IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

CIVIL APPEAL CASE NO 1 of 1997

IN THE MATTER — CIVIL CONTEMPT OF COURT

A N D — CHRISTIAN ROGER DE ROBILLARD

Appellant

Coram: Justice Bruce ROBERTSON
Justice Kubulan LOS Kt.
Justice Kalkot MATASKELEKELE

Hearing: 5, 6, 7 May 1997

Counsel: Mr Peter ADAMS QC & Nicole ABADEE for the Appellant
Mr Ishmael KALSAKAU for the Attorney General

Reasons: June 1997

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY ROBERTSON J

At the conclusion of the hearing of this appeal we announced that the appeal must succeed on the issue of process. Because there were important issues of principle and practice, we said we would take time to deliver reasons which we now do. Our spread of geographical

domicile and the demands of other sittings have led to regrettable delay.

Christian Roger de Robillard (Mr de Robillard) appealed against "orders made by His Honour the Acting Chief Justice Vincent J Lunabek on 14 March 1997 and 27 March 1997".

The orders of 14 March 1997 were in the following form :

1. That Mr de Robillard is ordered to withdraw himself forthwith from Civil Case No 140 and 144 of 1996.

2. That by this afternoon, at 2 o'clock pm today, 14 March 1997, Mr de Robillard is ordered to deliver the Original Instrument of his appointment that he took in the Attorney General's Chambers in his absence.

3. That by 2.00 pm this afternoon, 14 March 1997, Mr de Robillard is ordered to deliver all the documents in relation to Civil Case No 140 and 144 of 1996 to the Attorney General's Chambers.

4. That the substantive matters in Civil Cases No 140 and 144 of 1996 be fixed on 21st March 1997 at 9.00 am o'clock.

5. That Mr de Robillard's costs be paid through Taxation process failing agreement.

The orders made on 27 March 1997 were as follows :

1. That Mr de Robillard is committed to prison for a term of 2 months as from today 27 March 1997.

2. That his passports be seized and be kept within the Supreme Court custody.

3. That Police Officers responsible for Central Prison are directed to respect and enforce the terms of these orders with immediate effect.

4. That Mr de Robillard has 30 days to lodge his appeal.

5. That the Appeal should not operate as a stay of executing the imprisonment sentence.

6. That Reasons of this Order are reserved.

The reasons for the decision of 27 March were duly delivered on 2 May 1997. We will refer to them later.

The hearing before this Court was concerned only with the committal for contempt and the term of imprisonment imposed. Other issues were by agreement not considered by us.

At the beginning of the appeal hearing the Court made inquiry about the orders 2 and 3 made on 14 March. We were told that there had still not been compliance. We took a short adjournment and were then advised that the handing over of the documents could be completed forthwith although there was an issue about a possible lien and the protection of Mr de Robillard's right to costs.

We indicated that the documents should be deposited with the Registrar of this Court pending resolution of outstanding matters. This was immediately attended to on the first day of the appeal hearing. On Wednesday morning 7 May we were informed that a mutually

satisfactory arrangement had been made for Mr de Robillard to have copies of documents he required to protect his position.

The ease with which the resolution of the underlying issue could be dealt with when the focus was placed on problem solving rather than a pre-occupation with principle, demonstrates how the difficulties of the past weeks could have been avoided. Regrettably Mr de Robillard's unwillingness or inability to accept and adhere to orders of the Court, (and to challenge them only by a proper Court application for review or reassessment or by an appropriate appeal) meant his dispute took on a life of its own mainly unrelated to and detached from the essential reality of the underlying litigation.

To understand the unhappy saga which developed it is necessary to return at least to October of 1996. It might be suggested that the true genesis was an order made against Mr de Robillard on 11 March 1996 under s 15(2) of the Immigration Act (CAP 66) (declaring him to be an undesirable immigrant) and the subsequent proceedings Civil Case 91/96. However the determination in the present case does not depend on any of these deeper under-currents, nor in fact the precise merits of what occurred in more recent times, but fundamental issues which must be applicable to any Court process.

On 21 October 1996 the Hon Willie Jimmy, the then Minister of Foreign Affairs issued a declaration that Charles Vaudin d'Imècourt (then the Chief Justice of this Republic) was an undesirable immigrant.

There was immediately filed an ex parte application for an interim injunction restraining any action on that Declaration. This was initially heard that day by a full Bench of the Supreme Court of the Republic of Vanuatu (Robertson, Dillon and Muhamed JJA). Interim relief was granted until the next day. Following an appearance being entered on behalf of the then Attorney-General this was extended consensually for a further week. That is the proceeding 140 of 1996.

At an early stage in that proceeding an issue arose as to the legal representation of the Minister of Foreign Affairs and the Attorney-General who were the named defendants.

