

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

Civil Case No. 773 of 2015

BETWEEN: HARVEY RIVER ESTATE PTY LTD
First Claimant

AND: FOUR LITTLE GIRLS PTY LTD
Second Claimant

AND: NATIONAL BANK OF VANUATU LTD
First Defendant

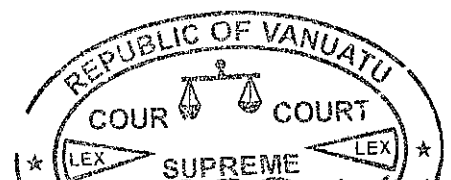
AND: SPORTS TRADING CLUB LTD
Second Defendant

Hearing: 1st December 2017
Before: Justice Chetwynd
Counsel: Mr Hakwa for First and Second Claimants
Mr Malcolm for 2nd Defendant
No appearance for First Defendant

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

1. On 1st December 2017 I dealt with an application for Summary Judgment lodged by the Claimants. I have received submissions from the Claimants on 2nd November 2017 and from the Second Defendant on 10th November 2017. Nothing has been received from the First Defendant, the National Bank of Vanuatu Ltd ("NBV"). I confirm what I have said in a Minute previously, this is not to criticise NBV in any way. NBV is simply piggy in the middle. I have been contacted by counsel for NBV and I accept what they say, namely their client simply does not have any information about the claims raised. The Second Defendant has opened a bank account with NBV and that is all it can really say. Again through counsel, NBV has indicated it will abide the decision of the Court in regard to that account.

2. The Claim runs to 25 pages and some 53 paragraphs (without counting the schedules of names of the 132 claimants). In précis the claim says the Second Defendant, Sports Trading Club Ltd "STC Ltd" is part of a global scam. STC Ltd is owned and controlled by one man, William Duffy ("Duffy"). It is variously alleged that Duffy is a close associate of one Peter Foster ("Foster") or even an alias for Peter Foster. Foster is a convicted fraudster from Australia and the frauds for which he has been convicted involve, amongst other entities, companies called Sports Trading Club Ltd (Hong Kong) and Sports Trading Club Partnership (Australia). It is said STC Ltd received funds from Sports Trading Club Ltd (Hong Kong). Those funds were fraudulently obtained through the activities of Foster and his associates. The claimants are some of those defrauded by Foster. The claimants are trying to trace the proceeds of a crime to an account with NBV held by STC Ltd. They want that money back.



3. Extensive evidence has been filed by the claimants. It covers proceedings in Australia. The evidence covers in meticulous detail the activities in Australia which led to Foster's convictions for fraud.

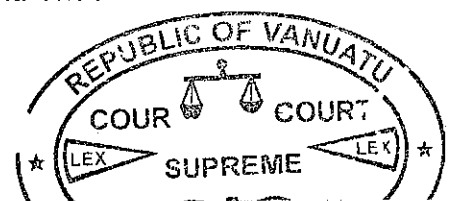
4. It is accepted STC Ltd is owned and controlled in Vanuatu by William Duffy. Apart from that there is a basic denial by STC Ltd of any of the claims by the claimants. Bearing in mind the company is owned and controlled by Duffy the defence is really his defence to the claims.

5. Despite the voluminous amount of evidence by the claimants STC Ltd has filed very little. In that regard Mr Malcolm says his client does not have anything to prove. It has denied the allegations and provided some evidence. It is also said that most of the evidence filed by the claimants is inadmissible. This is on the basis that what is provided are copies of statements made in proceedings in Australia and whilst they are evidence of the fact that the statements were made and filed in Australia they are not evidence of the contents in Vanuatu. I accept that argument.

6. It is also said the evidence is speculative. It meticulously sets out Foster's "career" as a conman and how the frauds were perpetrated by Foster. There is extensive evidence about bank accounts and company documents. However, there is nothing really which ties STC Ltd to Foster. There is no evidence of breaches of contract by STC Ltd, nothing about deceit or fraud by STC Ltd and nothing about conversion by STC Ltd. There is evidence that Duffy may be Foster or is likely to be a close associate of Foster's. There is ample evidence of the name Sports Trading Club being used in different variations to perpetrate frauds elsewhere. I have to agree with Mr Malcolm that this is speculative evidence about a conspiracy involving Foster, Duffy and STC Ltd. Whilst it may be possible on occasion to follow the old adage that; if it swims like a duck, walks like a duck and quacks like a duck, it most likely is a duck, this is not one of those occasions.

7. The burden of proof that on the balance of probabilities, STC Ltd is responsible for accounting to the claimants for money defrauded from them by third parties and then passed to STC Ltd, has not been satisfied. I cannot say the Second Defendant does not have any real prospect of successfully defending the claim. I might be of the opinion that Duffy, on behalf of STC Ltd, has some explaining to do but that is not the same thing. I might also be off the view that STC Ltd has not satisfactorily dealt with the evidence in support of the claim in either it's the statement of case in defence or evidence filed in support of the defence, but that is a matter for the defendant and its counsel. There is an obligation to do so (see Rule 4.5 of the Civil procedure Rules) and failure to discharge that obligation may have repercussions in costs. No doubt Mr Malcolm has explained such to STC Ltd or rather to Mr Duffy.

8. With regard to the application for summary judgment, it cannot succeed. As I have pointed out, the claimants have not established that the Second Defendant has no real prospect of successfully defending the claim against it. That is the correct test



to apply in such applications. It is not a test solely based on the volume of evidence from one side against the lack of evidence from the other side. It is a test which involves consideration of the persuasiveness of the totality of evidence before the Court.

9. The application for summary judgment is refused.

10. As to costs, usually costs follow the event. However, costs are always at the discretion of the Court. I do not think it is appropriate to reach a decision on the costs of the application at this stage. Costs will be reserved.

DATED at Port Vila this 26th day of January 2018.

BY THE COURT


D. CHETWYND

Judge

