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

CIVIL CASE NO. 130 OF 2012

BETWEEN: JEREMY DICK
Claimant

AND: AND PROPERTY LIMITED
First Defendant

AND: MISSION DEVELOPMENT GROUP PTY LIMITED ATF THE SALTER SUPERANNUATION FUND NO 2
Second Defendant

Coram: Justice Mary Sey

Counsel: Mr John Malcolm for the Claimant
Mr Mark Hurley for the Defendants

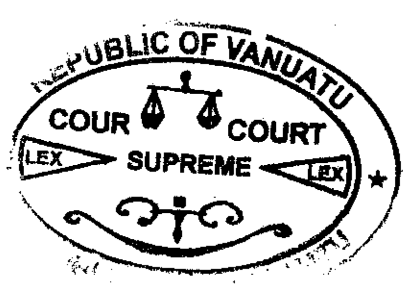
Date of Hearing: 20th December 2012
Date of Decision: 16th January 2013

RULING

1. In his Statement of Claim dated 6 November 2012 and filed at Port Vila on the 8th day of November 2012, the Claimant claimed the following reliefs:

    1. A declaration that the Second Defendant holds 50% of their interests in the First Defendant on trust for the benefit of the Claimant.

    2. An Order that the Defendants account to the Claimant for moneys had & received from the development.



3. An Order that the Claimant be re appointed as a Director of the First Defendant.

4. An Order that the Claimant be re appointed as signatory to the Bank Accounts of the First Defendant company.

5. An Order that the company register be amended to reflect the re appointment of the Claimant as a Director and that the Second Defendant holds 50% of their shares in the First Defendant on trust for the Claimant.

6. An order that the Second Defendant pay damages for breach of Contract, breach of fiduciary duty to the Claimant of no less than $400,000.00 AUD with interest thereon pursuant to statute.

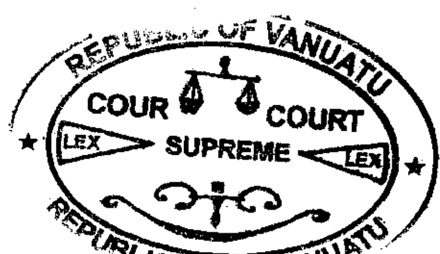
7. An order that the Second Defendant pay the Claimant's cost of and incidental to these proceedings on an indemnity basis.

2. On the 13th day of November 2012, the Defendants filed an application in which they sought orders, inter alia, that:

2.1.1 The statement of Claim filed on 8 November 2012 ("the Claim") be stayed in order that the dispute the subject of the Claim be referred to arbitration in accordance with clause 13 of the Agreement between the Claimant and the Second Defendant of June 2011.

2.1.2 The Order dated 26 October 2012 be discharged in order that the dispute the subject of the Supreme Court Claim be referred to arbitration in accordance with clause 13 of the Agreement between the claimant and the Second Defendant of June 2011.

3. The Defendants' application is premised upon the grounds that Clause 13 of the Agreement between the Claimant and the Second



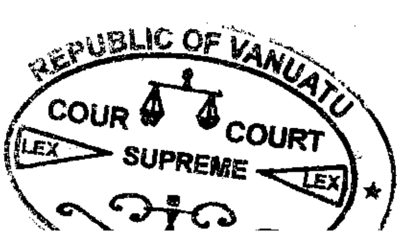
Defendant dated June 2011 provides as follows:

> "If any dispute, question or difference shall arise between the parties as to the meaning, operation or effect of any of the provisions of this Agreement or the rights or liabilities of any of the parties hereto, such dispute, question or difference shall be referred to the arbitration of an independent arbitrator to be appointed by the President or the person for the time being fulfilling the office of the President of the Law Institute of Victoria whose decision or award shall be conclusive and binding upon the parties. Any such reference shall be deemed to be a submission to arbitration within the meaning of the *Commercial Arbitration* Act and, subject to the provisions of that Act, a reference to arbitration in accordance with the provisions hereof shall be a condition precedent to any action or other legal proceedings between the parties relating to such dispute, question or difference. The arbitrator shall have the power not only to determine the strict legal rights of the parties but also to determine (and order) what is fair and equitable in all of the circumstances and to fix and make definite and certain anything which would be indefinite or uncertain."

4. In his submissions, counsel for the defendants contended that the Claimant and the Second Defendant are bound by the terms of their Agreement of June 2011, including clause 13 of it.

5. The defendants have further contended that although there is no specific rule in relation to the stay of proceedings in circumstances where the parties have contracted for the reference of their disputes to arbitration, as a condition precedent to legal proceedings, it cannot be doubted that this Court has such power either pursuant to Rule 1.7 "substantial justice" or pursuant to its inherent jurisdiction.

