

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

Civil Case No. 60 of 2014

BETWEEN: REPUBLIC OF VANUATU

Claimant

**AND: JOEMELSON JOSEPH (T/A School Home Office
Machinery Supplies)**

Defendant

Hearing: 12th June 2017
Before: Justice Chetwynd
Counsel: Mr. Kalsakau for the Claimant
Mr Boar for the Defendant

Judgment

1. This case involves the Republic Of Vanuatu ("ROV") as Claimant ordering and paying for some office furniture and the Defendant supplier ("SHOMS") failing to deliver all that was ordered but counterclaiming in respect of unpaid for school supplies. There are said to be agreed facts but in reality very little was actually agreed between the parties. The events surrounding the claim and counter claim start in 2011.

2. ROV's case is that it ordered office furniture from SHOMS in July 2011. The contract referred to office furniture of not more than VT 3,000,000 in value. The furniture was to be delivered within 90 days from the date of the contract. An initial payment was required, and made, of VT 1,779,000. No furniture was delivered.

3. In April 2012 the contract was amended. ROV says the value of the office furniture was to be increased to VT3,503,870. The initial payment or first instalment was to be increased by a further VT 1,724,870. That further payment was made in early May 2012. The same 90 day provision was made for delivery of the office furniture. No furniture was delivered.

4. In November 2012 SHOMS requested a final payment of VT 1,778,137 for the furniture before it would deliver anything. That further payment was made and sometime in December 2012 SHOMS delivered some office furniture which ROV value at VT 1,162,675.

5. In February 2013 ROV wrote to SHOMS demanding delivery of the remaining furniture. Nothing more was delivered and eventually proceedings were issued requiring the return of all the money that ROV had paid amounting to VT 5,282,626.

6. By way of defence SHOMS agrees there was a contract entered into but claims the total value of the contract was VT 9,966,935. The first instalment required was VT 6,976,854 and because that was not paid the furniture was not delivered. It



claims it is owed the balance of the VT 9,966,935 plus a further "surcharge" of VT 1,388,355 for late completion.

7. SHOMS says it also has a counterclaim against ROV in respect of a procurement contract entered into for the supply of schools' stationery on or about 22nd February 2012. The contract was valued at 40 million vatu.

8. In defence of the counterclaim ROV says it has no knowledge of any contract for the supply of office furniture valued at VT 9,966,935. With regard to the school stationery supplies, ROV refers to breaches of the Government Contracts and Tender Act [Cap 245] which renders any purported contract void and of no effect.

9. The evidence in sworn statements leaves little doubt that in 2011 the Ministry of Health required new office furniture for the Minister's Office. ROV entered into a contract with SHOMS for the supply of that furniture. A copy of the agreement can be seen marked GT1 annexed to the sworn statement of George Taleo filed 23rd January 2015. It records the parties to the agreement as being the Ministry of Health and SHOAM Company represented by Joemelson Joseph (called The Contractor). There is no dispute that that agreement was between the Claimant and Defendant in this case.

10. The recitals to the agreement state that the Ministry of Health required the Contractor to supply it with office furniture to a maximum value of VT 3,000,000. The Agreement then says:-

"The Contractor agrees to supply the following Office furniture the list hereby referred to in annex 1, to the value of not more than, vt3,000,000, within 90 days of this contract."

Sadly there is no copy of "annex1" produced. The Agreement, after a warranty about the quality of the furniture, goes on to say:-

That, Ministry of Health Agrees to make an upfront payment of vt1,779,000 hereby called first instalments.

That, upon receipt of such amount (vt1,799,000) the Contractor agrees to supply the said furnitures listed in annex 1 to the Ministry of Health."

The agreement then calls for the Ministry to pay the balance of the purchase price of VT 1,201,000.

11. There is ample evidence to show that a Local Purchase Order ("LPO") was confirmed on 14th July 2011 totalling VT 1,581,884 plus VAT of VT 197,735 totalling VT 1,779,619 and the LPO issued shortly after or even the same day. There is no dispute that SHOMS received the sum of VT 1,779,619 (see annexure GT2). There is no evidence SHOMS delivered any furniture.

