and the only reason given for the non-payment was because the Authority had never obtained an appropriate budget for the settlement of its outstanding debt to Mr. Bohn.

39. He said at all material times he had kept Mr. Bohn's counsel informed of the progress of the settlement. Mr. Benard said this is confirmed by Mr. Nigel Morrison's letter addressed to him on 15 October 2003 (annexure GMB7) in which



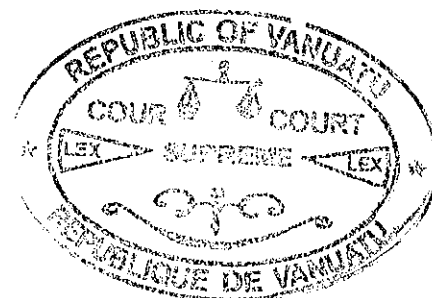
the latter requested payment of his legal fees and further acknowledged that the first part payment of the full settlement will be paid by the Authority before the end of October 2003.

40. Mr. Benard was cross-examined about the Power of Attorney Mr. Bohn had given him and in reply Mr. Benard said he had given the document to the VMA Board. When he was questioned about the settlement amount of VT18M he said it was clear that the settlement was for VT18M to be paid by 4 instalments. He said he did not agree with counsel's suggestion that the decision to settle for VT18M was unreasonable because the VMA's Mr. Emelee and Lawyer Mark Hurley had decided to settle instead of going to court. He added that *"it was not a Judgment at the time because this was an appeal and in order to stop the appeal an agreement was entered into"*.
41. Mr. John Less Napuati gave detailed evidence on behalf of the Claimant. He filed four sworn statements which were admitted as Exhibits C9, C10, C11 and C12. I have, for convenience, reproduced hereunder paragraphs 9 through 16 of his sworn statement dated 23 April 2009 as follows:

*"9. Reconsidering the VMA letter of 25<sup>th</sup> September 2003 addressed to Capt. Benard (cf: annexure "2JLN2") and the English translation of the hand written note of Capt. Benard in response (cf: annexure "2JLN3", my findings were as follows:-*

- (a) That the VMA had agreed to pay VT18,000,000 to Mr. Bohn by four instalments;*
- (b) That only the first payment of VT 6,500,000 was made;*
- (c) That 3 instalments were never paid;*
- (d) That the balance to be paid amounted to:  
VT 18,000,000 – VT 6,500,000 = VT11,500,000 plus interest;*
- (e) That the reason for the non-payment of the three instalments was lack of budget and the refusal of access to the VMA/MPIF monies by Mr. Athy.*

10. *Considering the matter further I understood that:-*



- (a) the VMA had clearly stated that the full settlement was dependent on the status of the MPIF;
- (b) the VMA had reserved its rights to alter the agreement, should the MPIF be altered or changed.
- (c) the agreed amount to settle the salvage works done on quantum meruit basis was in the sum of VT13,000,000 (the principal);

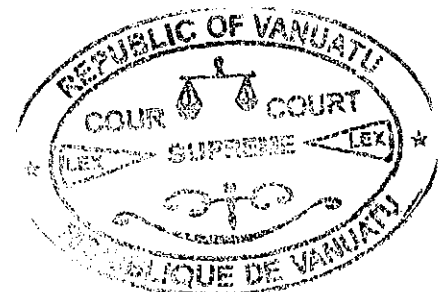
(e) half of the sum of VT 13,000,000 was paid;

