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

CIVIL CASE 15/601 SC/CIVL

BETWEEN: **ROBB EVANS of ROBB EVANS & ASSOCIATES**
Claimant

AND: **EUROPEAN BANK LIMITED**
Defendant

Coram: Justice Mary Sey

Counsel: Mr. Mark Hurley for the Claimant
Mr. Garry Blake for the Defendant
Date of Decision: 24 February 2017

RULING

Introduction

1. By its Amended Application filed on 23 May 2016, the Defendant has applied to strike out the Amended Supreme Court Claim on the ground that the Claimant does not have standing to bring the proceedings because Benford Ltd is the proper Claimant.

2. The Claimant's Amended Claim filed on 29 March 2016 is for an order that the Defendant pay to the Claimant the sum of USD 4,298,731.68 as at 9 December 2014, together with all interest accrued thereafter or, alternatively, such other amount that this Honorable Court may determine.

Background

3. The Claimant alleges (at paragraph 4 of the Amended Claim) that on or about 19 February 1999 Benford entered into a contract with the Defendant to open the USD Term Deposit Account no. 8901-116101-0206 in its name with the Defendant.

6. In its Defence to the Amended Claim the Defendant pleads at paragraph 3 as follows:

> "As to paragraph 4 of the amended claim, the Defendant admits that Benford established a current account with the Defendant on 19 February 1999 being an account styled "Benford Limited" with account

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number 8901- 11603. A term deposit with account number 8901 – 116101–0206 was established at Benford's request on 26 February 1999. Save as otherwise expressly admitted the defendant does not admit paragraph 4 of the amended claim."

7. The Defendant also admits in paragraph [8] of its Defence that on or about 9 December 2014 it transferred, by order of the Supreme Court of Vanuatu, to the Claimant the sum of US$5,052,041.81 being the balance held by the Defendant for the account of Benford as at that date.

8. It further admits at paragraph [9] of its Defence that the amount transferred to the Claimant on or about 9 December 2014 was the amount due to Benford Ltd arising out of and in respect to the operation of Benford's account with the Defendant.

9. However, the Defendant's main contention is that the contract that governs the operation of the Account is a contract between Benford and the Defendant and that there is no claim the Claimant could bring based upon the operation of the Account by Benford with the Defendant. Furthermore, that any claim that lies in relation to the operation of the Account and any alleged breach of the contract governing the operation of the Account lies exclusively with Benford.

10. The Defendant's pleading in paragraph [12] reads as follows:

> "Further or in the alternative, in answer to the whole of the Claim, the Defendant says that the Claimant does not have standing to bring these proceedings or otherwise claim the relief sought and the Defendant denies that it is indebted to Benford and/or the Claimant as alleged or in any respect whatsoever."

Submissions

11. The Defendant submits that the Claimant has not been appointed as a Receiver of Benford under Vanuatu law and as such is not able to bring a suit as a Receiver of Benford and that indeed the Claimant does not do so as the Claimant is referred to as "Robb Evans" and not "Benford Limited (Receiver Appointed)." Furthermore, that it is not pleaded that any contractual right of Benford has been assigned to the Claimant.

12. The Defendant further submits that it paid out funds owing by it to Benford under the terms of the contract between it and Benford and paid those funds to

the Claimant in accordance with the orders of the Court of Appeal in its judgment in *Public Prosecutor v Robb Evans [2014] VUCA 38.*

13. For his part, the Claimant says that the Defendant is attempting to re-litigate an issue that was decided against it by the Supreme Court of Vanuatu and the Court of Appeal of Vanuatu. That Mr. Evans was appointed the receiver of Benford Ltd by the United States District Court, Central District of California, and Western Division. That appointment has been recognised as valid by the Court of Appeal of NSW, the Supreme Court of Vanuatu and the Court of Appeal of Vanuatu. In that capacity, Mr. Evans has standing to bring this claim.

14. The Claimant contends that the doctrines of issue estoppels, res judicata (as extended by the rule in *Henderson v Henderson* (1843) 67 E.R 319 as applied by the Court of Appeal in *Miller v National Bank of Vanuatu [2006]* VUCA 1 and subsequent cases) or abuse of process preclude the Defendant from advancing a submission that the Claimant does not have standing. The Claimant further submits that the question of whether the Claimant has standing to bring this claim was finally disposed of in favour of the Claimant by the Supreme Court of Vanuatu in *Evans v European Bank Ltd* [2014] VUSC 23; Civil Case 85 of 1999 (6 May 2014) and that it is entirely inappropriate for the Defendant to attempt to re-litigate the issue in this proceeding.