12. On 25th April 2012 another agreement was signed between the Ministry of Health and SHOMS. A copy is annexed to Mr Taleo's sworn statement and marked GT3. The recitals state that the Ministry requires the services of SHOMS to supply office furniture to the maximum value of VT 3,503,870. The agreement then records that the Ministry agreed to an upfront payment of VT 1,779,000 and confirms this



part of the July 2011 agreement, "...has been fulfilled". This new or amended agreement does not record the actual amount paid to SHOMS as set out above. Unfortunately the next part of the agreement is far from clear in its meaning. It says:-

"That, the balance due of VT1,724,870 be paid as top up to the amount of VT 3,503,870 to qualify the first agreement of 70% to be paid upfront to the contractor before release of the furnitures to the Ministry of Health".

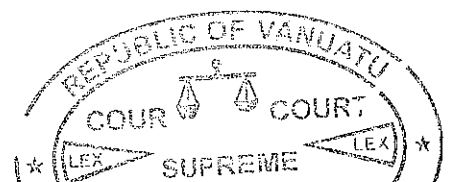
Even allowing for the tortured grammar the provision makes no sense at all.

13. Simple calculations show that *if* the total of the contract price is VT3,503,870 then the further payment of VT1,724,870 would be an overpayment. This is because someone has overlooked the fact that the actual payment made in July 2011 was VT 1,779,619. There is also the introduction of the 70%. 70% of VT 3,503,870 would amount to $(3503870 \times .70)$ VT 2,452,709. If the first intended payment of VT 1,799,000 is deducted from that figure then only VT 673,709 would be required for 70%. If the actual payment of VT1,799,619 is deducted the balance would be VT 673,090

14. Does the 70% refer to 3,503,870 ? In other words does 3,503,870 equal 70% of the total price. If that is what is intended then the total price would be $(3503870/.70)$ VT 5,005,528. That figure bears no relationship to any sum mentioned in the documentation. To confuse matters even further on page 2 of the April 2012 agreement there is reference to 34.5% due to the contractor. This is due after the payment of 1779000 plus 1724870. So, is it meant to infer that 3503870 is 65.5% of the total price which would then be $(3503870/.655)$ or VT 5,349,420 ? That figure bears no relationship to any sum mentioned in the documentation either. The figures do not make sense at all. All that can be said is that a further VT 1,724,870 *was* paid to SHOMS on or about 10th May 2012 (see GT4).

15. Just when you might think that the confusion could get no worse, it does ! Attached to Mr Taleo's sworn statement are annexures GT5 and GT6. The former introduces us to the magical mystery tour which constitutes Ifira Wharf charges and the even more mysterious "other charges". Then just in case you thought any misperception you had might be mathematically induced you realise the letter (GT5) written to the Asset Manager at the Ministry of Health has been written by the First Political Adviser to the Minister who is none other than the proprietor of SHOMS, Mr Joseph.

16. We then turn to GT6. Included in that bundle of documents is a "Statement of Accounts" dated Nov-12. The statement refers to invoices 92 and 93. The total value of number 92 is VT 3,714,650 and that of number 93 is VT 1,369,976. That makes a grand total of VT 5,084,626. The statement refers to a reduction of VT 85,000 leaving a total to be paid of VT 4,999,626. There is then deducted the actual sum paid pursuant to the first LPO in July 2011 of VT 1,779,619. An adjustment is then made by reference to "Adjustments for freighths" (sic) of VT 283,000 with a balance then left of VT 3,503,007. There is a further deduction for the amount of the LPO in May 2012 of VT 1,724,870 leaving a balance of VT 1,778,137. That sum was paid by reference to an LPO issued in November 2012 for VT 1,580,566 and VAT of VT 197,571 (total value VT 1,778,137).



17. Mr Joseph filed a sworn statement on 26th November 2014. Annexed to it marked JJ1 are four quotations from SHOMS, all dated 28th April 2011. They are numbered 92, 93, 94 and 95. Mr Joseph says that furniture listed in these quotations is the furniture that he contracted to supply to the Ministry of Health. He agrees that he received a total of VT 5,282,626 from ROV and annexes JJ2, JJ3 and JJ4 as confirmation of that sum. He does not produce any further evidence in relation to the Ministry of Health furniture contract. All the other evidence in the case relates to the second part of SHOMS counter claim, the school stationery contract.