(f) the balance to be paid was:

$$VT\ 13,000,000 - VT\ 6,500,000 = \underline{VT\ 6,500,000}$$

11. It was further agreed with Mr. Bohn that the outstanding principal sum of VT6,500,000 shall be paid to him plus interest at the rate of 10% as stated in the Judgement of 9 September 2002 in CC 115 of 2000 plus legal costs to be determined and agreed between the parties.
12. The verbal agreement that I, on behalf of VMA, concluded with Mr. Bohn is set out in the Deed of Settlement signed by myself and Mr. Bohn on the 5<sup>th</sup> October 2007 (which is attached hereto as annexure "2JLN 4") and definitively confirmed by the Final Agreement signed between myself for the VMA and Mr. Bohn on the 9<sup>th</sup> October 2007 (cf: annexure "2JLN 5"). The said agreement was final and superseded the first agreement of 2003 except for the acknowledgement of the first payment made on 31/12/2003 which was taken into account for the payment of the balance due.
13. As the representative of the VMA at that time I was satisfied that I had properly analyzed the matter and that the interests of the Government of Vanuatu were at all times being protected.
14. By comparison if I had accepted to pay the remaining amount of VT11,500,000 (as a result of the non-payment of the agreement made between the VMA and Mr. Benard on 25<sup>th</sup> September 2003) plus the interest from October 2003 to October 2007 and the agreed legal costs, the VMA would be paying Mr. Bohn much more than VT14,500,000 negotiated under the second agreement.

For this scenario, the calculation is as follows:

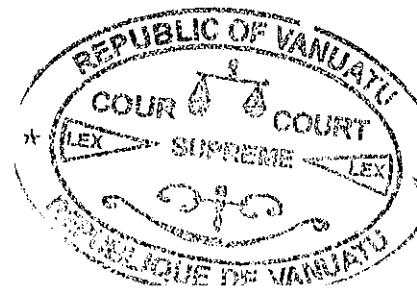


Principal		VT 11,500,000
Interest 10% - from 2004 to 2007		
2004	11,500,000 X 10%	VT1, 150,000
2005	12,650,000 X 10%	VT1, 265,000
2006	13,915,000 X 10%	VT1, 391,000
2007	15,306,500 x 10%	VT1, 530,650
Total accrued interest		VT 5,337,150
Total Principal and Interest		VT16, 837,150
Plus legal costs minimised to		VT 500,000
Total to be paid		VT 17, 337,150

15. The financial figures above provide a clear demonstration that I had saved VT3,000,000 in favour of the government agency, VMA.

16. As consequence of the final agreement I had instructed Mr. Malvirlani to prepare a bank instruction in the sum of VT 14,500,000 which was the agreed amount for settlement. Mr Malvirlani prepared the bank instruction and I signed the instruction”.

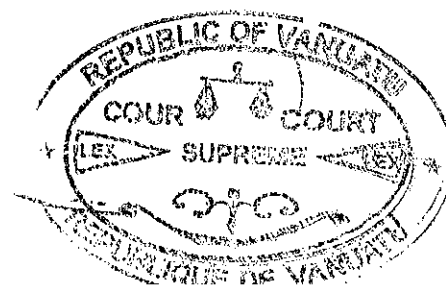
42. At paragraph 2 of Mr. Napuati’s sworn statement dated 24<sup>th</sup> June 2009 (Exhibit C11) he stated as follows: “Referring to the Statement dated 22<sup>nd</sup> June 2009 and sworn by Mr. Bennen Sahe, it is true that all bank instructions for payments to be made through the VMA/MPIF Trust Account were addressed to the office of the Director General for co-signature. The bank instructions were always supported by relevant documents for the purpose of justifying the payments. The bank draft referenced NO. 086 104-3 07.10.013 which is attached to Mr. Bennen Sahe’s sworn statement as Annexure BS1 was not supported by the documents related to the purchase of air bags by the VMA as mentioned and itemized in the WPM/Robert Bohn invoice dated 18<sup>th</sup> September 2007. The bank draft NO. 086 104-3 07.10.013 was established and signed by me for the sole purpose of the effective payment to WPM/Robert Bohn in the sum of 14.5 million Vatu related to the Deed of settlement and the final agreement (Salvage Services) that I personally made with Mr. R. Bohn on behalf of the Authority. At the time I had





*signed the bank draft NO. 086 104-3 07.10.013 the attached supportive documents were the Annexures JLN3 and JLN4 of my Sworn Statement dated 23<sup>rd</sup> April 2009."*