6. It is further submitted by the defendants' counsel that the parties are entitled to choose whichever law they want to govern their contract. To bolster his argument, Mr. Hurley cited the case of



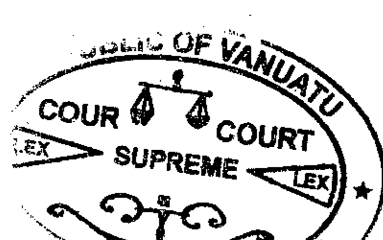
Laho Ltd v QBE Insurance (Vanuatu) Limited [2003] VUCA 26 where the Court of Appeal stated as follows:

> " Of course the parties are entitled to choose whichever law they want to govern their contract and this has traditionally been so particularly with marine insurance contracts.
>
> The course of the parties choosing the Australian law to govern their contractual agreement cannot be contrary to Article 95 of the Constitution of the Republic of Vanuatu...
>
> Parties are not restricted by that article from making contractual arrangements outside the laws applicable in the Republic of Vanuatu and we find that that submission by the appellant has no merit."

7. In opposing the application on behalf of the Claimant, Mr. Malcolm submitted as follows:

   (a) that John Salter has submitted to the jurisdiction of Vanuatu;
   (b) that under the doctrine of *forum non conveniens* it would be inconvenient for the Claimant to fly to Victoria to arbitrate. Counsel then referred the Court to the case of **Spiliada Maritime Corp v Consulex Ltd [1987] AC 460** where the principles relevant to arguments of *forum conveniens* and *forum non conveniens* were reviewed by the House of Lords;
   (c) that there is nothing to arbitrate because the share holding is held in trust and the only thing left is for John Salter to pay off Jeremy Dick his 50% shares.

8. In response, Mr. Hurley rejected counsel's submission that John Salter had submitted to the jurisdiction and counsel argued that there was no cause of action at the time of the restraining Orders dated 26 October 2012. On the issue of *forum non conveniens*, counsel submitted that the situation in this case is different because of the express provisions of clause 13 in conjunction with



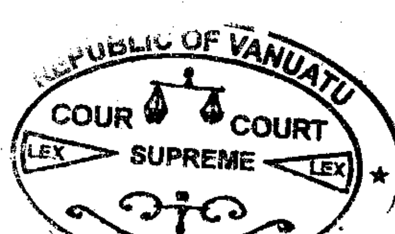
clause 14 of the Agreement dated June 2011 and on the issue that there is nothing to arbitrate, counsel argued that there is in the light of the Statement of Claim filed.

9. It is trite law that agreements to refer matters in dispute to arbitration are sometimes regarded as attempts to "oust the jurisdiction of the Courts," and to that extent will not be specifically enforced. Thus, an agreement to refer to arbitration, though so far valid that an action can be maintained for its breach, will not be enforced, and does not oust the jurisdiction of the Court; that is, it cannot be set up as a bar to an action brought to determine the very dispute which it was agreed to refer.

10. Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid. See **Scott v Avery [1856] 10 E.R. 1121**, where the Court held that any person may covenant that no right of action shall accrue until a third party has decided on any difference that may arise between himself and the other party to the covenant. As stated by the English Court of Appeal in **Czarnikow v Roth Schmidt and Co. [1922] 2 K.B. 478 at 491:**

> "The effect of the decision [**Scott v Avery**] is to establish that an agreement that the rights of the parties shall be determined by arbitration as a condition precedent to an action is not an agreement ousting the jurisdiction of the Court. There is no cause of action and therefore no jurisdiction until an award is made, and when made the Court has complete jurisdiction."

11. **Scott v Avery** clauses have been upheld in many cases in various jurisdictions to prevent the courts from exercising jurisdiction until an arbitration award has been made In the case of mutual associations, such as mutual fire insurance companies and mutual benefit societies, stipulations in the by-laws have been sustained which require a member to submit a claim to arbitration or otherwise to exhaust the remedies provided, as a condition



precedent to a resort to the courts and in some jurisdictions provisions have been sustained which make the decision of the arbitrators final and conclusive.