18. It is convenient at this time to deal with the claim and the counterclaim in relation to the Ministry of Health furniture supply. I remind myself that it is for ROV to prove their claim, on the balance of probabilities and it is for SHOMS to prove its counterclaim on the balance of probabilities. It is difficult to say that either side has proved anything to the required standard. If only one side or the other had produced a copy of "annex 1" there might have been some clarity. As demonstrated above it is impossible to reconcile the figures referred to by either ROV or SHOMS. It is difficult to accept the claim by ROV that the contract price was VT 3,503,870 when it ended up paying VT 5,282,626. It is equally difficult to accept that ROV agreed to a contract to pay VT 9,966,935 to SHOMS for the furniture listed in quotations 92, 93, 94, and 95. They are after all only quotations and not invoices. Even if the quotations could be somehow linked to the contracts, why are the contracts limited to VT 3,000,000 and VT 3,503,870 ? There is no sense contracting to buy over 9 million vatu worth of furniture by a contract, or by contracts, which limit the amount of the consideration to be paid to one third of the value of the items to be purchased.

19. The only paper trail of evidence which can be followed with any confidence is that set out in annexure GT6 as mentioned in paragraph 16 above. However, even that requires presumptions to be made which are not explicitly dealt with in evidence.

20. Starting with the totals of quotations 92 and 93 you arrive at a joint total of 5,084,626. If you then calculate 35% of that figure you arrive at an amount of 1,779,619 which is the actual sum paid by the first LPO (see paragraph 11 above). If you then calculate 34.5% of 4,999,626 you arrive at a figure of 1,724,870. That is the amount of the second LPO. The presumptions are required when dealing with the "Adjustment of Invoice 92 to cost of chairs" and the "Adjustment to freights". There are no explanations as to how those amounts are arrived at. What is important to note is that the deduction of 85,000 reduces the value of the goods to below 5,000,000.

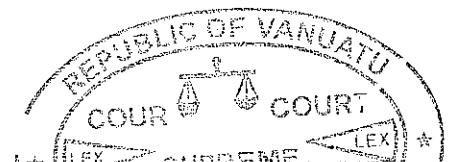
21. The Government Contracts and Tenders Act [Cap 245] ("the Act") defines a Government Contract:-

2A. Government Contracts defined

(1) Subject to subsections (3) and (4), each of the following is a Government Contract:

(a) a contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment out of public moneys;

(b) a contract or arrangement for the disposal of an asset of the Government;



(c) a concession or franchise granted by the Government.

(2) Any subcontract made in relation to any contract or arrangement mentioned in subsection (1) (a) or (1) (b) is also a Government Contract.

(3) The consideration in relation to any contract, arrangement, franchise or concession must exceed VT 5,000,000.

(4) A contract or arrangement for raising loans for the Government is not a Government Contract.

(5) Nothing in subsection (1) (c) is to be taken to affect the requirement for a licence, permit, approval, authority or permission required under or by any other Act.

22. It is clear then that as originally proposed a contract to purchase office furniture valued at VT 5,084,626 would have meant there would have existed a Government Contract. It would have been subject to the provisions of Part 2 of the Act as the consideration was in excess of VT 5,000,000. It would also have been subject to Part 3 of the Act:-

"PART 3 – TENDERS AND QUOTATIONS

8. Requirement to obtain tenders and quotations

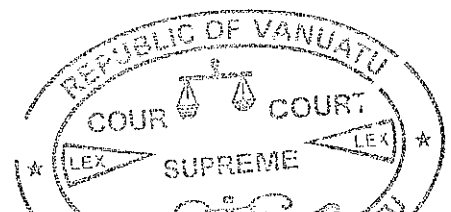
When entering into a Government Contract or a contract for the contracting out of a Government service or the purchasing of goods or services, a minister, or director-general of a ministry, or any other person authorized to do so, must comply with the quotation or tendering process in accordance with this Act or with any regulations made under this or any other Act."

23. The Ministry of Health would have had to comply with the provisions as to tendering and the Tenders Regulations promulgated pursuant to section 10 of the Act. The formulation of the Statement of Accounts as set out in GT6 seems to me to be a deliberate attempt to escape the provisions of the Act and the Regulations. Even if I am wrong in that, the evidence does lead to a conclusion that the figures set out in the Statement of Accounts were the ones being relied on. The end result is the same.

24. ROV has paid SHOMS VT 5,282,626 but SHOMS has only provided office furniture worth VT 1,162,675. SHOMS therefore owes the difference of VT 4,119,951. Alternatively, if the machinations set out above do mean that there has been a breach of the provisions of the Act that will bring into play section 7 of the Act:-

"Effect of Government Contract entered into in breach of this Act

A Government Contract entered into after the commencement of this Act, which is in breach of the provisions of this Act, will be void, of no effect, and will not be binding on the State or the Government."