43. Mr. Napuati then went on to say that at the time Mr. Bohn was paid vide the first bank instruction NO. 097 104-3 07.11.009 of 5<sup>th</sup> November 2007, Mr. Bohn had released the airbags on 6 November 2007 and that he had delivered to Mr. Bohn an official receipt (Annexure 3JLN3).
44. During cross-examination by Ms. Williams, Mr. Napuati was shown the Reasons for Judgment dated 28 April 2003 in CC 115 of 2000 and attached to the sworn statement of James Mark Hurley. And he was asked whether The Claimant had appealed. He said: *"I recall that VMA did appeal the Judgment. From my recollection the Claimant did file a notice of appeal. I came across this in the VMA files in the office where I was working as Administration Officer, then as Acting Commissioner and later Commissioner of VMA. I am aware of the Deed of Settlement dated 5<sup>th</sup> October 2007. Yes I drafted this document. I agree that on 30 October 2003 VMA made a payment of VT6.5M to Guy Benard. It was part payment. I see annexure "2JLN1". It is my signature. The document was drafted by me, signed by me, stamped by me.*
44. Mr. Napuati was re-examined by Mr. Morrison. He was shown RMBI (annexed to the sworn statement of Robert M. Bohn dated 17<sup>th</sup> January 2008) and he was asked whether he recognised the document. In reply, he said he recognised this document as the RFBD dated October 9, 2007 and that he could see the hand written notations on the document "says insufficient funds". He said what would happen is that the cheque would be returned to him. He was asked whether the VMA had external Audit and he said "Yes the VMA gets audited by VMA Auditor and also the accounts are audited externally annually.
45. Mr. Napuati was asked to refresh himself and to look at paragraph 9 through 15 and to tell the Court how he arrived at the figure of VT14,500,000. He said there



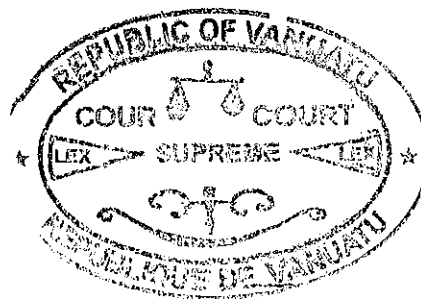
were two options - ***either*** to pursue the settlement amount of VT18,000,000 less the 1<sup>st</sup> payment of VT6,500,000 leaving a balance of VT11,500,000 plus the accrued 10% interest from 2004 to 2007 and the agreed legal costs would have amounted to VT17,337,150; ***or*** to settle the balance of VT11,500,000 plus an extra VT3,000,000 (to cover the period the balance was outstanding) which amounted to a lesser total sum of VT14,500,000. He said that this was the option they used to settle the case because it was cheaper by VT3M.

46. Mr. Dimitri Malvirlani was the fourth witness for the Claimant. He could recall that the amount in the cheque was VT6,500,000 and that he had received instructions to make that VT 6,500,000 payment as the first payment. He was questioned about the RFBD for VT 14,500,000 and he said that he prepared it with supporting documents and that there was a Deed of Settlement attached to the document. He also said that he did not agree with Mr. Athy's sworn statement that the request was for airbags.
47. Mr. Christophe Emelee said that in 2003 he was the Chairman of the VMA Board. He said that he instructed Mr. Hurley not to proceed with the appeal on the basis that the case had been ongoing since 2000 and because the cost was high and the Lawyer was telling him that the possibility was 50-50 chances of success. He said that Mr. Hurley was not happy that he had settled the matter without going through him. He referred to a facsimile he had received from Mr. Hurley in response to the VMA's facsimile of 25<sup>th</sup> September 2003. (Annexure CE 27 attached to his sworn statement dated 26<sup>th</sup> February 2009). It reads:

*"Dear Mr. Emelee,*

*Re: WESTERN PACIFIC MARINE – SALVAGE AGREEMENT  
SUPREME COURT CIVIL CASE NO. 115 OF 2000  
COURT OF APPEAL CIVIL CASE NO. 19 OF 2002*