15. In *Evans v European Bank Ltd* (supra), the Claimant sought the following declaration at [3]:

> "A declaration that Robb Evans of Robb Evans and Associates as Permanent Receiver of J.K Publications Inc, MJK Service Corp., TAL Services Inc., and their affiliates and subsidiaries, and as Receiver over the assets of Kenneth Taves and Teresa Taves, appointed in Civil Action No.99 – 00044 ABC (AJWx) entered on 16 March 1999 in the New United States District Court, Central District of California, Western Division is entitled to receive and to give European Bank Ltd a good discharge for the receipt of all monies standing to the credit of an account in the name of Benford Limited."

16. That declaration was made by the Court following a final hearing on the merits (*Evans* at [76]). In making that declaration, Spear J. reached the following conclusion (*Evans* at [75]):

> *"I confirm that I find that the appointment of Mr. Evans as receiver of Benford in these circumstances is one that is to be treated with respect by the Courts of Vanuatu particularly in the absence of any other*

rightful claimant to the funds deposited to Benford's account with European Bank."

17. In *Public Prosecutor v Robb Evans [2014] VUCA 38*, the Court of Appeal upheld that the Claimant, as the receiver of Benford, was entitled to receive the funds deposited to Benford's account with the Defendant. I find passages [40] to [47] of the judgment to be quite significant. They are set out below as follows:

> "[40] .....Benford was an artifice created by and on behalf of Dr. Taves and his interests. Nothing held to the credit of Benford could possibly go anywhere but into the Taves receivership.
>
> [41] The problem for us is that if we were to send this civil aspect of the case back for further consideration in the Supreme Court of Vanuatu there would be even more delay and there is no realistic suggestion that a different outcome might sensibly result.
>
> *[42] The factual position is that there is sitting in an account in European Bank a substantial sum of money in the name of Benford. Benford is, and never has been anything other than, a front by Dr.Taves and his associates to try and avoid and circumvent orders in the US Courts.The money is part of what was obtained in a scam from innocent victims.*
>
> *[43] A mechanism is urgently required to get that money back to the victims.*
>
> *[44] A good deal of time and effort has been expended on the application or not of the exclusionary rule where under private international law steps will not be taken to enforce penal or revenue law of a foreign state. But that is not what has ever been contemplated here. It has added a degree of complication which is not justified in the circumstances.*
>
> *[45] It might have been more helpful if the trial judge had articulated to a greater extent his own reasoning rather than adopting that of Judges hearing aspects of the case in another jurisdiction. However what in the final analysis has to be determined is what is the best way to get this money to those people who suffered loss.Although the receivership authorized by the US District Court may be an expensive process no alternative has been advanced and certainly not one which at this stage in all the circumstances could be less expensive or effective.*
>
> *[46] We are satisfied on the basis of the pleadings together with the evidence which is available, that if the money is paid to*

Robb Evans then there is oversight by a relevant court and eventual accountability to the FTC.

[47] In those circumstances we conclude that it is appropriate to uphold the order made appointing Robb Evans to receive the Benford funds. That decision in the Supreme Court has not been shown to have been in error."

18. It is submitted by Mr. Hurley that it is clear that the Supreme Court of Vanuatu authoritatively determined that question of Mr. Evans' standing to act as receiver of Benford Ltd. Counsel further submitted that the doctrines of issue estoppels, res judicata (as extended by the *rule in Henderson v Henderson) or* abuse of process operate to bar the Defendant from challenging the Claimant's standing. I must say that I am inclined to agree with counsel's submissions.

Striking out

19. Turning now to the application before me which is for an order striking out the Claimant's amended claim against the Defendant on the ground that the Claimant does not have standing to bring the proceedings, it is pertinent to note that there is no provision contained in **Part 9 of the Civil Procedure Rules (CPR)** (dealing with ending proceedings early) to strike out a claim. However, I am mindful of the provisions in **Rule 1.2 CPR** which state that the overriding objective of these Rules is to enable the courts to deal with cases justly. I am equally mindful of **Rule 1.7** which clearly outlines the *position if no provision in Rules*:

> **"1.7** If these Rules do not deal with a proceeding or a step in a proceeding:
>
> *(a) the old Rules do not apply; and*
>
> *(b) the court is to give whatever directions are necessary to ensure the matter is determined according to substantial justice."*

20. The Court of Appeal observed in *Kalses v Le Manganese de Vate Ltd* [2004] VUCA 8; Civil Appeal Case 34 of 2003 (11 June 2004), that *"the Civil Procedure Rules (CPR) make no specific provision for an application by a defendant to strike out a claim. The CPR make provision in Part 9 for "Ending a Proceeding Early", but those rules are directed only to situations where a claimant seeks to obtain an early judgment. They do not make provision for the reverse situation where a defendant wants to bring the proceedings to an early end."*

21. In *Iririki Island Holdings v Ascension Limited [2007] VUCA 13; Civil Appeal Case 35 of 2007 (24 August 2007),* the Court of Appeal said:

> *"Although, as this Court pointed out in Kalses v Le Manganese de Vate Ltd [2005] VUCA 2, Civil Appeal Case 34 of 2003 (3 May 2005), there is no specific provision in the Civil Procedure Rules to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process, it was not disputed that such a power exists. Jurisdiction can be found within the broad terms of ss.28 (1) (b) and 65 (1) of the Judicial Services and Courts Act No. 54 of 2000 and the Civil Procedure Rules themselves provide in Rules 1.2 and 1.7 a basis for exercising the jurisdiction. In practice the existence of such an inherent jurisdiction has been assumed by the Supreme Court: see e.g. the judgments of Treston J in Naflak Teufi v Kalsakau [2004] VUSC 94; Civil Case 102 of 2002 (6 May 2004) and Kalomtak Wiwi Family v Minister of Lands [2004] VUSC 47, Civil Case 14 of 2004 (2 September 2004). However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material; the claimant's case must be so clearly untenable that it cannot possibly succeed: Electricity Corp Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641."*

22. The Court went on to express the approach to be adopted in determining such an application:-

> *"Disputed issues of fact should be decided at trial not on an application to strike out which is normally dealt with on the basis that the facts pleaded in the claim can be proven."*

23. In determining this strike out application before me, I begin by considering that which appears in the Amended Supreme Court claim and take it that the facts pleaded in the claim can be proved. Paragraph 1 of the Amended Supreme Court Claim makes the following allegation:

> "The Claimant is the Permanent Receiver of J.K. Publications Inc, MJD Service Corp., TAL Services Inco., and their affiliates and subsidiaries, and as Receiver over the assets of Kenneth Taves and Teresa Taves, appointed in Civil Action No.99-00044 ABC (A.JWx) entered on 16 March 1999 in the United States District Court, Central District of California, Western Division and has been recognised by the Vanuatu Courts as entitled to receive and to give to the Defendant a good discharge for

the receipt of all monies standing to the credit of an account in the name of Benford Limited."

24. The Defence admits this allegation at paragraph [1]. I agree with Mr. Hurley's submission that in those circumstances, it is difficult to see how the Defendant can properly challenge the standing of the Claimant. Mr. Evans is entitled to receive and to give to the Defendant a good discharge for the receipt of all monies standing to the credit of an account in the name of Benford Limited. Mr Evans is suing to recover outstanding funds from that account.

25. Thus, whilst there is nothing disclosed in the pleadings as to how any contractual right of Benford has been assigned to the Claimant, the Court assumes that this can be proved as claimed.

26. In determining this strike out application, I have averted my mind to the case of *Mataskelekele v Abil No 2* [1991] VUCA 1 where the Vanuatu Court of Appeal considered an application to strike out a pleading on the issue of alleged want of standing in the plaintiff. The Court remarked as follows:

> *"The right of the plaintiff to bring the proceedings was at the very least arguable, and it would not have been appropriate to strike out the Amended Statement of Claim because of the alleged want of standing in the plaintiff. It is clear law that a pleading should not be struck out when it discloses a reasonably arguable cause of action: see Halsbury Laws of England, 4th Edition, para 73 and cases there cited and General Steel Industries Inc. v Victorian Railway Commissioner [1949] HCA 1; (1949) 78 CLR 62. Similarly, a pleading should not be struck out because of the plaintiff's lack of standing unless that lack is demonstrably clear. That is not the case in the present proceedings."*

27. Interestingly, Mr. Blake's submission in this present application is that there is no claim the Claimant could bring based upon the operation of the Account by Benford with the Defendant. Furthermore, that the claim pleaded by the Claimant simply does not lie at the suit of the Claimant and should be struck out as the amended statement of claim does not otherwise disclose any cause of action on the part of the Claimant which has any prospect of success against the Defendant. Counsel further submits that it is not simply a pleading issue. I reject this submission in its entirety.

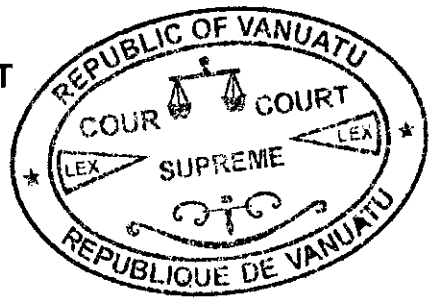
28. I consider that striking out the claim at this stage is not the proper approach to be taken as the right of the Claimant *to* bring the proceedings is at the very least arguable. Therefore, it would not be appropriate to strike out the

Amended Supreme Court Claim because of the alleged want of standing in the Claimant. Besides, there remain triable issues between the Claimant and the Defendant that cannot be determined without trial.

29. In the circumstances, the Defendant's Amended Application filed on 23 May 2016 is hereby dismissed. I reserve the question of costs on the application.

DATED at Port Vila, this 24th day of February, 2017.

BY THE COURT



M. M. SEY
Judge