That would mean that ROV would not be obliged to complete the contract and would be entitled to the return of any money paid to SHOMS. ROV may well be under some obligation to return anything supplied by SHOMS but as that has now been in ROV's possession for some 5 or 6 years SHOMS may be entitled instead to deduct the value from what it had to repay ROV.

25. Turning now to the counterclaim, the contract was for goods valued at some 40 million vatu. There is no doubt that a contract to purchase school stationery was:-

*"a contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment out of public moneys"*¹

The contract was clearly a Government Contract as defined in the Act. The fact that the purchase might be funded with the help of donor partners or aid money does not take the contract out of the definition. Donor funds would be held by the State or by the Government or even for and on behalf of the Government by the donor partner and as such would be public money as defined in section 2(1) of the Public Finance and Economic Management Act [Cap244]. There is no escaping the conclusion that this was a Government Contract.

26. As set out earlier a Government Contract means that the provisions of the Act must be complied with. This is not something which is subject to the Minister's or Director General's discretion. Section 8 of the Act could not be clearer:-

"Requirement to obtain tenders and quotations

When entering into a Government Contract or a contract for the contracting out of a Government service or the purchasing of goods or services, a minister, or director-general of a ministry, or any other person authorized to do so, must comply with the quotation or tendering process in accordance with this Act or with any regulations made under this or any other Act."

The Tender Regulations (Regulation 2) require:-

"Every Minister, head of a ministry or employee of the Public Service or any other person who is concerned with or responsible for:

(a) arranging or calling for tenders for Government Contracts; or

(b) the contracting out of government services or purchasing goods, services, or supplies on behalf of the State or Government over VT 5,000,000;

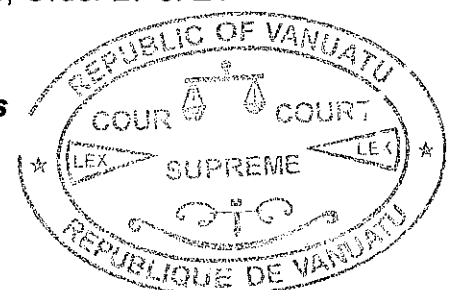
(c) approving or recommending such tenders;

must follow the procedures under these Regulations."

This is a repetition of what is set out in the Financial Regulations, Order 27 of 2000 (Amendment published in Gazette No. 36 of 2005) :-

"3.2. Signing and approving purchases and payments

¹ See section 2A(1)(a) of Government Contracts and Tenders Act [Cap 245]



- (1) *All purchases and expenditure of public funds must be approved and signed off by a person with appropriate financial authority or a financial delegation to authorise the purchase or expenditure. The Head of Ministry automatically has this authority for his or her Ministry only.*
- (2) *All purchases of or under VT 5,000,000 must follow the regulations set out in Part 5 (Purchasing, approval and payment for goods and services).*
- (3) *All purchases over VT 5,000,000 must follow the Tenders Regulations."*

27. There is some scope for not rigidly adhering to the procedures in the Tender Regulations but that is subject to the following provisions of Regulation 3:

3. Tenders

- (1) *Tenders must be called for all Government Contracts;*
- (2) *All tenders must be called by open and competitive bidding except where another process is approved by the Tenders Board under subregulation (3).*
- (3) *The Tenders Board may approve another tender process for projects where a straight open and competitive tender process may not provide the best result in the opinion of the Tenders Board.*
- (4) *Any other tender processes may include:*
- (a) *two stage tendering (eg. request for information followed by selected request for proposal); and*
- (b) *selective tendering (eg. where it is known that limited skills are available to perform the work required); and*
- (c) *period contracts for repetitive purchases.*
- (5) *Any other tender process used must follow any guidelines or instructions issued by the Director General of the Ministry of Finance and Economic Management.*

It is clear that any deviation from the procedures set out in the Act and the Regulations must be either approved by the Tender Board or follow instructions or guidelines issued by the Director General of the Ministry of Finance and Economic Management.