*We acknowledge with thanks receipt of the VMA's facsimile of 25<sup>th</sup> September 2003.*



*At the Court of Appeal review session tomorrow we will advise the court that we are instructed to withdraw the appeal. We will advise the court to make no order as to costs arising from the appeal.*

*We note that you refer in your facsimile to a settlement offer having been accepted by Mr. Benard. In order that there is no misunderstanding at any future date, we recommend that the VMA instruct us to prepare a Deed of Release between the parties to record the terms of settlement.*

*In this regard, we look forward to the receipt of the VMA's further instructions.*

*Yours Sincerely,  
GEORGE VASARIS & CO*

*Mark Hurley*

48. Under cross-examination Mr. Emelee was asked about the contents of the letter dated 25<sup>th</sup> September 2003 and he said he was not lying about the consents. He also confirmed that he had the powers to have the meeting with Mr. Benard without the Board. He said everything was recorded and passed on to the Board after that and that this letter was in his computer but that after the repeal of the VMA Act everything was taken away.
49. It is noteworthy that whilst Mr. Emelee and Mr. Malvirlani gave relevant and useful background evidence for the Claimant, it was only the evidence of Mr. Bohn, Mr. Benard and Mr. Napuati which went directly to the issues the Court must decide.

### **Evidence For The Defendant**

50. The Defendant gave evidence from Mr. Simeon Athy, Mr. Bennen Sahe Mr. Morris, Mr. Nigel Grant Morrison, Mr. Mark James Hurley and Mr. Eric Puyo-Festa.
51. Mr. Athy said he was Director General of the Ministry of Finance from October 2003 – 2008. He said on 18 September 2007, he was shown an invoice from WPM for payment of VT14,500,000 being for salvage bags. He said the invoice was

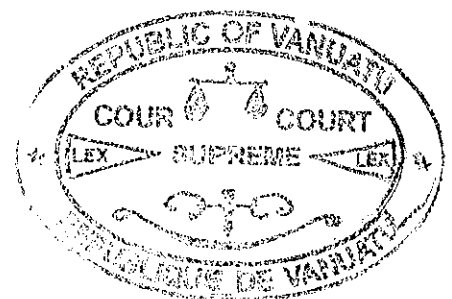


shown and presented to him by Philip Tasale who was employed by the VMA as an Administration Officer.

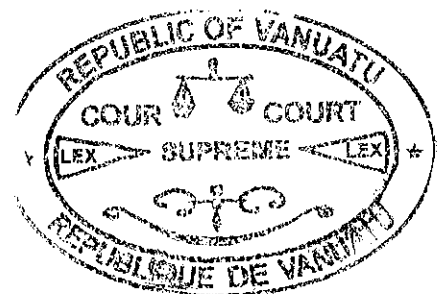
52. Paragraphs 7 through 10 of Mr. Athy's sworn statement dated 3 June 2008 (Exhibit D1) read as follows:

- "7. Given the insufficient funds in the MPIF account, on or about October [sic] 2007, I wrote two Bank Drafts for VT7,250,000 each from the MPIF funds. I told Philip Tasale that the second Bank Draft for VT7,250,000 will be made on 30 January 2008. The two Bank Drafts of VT 7,250,000 each replaced the original Bank Draft of VT 14,500,000 that I signed on 9 October 2007*
- 8. On 27 December 2007, the Claimant approached me at my office showing the original Bank Draft of VT14,500,000 and told me that the bank Draft is for an alleged debt which VMA may have owed him. At that point in time, I was surprised that the Claimant was still holding onto that cheque. I told him that the cheque should have been destroyed.*
- 9. I could tell from the Claimant's face that he was also shocked when I told him that the cheque should have been destroyed.*
- 10. I told the Claimant that as far as I am aware, there was an invoice from an invoice from Western Pacific Marine in the amount of VT14,500,000 for salvage air bags only. VT 7,250,000 has been paid to the Claimant and VT 7,250,000 is yet to be paid to him".*

53. Mr. Athy was cross-examined by Mr. Morrison. He agreed that if there were documents to support a Request and funds were available in the account then it would be proper for him to countersign. Mr. Athy said that his understanding was that when he countersigned the Claimant's RFB for VT14,500,000 he thought it was for the purchase of air bags and air bags alone. It was put to Mr. Athy that when he received the RFB for VT14,500,000 on 9 October 2007 he assumed and jumped to the conclusion that this was what had accompanied the invoice he had received two weeks before. He said: "Yes – relating to the airbags".



