

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

Civil Case No. 154 of 1997

State Law Office
Received

BETWEEN: ANNA SPOONER

12 DEC 2000

Plaintiff

AE 15/399
by hand

AND: THE GOVERNMENT OF VANUATU

First Defendant

**AND: THE VANUATU FINANCIAL
SERVICES COMMISSION**

Second Defendant

Coram: Mr. Justice Roger J. Coventry

Mr. Kalkot Mataskelekele for the plaintiff

Ms. Lorraine Kershaw for the first defendant

Ms. Marisan Pierre for the second defendant

Ruling on Motion to Strike Out

The plaintiff claims approximately VT15 million in respect of monies, which she deposited in the Olilean Bank. She, in fact, deposited VT4 million and claims VT10, 000, 000 for loss of business opportunity. The balance of the sum is interest. The Bank crashed and no money was returned to the plaintiff.

The plaintiff says the second defendant is a "statutory arm" of the first defendant, "responsible for companies and banks". She further says the defendants gave the Olilean Bank Limited a licence. However, they were in

breach of a statutory duty of care owed to her. The particulars say that the breach was the failure

- “(a) To ensure such bank is a fit and proper bank to hold such a banking licence.
- (b) To ensure such bank holds sufficient reserves to meet payments of such deposit on defalcation of the bank.
- (c) To ensure the bank complies with the laws of the Republic of Vanuatu including filing annual returns.
- (d) To warn investors in the event of any failures of the said bank”.

Both defendants seek to have the claim struck out as disclosing no cause of action. They say, quite simply, no action lies even if there was any breach of statutory duty by either or both defendants.

The action was filed over three years ago.

It is absurd that, three years later after a welter of interlocutory manoeuvrings, this issue is being determined.

All the parties have filed written submissions. In essence the first defendant says it has requested clarification of which particular statute is involved and received no reply. On the assumption it is the banking Act (Cap 63), the first defendant says the Act itself does not specifically confer a right of action. Further, no right of action arises when the duties are owed to the state or community at large and not to individuals or a defined class of individuals. The Act provides generally for the licensing and regulation of the banking business. The benefit of the Act is not for depositors or borrowers or other customers, but the public at large, who might consider doing business of any kind with a bank. Various cases were cited to support the defendants contention particularly Lord Browne Wilkinson in *X (Minors) v Bedfordshire CC* [1995] 3 AER 353 at p365 where he says

“The cases where a private cause of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions

imposes on public bodies and involving the exercise of administrative discretions”.

The second defendant adopts all the arguments of the first defendant, but adds that by section 21 of the Vanuatu Financial Services Commission Act, No 35 of 1993 “No suit or prosecution shall lie – (a) against the Commission for any matter or thing or act done or any contract entered into in good faith by the Commission under this or any other Act or regulation;”. They say neither “bad faith” nor the doing of an illegal act has been pleaded.

In response the plaintiff argued that there was a statutory duty on the first and second defendants to ensure the Olilean Bank was a fit and proper entity to hold a banking licence and ensure it complied with the various statutory requirements. She says the “scope, structure and purpose of the Banking Act is designed, inter alia, to protect members of the public” who do business with such a body. In particular, she says the Banking Act empowers the minister to remove a licence where the institution is operating “in a manner detrimental to the public interest or to the interest of the depositors”.

It was, also submitted that the “Canadian and United States alternative approaches of subsuming the civil consequences of breach of statutory duty in the law of negligence is an approach which could be adopted as a system or as a one off solution to particular cases”. This approach is not adopted and in any event is not pleaded.

There is no provision in the Banking Act (as amended by the Banking (Amendment) Act No.7 of 1995) specifically providing a remedy for an individual for breach of any provision thereof. Section 4 as amended, gives the Minister (responsible for finance) after consultation, the discretion to refuse a licence, if he “ is of the opinion that it would be undesirable in the public interest” to grant it. Reasons need not be given.

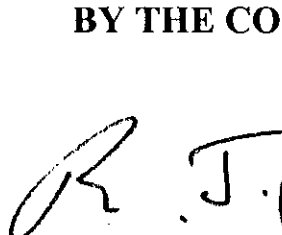
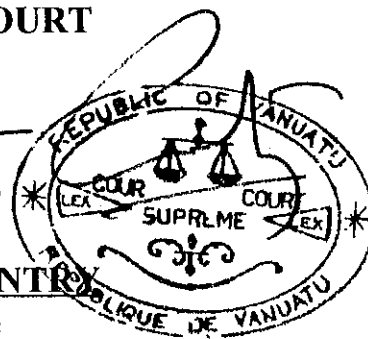
Section 17 (as amended) gives the Vanuatu Financial Services Commission power to take various steps if after examination a financial institution “ is carrying on its business in a manner detrimental to the interests of the depositors and other creditors, or has insufficient assets to cover its liabilities to the public, or is either in Vanuatu or elsewhere contravening any of the provisions of this Act, ...”.

I respectfully adopt the dictum of Lord Browne – Wilkinson, set out above. I look at the Act itself. No specific right of action is created. Further, there is nothing limited or specific about the duties of the Minister or the Commission under the Act which could give rise to an action by an individual. The administrative functions are general and involve the exercise of administrative discretions. The benefits of the duties created under the Act are, as the preamble to the Act says “To provide for the regulation of the business of banking and for purposes connected therewith”.

I accept the arguments of the two defendants when they say that no action arises for an individual in respect of an alleged breach of statutory duty under the Banking Act. In these circumstances I must strike out the claim.

DATED at Port Vila, this 05th Day of December 2000

BY THE COURT

R. J. COVENTRY
Judge