28. SHOMS says the procedures were not followed because of the urgency of the situation. This is set out in the sworn statement dated and filed on or about 9th April 2015 of Mr Jimmy Luna Tasong who was the First Political Adviser to the Minister of Education at the relevant time. Annexed to his sworn statement is a copy of a letter he says was sent to all the suppliers in Port Vila. He also attaches a letter from Mr Jessie Dick dated 3rd October 2011 marked JLT3 (see also JJ5 incorrectly referred to as J 5 in the sworn statement of Joemelson Joseph filed 26/11/2014). He links that letter to the urgency of the situation. Mr Dick was the Director General at the Ministry of Education at the time. Mr Dick swore a statement in February 2015 and



he also gave evidence in Court. He said cross examination there was no urgency. According to him there was sufficient stock in store for the next 18 months. He knew nothing about the procurement contract until it was brought up in the case.

29. I accept his evidence. The letter he wrote to AusAid, NZAid and Unicef JLT3) does not refer to any **urgent** need for school stationery. It confirms difficulties that schools in rural areas have in obtaining supplies when contrasted with schools in urban areas. The letter goes on to confirm that the Ministry will be continuing to assist schools with procurement. Nowhere in the letter is there a plea for urgent assistance. It also seems to me that it would be most unusual for a Political Adviser to step into the administrative shoes of the Director General especially given the detailed and extensive powers and functions given to the Director General in the Education Act [Cap 272]. There is no evidence of any delegation of those functions to the Political Adviser.

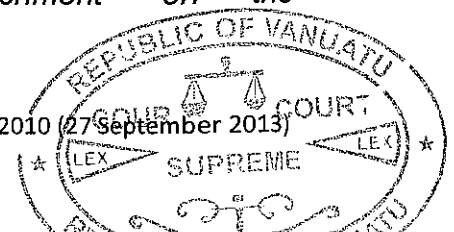
30. It is also suggested that there is evidence of approval by the Development Committee of Officials ("DCO") and the Council of Ministers ("COM") to adopting the process used to enter into the procurement contract. There are several problems with that suggestion. First, the procurement contract is dated 22nd February 2012 and the DCO meeting relied on did not take place until March 28th 2012. The COM meeting did not take place until 3rd April 2012. How can those meetings give authority for a contract entered into before they took place? Secondly, the minutes of neither meeting refer to approval of a contract let alone approval of an alternative tendering process. The DCO minutes are annexed to Mr Joseph's sworn statement as JJ 11 and the COM decision is set out in JLT5 annexed to Mr Tasong's sworn statement. The former refers the request by the Ministry of Education for 40 million vatu for primary school stationery and says that the Ministry should work with the Ministry of Finance and Economic Management to meet the need for the 40 million vatu. The minutes also, tellingly, indicate that the Ministry of Education had previously requested that sum from the Ministerial Budget Committee but the request had been refused apparently because although it was said to be a priority of the Government and the Ministry, "...the ministry of Education does not seem to address it through budgetary allocation". The COM decision approves a budget of 40 million vatu and says the Ministry of Education should work with the Ministry of Finance and Economic Management to allocate the funds with donor partners and inside the budget.

31. In short, there is absolutely no evidence that either the DCO or the COM approved the different "tender" process adopted.

32. It is clear that the procurement contract was signed in contravention of the Act, the regulations and any other legislation relating to financial or economic management. It is suggested by the Defendant that even so the contract should be enforceable against the Government. It is suggested that Fatiaki J's comments in the *Ranch de La Falaise*² apply:-

"I cannot agree with the opportunistic defence based on the Government Contracts and Tenders Act or accept that such a "total failure of consideration" and the corresponding "unjust enrichment" on the Government's part must be left without a remedy."

² *Ranch de la Falaise v Republic of Vanuatu* [2013] VUSC 162; Civil Case 58 of 2010 (27 September 2013)



Unfortunately for the Defendant SHOMS this is an entirely different case to that being dealt by His Lordship in *Ranch de la Falaise* and the preceding paragraph to that set about above brings the decision into perspective :-

"In the present case there was never any mention of the need for the claimants to comply with the provisions of the Government Contracts and Tenders Act and the claimant companies surrendered their valuable, exclusive quarry permits to the Government upon its very senior officers' written and verbal "understandings" and "agreement" to compensate the claimants for their magnanimous gesture.