54. He was asked whether he was aware of the Claimant's case and he said he only came to know of such a Deed when Mr. Bohn entered his office towards the end of 2007 and showed him the Bank Draft of VT14.5M with words to the effect that it was for an alleged debt which VMA owed him. Mr. Athy said he was surprised that the Claimant was still holding onto that cheque.
55. Mr. Athy went on to say that the cheque for VT14,500,000 which was originally supposed to settle the airbags had been "broken into 2 pieces" and that he "had already authorized 2 subsequent cheques of the same amount." He was asked if it would surprise him that Mr. Bohn had to go to Court to recover that payment. He replied "it would surprise me."
56. The crux of Mr. Athy's evidence is that on or about 18 September 2007 he received an invoice for airbags in the amount of VT14,500,000. Then on or about 9 October 2007 he received a "Request for Bank Draft" in the amount of Vatu 14,500,000. There was nothing on that Request that denoted what the payment was for: salvage or airbags? Mr. Athy connected the invoice with the RFBD and he countersigned the RFBD on his understanding he was making a payment for airbags. He agreed that the invoice had arrived more than two weeks before he signed the Request. When questioned further about what had transpired Mr. Athy agreed that if the RFBD had clearly been for salvage and had attached to it the Deed of Settlement he would perhaps have made phone calls to Mr. Napuati and Mr. Malvirlani before countersigning it.
56. Mr. Athy was re-examined by defence counsel Ms. Williams. She asked him to tell the Court if the invoice for airbags dated 18<sup>th</sup> September 2007 and the RFBD dated 9<sup>th</sup> October 2007 had come separately. Mr. Athy candidly said: "*I got them on two different days. I eventually put them together.*" He was asked whether he could recall seeing a Deed of Settlement as supporting document presented to him for countersigning and he said "*No, there was none.*"



57. The sole Issue for determination by the Court in this case is :-

**“On 5 October 2007 when the Claimant and the VMA entered into a Deed of Settlement to finally conclude CC 115 of 2000 was that deed induced by the fraud and misrepresentation of the Claimant and a sham as pleaded by the Defendant?”**

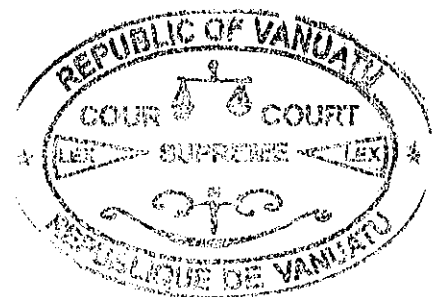
58. It is timely to state that **it is well established that fraud must be distinctly alleged and as distinctly proved and the burden of proof lies on the pleader** in establishing the fraud that it alleges. The standard of proof is that of the balance of probabilities. See **Hornal v Neuberger Products Ltd** [1957] 1 QB 247 where the Court of Appeal held that in civil proceedings the standard of proof is that of the balance of probabilities, even where the allegation is one of fraud.

59. At paragraph 3 of the Defendant’s submissions they say that *“the Defendant’s case is supported by concrete evidence which shows that the Deed of Settlement of 5 October 2007 is a sham...”*

60. An analysis of the Defendant’s submissions identifies the following as the evidence they rely on:

(a) “The Claimant never appealed the Supreme Court’s judgment nor did he cross appeal the VMA’s appeal”

In the Claimant’s Reply to the Defendant’s submissions, Mr. Morrison submits that there was an appeal. Who got in first in time is trite. Once an appeal is filed the matter is effectively stayed and it can be resolved in one of two ways. It can be heard or the issues can be settled and the appeal withdrawn. On this occasion the latter occurred. There was no compromise to the Claimant’s position or result by not having filed a cross appeal. He was happy with the resolve. I agree.