Examples of **Scott v Avery** clauses upheld by the High Court of Australia to prevent the Court from exercising jurisdiction until the matters in dispute are the subject of an arbitration, include:

Kirsch v H.P. Brady Pty Ltd (1937) HCA 20 (p.5 & p.10);
John Grant & Sons Ltd v Trocadero Building & Investment Co Ltd [1938] HCA 20 (p. 4 of 15);
Plucis v Fryer [1967] HCA 38 [7-8];

12. In **SPIE-EGC LTD v FIFA [2003] VUCA 11**, the Court of Appeal of Vanuatu noted that the parties' contract appeared to contain an arbitration clause (it was in French). The Court of Appeal stated:

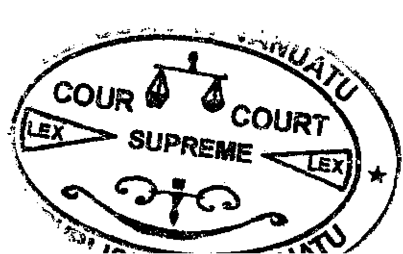
> "There is no dispute there has been no arbitration. The question whether or not the dispute should have been referred to arbitration before any relief was sought before a Court was not, apparently, argued before the Chief Justice."

The orders made at first instance were set aside (on other grounds) and in the penultimate paragraph of the Judgment, the Court of Appeal stated thus:

> "Accordingly we must set aside the Chief Justice's Order of 16th December 2002 and remit the matter for the Chief Justice to consider Article 10, "the arbitration clause" and the other relief sought in the Originating Summons. FIFA will have to decide whether to continue with these proceedings or take some other course."

It is note worthy that, subsequent to the Court of Appeal proceedings, FIFA referred the dispute to arbitration.

13. In this present application, it is the defendants' contention that clause 13 of the June 2011 Agreement is in the nature of a **Scott v Avery** clause and that it cannot be ignored. I have perused a true

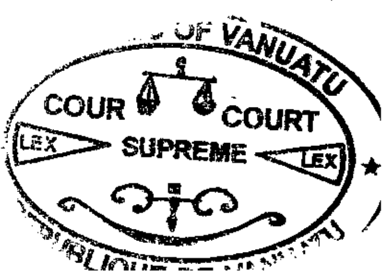


copy of the Agreement between the Claimant and the Second Defendant dated June 2011 which is at annexure "C" of the sworn Statement of Jeremy Dick of 2 August 2012 filed herein. It appears to me that clause 13 clearly states that if any dispute, question or difference shall arise between the parties as to the meaning, operation or effect of any of the provisions of the Agreement or the rights or liabilities of any of the parties thereto, <u>such dispute, question or difference shall be referred to the arbitration of an independent arbitrator.</u> Furthermore, it is clear to me that <u>a reference to arbitration by the parties shall be a condition precedent to any action or other legal proceedings between the parties relating to such dispute, question or difference.</u> (underlining mine)

14. I also find clause 14 of the said Agreement relevant. It stipulates as follows:

> "a) The parties agree that the law of this Agreement shall be the law of Victoria and the parties agree to submit to the jurisdiction of the Victorian Courts.
>
> b) The parties further agree that they shall consent to a judgment obtained in Victoria being registered in Vanuatu and New Zealand."

15. In my considered view, a perusal of clause 13 of the said Agreement has left no room for doubt that the Claimant and the Second Defendant named herein have made arbitration a condition precedent to a right of any action or other legal proceedings between them and such a condition is valid. I would therefore discountenance the claimant's submissions on the issue of *forum non conveniens* and on the other issues raised as well. Rather, I must state that I am in agreement with the submission made by the defendants' counsel that the situation in this case is different because of the express provisions of clause 13 in conjunction with clause 14 of the Agreement dated June 2011. In the circumstances, therefore, I have reached the inescapable conclusion that the Claimant and the Second Defendant are bound



by the terms of their Agreement of June 2011, including clauses 13 and 14 of it.

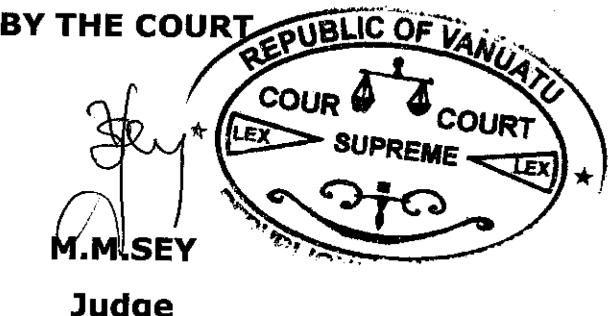
16. In the result, I make the following Orders:

    (1) The Statement of Claim filed on 8 November 2012 ("the Claim") is hereby stayed in order that the dispute the subject of the Claim be referred to arbitration in accordance with clause 13 of the Agreement of June 2011 between the Claimant and the Second Defendant.

    (2) The Order dated 26 October 2012 and varied in terms of the Consent Order of the parties dated 17th December 2012 is hereby discharged in order that the dispute the subject of the Supreme Court Claim be referred to arbitration in accordance with clause 13 of the Agreement of June 2011 between the Claimant and the Second Defendant.

DATED at Port Vila, this 16th day of January, 2013.

BY THE COURT



M.M.SEY

Judge