33. The law in such circumstances as are present in this case has been settled for some time and in English case of *Cope*³ it was said:-

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect"

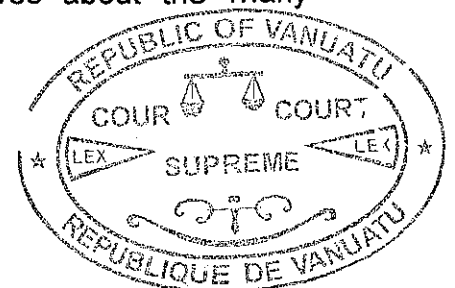
This sentiment has been expressed in much later cases such as *Cudgen Rutile (No. 2) Ltd v Chalk* [1975] AC 520 and in the Australian case of *Bycon Pty Ltd v Moira Shire Council* [1998] VSC 25. As Fatiaki J held in *Ranch de la Falaise*, courts will be reluctant to allow government to argue that its own failure to observe legislative requirements renders a contract void if the circumstances are such that the expectations of ordinary business men and women might be frustrated. The approach of the courts appears to be that if the purpose of the rules or procedures prohibiting an act is for administrative or purely accounting reasons then non observance need not affect the contract. If on the other hand the rules or procedures are purposed in preserving or protecting the integrity of the competition for government business then non observance will make the whole process unacceptable and necessarily invalid. This differentiation is sometimes referred to as directory or mandatory. The words of Connolly J in the Australian case of *Hunter Brother*⁴ should also be remembered:-

"No authority should really be needed for the proposition that where the Legislature in terms forbids the doing of an act, not only is the act itself unlawful but an agreement to do it is itself unlawful."

34. It is quite clear that in this jurisdiction there is a large body of legislation both primary and subsidiary which is aimed at effective and transparent economic management. It would not be right to simply ignore the Government Contracts and Tender Act [Cap 245], the Tenders Regulations, The Public Finance and Economic Management Act [Cap 244], the Financial Regulations Order 27 of 2000 and the Education Act [Cap 272] on some rather spurious ground of convenience brought on by urgency. If that were the case then Ministries, Departments, Statutory bodies and even the Government itself could deliberately delay making decisions and then enter into all sorts of arrangements without concerning themselves about the many safeguards to the public purse put in place by Parliament.

³ *Cope v Rowlands* (1836) 2 M & W 149

⁴ *Hunter Brothers v Brisbane City Council* [1984] 1 Qd R 328



35. I do not think there is any doubt that the counterclaim must fail. The procurement contract for the supply of Primary School materials was entered into in without any serious attempt at complying with the requirements of the Act and associated regulations. It was entered into long before the issue was considered by the DCO and the COM and there is no evidence that they gave retrospective authority for "tendering" process which was adopted. In the words of section 7 of the Act the contract is "void, of no effect" and is not "binding on the State or the Government".

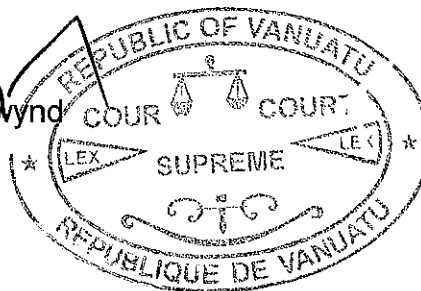
36. The contract is purely executory and cannot be enforced by either side. There is no evidence of work done, goods delivered or money paid and the contract can simply be declared to be void ⁵. The counterclaim is accordingly dismissed. As indicated earlier, the contract for the supply of office furniture to the Ministry of Health is different in that there was limited performance by the delivery of some furniture. The counterclaim in respect of that contract is also dismissed and the claim is allowed to the extent that there is owed to the Claimant the sum of VT 4,119,951. Judgment for that sum is to be entered in favour of the Claimant. The Defendant shall pay interest at the usual rate on that sum from the date of issue to the date of payment.

37. The Defendant shall pay the Claimant's costs of this action, such costs to be taxed on a standard basis if not agreed. It has also come to my notice on reviewing the paperwork in the file that it is likely the Defendant has not paid trial fees as ordered. I had considered ordering payment but on reflection the proper course would have been, prior to the trial, to ask why those fees had not been paid and then proceed in accordance with Rule 4.12(3) (f) of the Civil Procedure Rules. As the error was mine in not asking about the payment of trial fees at the correct time it is not appropriate to make any order at this point in the proceedings.

Dated at Port Vila this 27th June 2017

BY THE COURT


David Chetwynd
Judge



⁵ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.