(b) "Lack of explanation of a start Point of Deed".

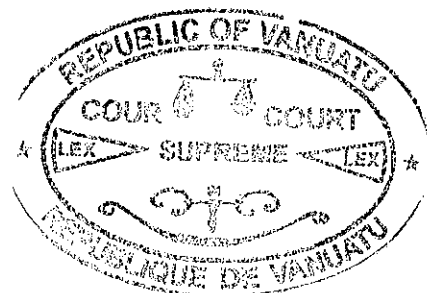
The formulation and starting point of the Deed were fully explained and set out in Mr Napuati's written and oral evidence. Inter alia he said;

1. He was aware only 6.5 million was paid in 2003.
2. He made an analysis of revisiting the balance due from there with interest and costs.
3. He made an analysis of the payment of 14.5 million.
4. He came to the firm conclusion that the best deal for him was the payment of VT14.5 million in full and final settlement.

(c) "No mention of Deed of Settlement in First Claim made by Claimant".

It is clear to me from the evidence adduced, that the Claimant believed the shortest way for him to recover his money was to sue on the unpaid cheque. What the Claimant was then unaware of was that Mr. Athy understood the VT14.5M cheque was for airbags and airbags only. When the Claimant understood this of course he realized that suing on the unpaid cheque would be more difficult than he perceived and so he sought legal advice and amended proceedings were issued suing under the Deed.

- (d) "Evasive Answers to Interrogatories". Suffice to say that this Court does not find the answers provided by Mr. Bohn to the interrogatories evasive. Beyond that, Mr Napuati's recollection of detail more than 10 years previous was, unsurprisingly, not clear. "Can't recall" and "Can't remember" don't have to be evasive answers. They can be honest answers when such time has passed.



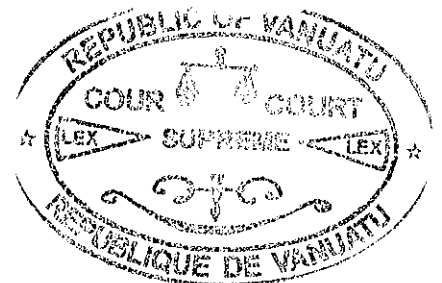
- (e) "Napuati wrote: On your side you did agree to collapse your appeal case and forsake the opportunity ....".

I agree with Mr. Morrison that this statement is correct. The appeal was not withdrawn as it was not filed. But it was "collapsed" because it was not pursued as settlement was achieved.

- (f) "Mr Emelee stated the amount awarded was not 6.5 million vatu but a far greater sum ....."

Undoubtedly, the amount awarded was a far greater sum and Mr Emelee repeatedly said this. It included interest and costs. Interest at 10% on VT6.5M over many years is a significant amount. Costs for running a lengthy Supreme Court trial is a significant amount. In the Claimant's Reply, counsel submits that the Defendant has always wanted to ignore these matters but Mr Emelee and Mr Benard did not ignore them when the appeal was settled in 2003. Why would VT6.5 million be accepted in full and final settlement by Mr. Benard as suggested by the Defendant? Counsel submits that he would be forsaking large amounts of money ordered by the Chief Justice to be paid. Why would Mr. Bohn and Mr. Napuati ignore interest and costs when they entered the Deed in 2007? Of course they would not.

It is further submitted by the Claimant that noticeably absent from the Defendant's submissions is any comment on the Claimant's rationale for intending to appeal and thereafter settling for the amounts he did. He felt the judgment awarded him 50% of his claim whilst the Chief Justice had seemingly determined that he had done 90% of the work. Counsel submits that there appears to be, respectfully, some mathematical error in the Chief Justice's calculations and that always formed the basis of the Claimant's intent to appeal and





thereafter the formulation of the agreed settlement amounts. It is noteworthy that the Defendant's submissions take no issue with this.

- (g) "The Claimant's Modus Operandi is to Create False Documents and Induce Others to Sign them".

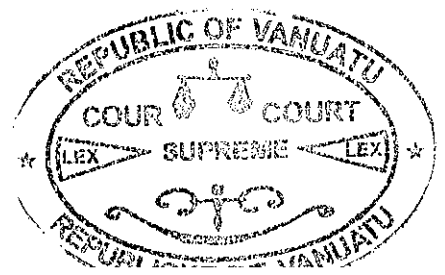
Mr. Morrison submits this is drawing an extremely long bow. Mr Bohn did not create the Deed, the VMA did. Mr Bohn did not create the "TAC" Deed. The TAC Committee did through their Counsel Ms Thyna. Of course Mr Festa's evidence was undisputed as the Defendant repeats. It was irrelevant to the issues and misconceived by the Defendant. I agree

- (h) "Mr Malvirlani said he delivered the original request for Bank Draft to Mr Bohn. Mr Bohn said he did not have it, he would expect it was with the Bank"

There was no conceivable reason not to produce the original if it was available. Mr Bohn simply stated he did not have it and it would be with the bank. Again, when requesting disclosure of the original, it was not put to Mr Bohn what Mr Malvirlani's evidence was.

61. To allege that Mr. Bohn and his witnesses, namely, Mr. Benard, Mr. Napuati, Mr. Malvirlani and Mr. Emelee proceeded through the Courts on a sham is a most serious allegation and one would expect that allegation to be supported by cogent and compelling evidence.

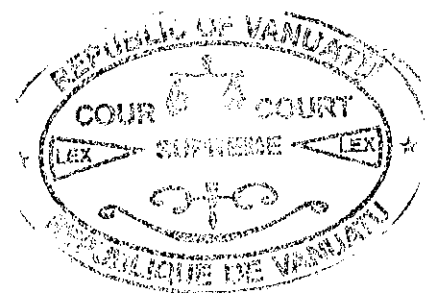
62. In my considered view, there is no such evidence. What there seems to be is confusion in regard to the first instalment payment of VT6.5M which is in fact the same amount (VT6.5M) which was allowed by the Chief Justice in his Judgment in CC 115 of 2000. The parties had an option to appeal and the VMA filed Civil Appeal 19 of 2002. Once an appeal is filed the matter is effectively stayed and it can be resolved in one of two ways. It can be heard or the issues can be settled and the



appeal withdrawn. On this occasion the latter occurred and the parties opted to negotiate instead of going to Court. This resulted in the Deed of Settlement and the Final Agreement dated 9 October 2007. It seems that but for poor management control of "Requests for Bank Draft" Mr. Athy would have countersigned the RFBD had he known it was for salvage and thus conclusion of this case and the parties would not have had to come to Court.

63. It does appear that there is no cogent or compelling evidence that Mr. Bohn induced Mr. Napuati to enter into the Deed of Settlement by fraud and misrepresentation. These claims have no support from the evidence adduced before this Court and they are baseless. The VMA had a full board of directors when their Commissioner Mr. Napuati entered the Deed with Mr. Bohn and there is no evidence of any collusion with those directors.
64. Besides, I must say that I found Mr. Napuati to be an impressive witness and he was clear in his thinking. He believed that he had concluded Mr. Bohn's entitlements whilst safeguarding the VMA's position and had gained a good deal. He was briefed on the whole history and understood that history. It was on the basis of that history that he entered the Deed. There was no instance of any fraud or misrepresentation allegedly perpetrated by Mr. Bohn upon him that was put to him.
65. In the final analysis, I hereby enter judgment for the Claimant for the unpaid sum of VT14,500,000 under the Deed of Settlement dated 5<sup>th</sup> October 2007 and Final Agreement dated 9 October 2007 together with interest.

The Defendant is to pay the Claimant costs on a standard basis to be agreed or taxed.



**DATED at Port Vila, this 6th day of August, 2015.**

**BY THE COURT**



**M.M.SEY**

**Judge**