On 22 October when that case was before the same full bench of the Supreme Court an issue arose about the right of Mr de Robillard to appear for the defendants and generally his status as a legal practitioner in Vanuatu.

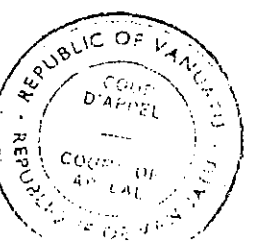
The Court was handed a document which in its operative terms was in the following form :

> "I, OLIVER A SAKSAK, Attorney-General, acting in accordance with the powers conferred on me by section 2(4) of the Law Officers Act [CAP 118] hereby appoint -
>
> CHRISTIAN ROGER de ROBILLARD
>
> to be a legal officer acting as counsel representing the Minister of Foreign Affairs and Immigration and the Attorney-General in the following proceedings
>
> CHARLES VAUDIN d'IMECOURT v MINISTER OF FOREIGN AFFAIRS AND IMMIGRATION AND ATTORNEY-GENERAL
>
> and to carry out any work or appear as counsel in any other proceedings relating thereto with effect from the date of this instrument for a period ending on the conclusion of the proceedings or related proceedings or until such appointment is otherwise terminated by me."

The Supreme Court took the view that this document was determinative of the issue and noted the position accordingly.

During the following week (while the 140 of 1996 proceedings were adjourned) events took a further dramatic turn. On 31 October 1996, a Constitutional Instrument was made in the following terms :

> "WHEREAS
>
> 1. Justice Charles Vaudin d'Imecourt was appointed Chief Justice of the Republic of Vanuatu on the 11th day of May 1992;



2. Article 47(3) of the Constitution of the Republic provides for the removal of office of all members of the Judiciary.

NOW THEREFORE, IN THE EXERCISE of the powers conferred by Article 47(3)(b) of the Constitution of the Republic of Vanuatu and acting in accordance with the determination by the Judicial Service Commission dated 22nd October, 1996, I, JEAN-MARIE LEYE LENELCAU MANATAWAI, President of the Republic of Vanuatu, hereby terminate the appointment of Justice Charles Vaudin d'Imecourt as Chief Justice of the Republic of Vanuatu made on the 11th May 1992 with effect from the date hereof."

That led to the immediate filing of proceedings 144 of 1996 and the seeking of various orders in connection therewith.

In terms of the appointment made by the Attorney-General on 22 October 1996, there could be no doubt that the proceedings in 144 of 1996 were "closely related" to 140 of 1996 and therefore included within the order of the Attorney-General about legal representation.

There is in addition (and relied on by Mr de Robillard) a certificate under the Legal Practitioners Act No 26 of 1980 dated 24 October 1996 which on its face certifies (without qualification) over the hand of the Attorney-General that Mr de Robillard had been registered as a legal practitioner in the Supreme Court of the Republic of Vanuatu. Its effect we need not determine, but we repeat what we noted at this

appeal hearing. The status and standing of Mr de Robillard within the legal profession in Vanuatu urgently requires to be authoritatively determined.

On 1 November orders were made by that same full Bench of the Supreme Court of Vanuatu in connection with both files. These orders resulted from a negotiated holding position until a hearing could occur on 140 and 144 of 1996. The details are not important save to note that they were predicated upon the basis that the substantive hearings of both these high profile constitutional cases (which were of major importance from the point of view of the particular litigants but also the rule of law and judicial administration in the Republic of Vanuatu) were to be disposed of on 26 November 1996. Regrettably that date passed without the matters being heard. A festering sore has continued to weep a debilitating poison into the legal apparatus from that time down to the present. The need for the disposal of those substantive proceedings as a matter of extreme urgency has not diminished with the passage of time.

The two civil files 140 and 144 of 1996 (hereinafter referred to as the "Chief Justice's proceedings") were listed before the Acting Chief

Justice of Vanuatu. The flavour of disputation between the presiding Judge and Mr de Robillard surfaced in December of last year.

In his subsequent reasons for judgment the Acting Chief Justice summarised the position of Mr de Robillard as follows :

> *"In subsequent proceedings, I notice an unhealthy conduct of the defendant - lawyer consisting of making written allegations of bias too readily against me as a judicial arbiter on insufficient material which quite clearly constitute threats against my integrity and judicial independence as an individual judge. I then form the view that nothing is more capable of eroding public confidence in this young judicial arm of the Republic than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs and in that respect, I did charge him (the Defendant) for contempt in the face of the Court and I did adjourn that matter to allow the Defendant to find himself a lawyer."*

It appears from further comments which were made on 3 March 1997 at a hearing on the Chief Justice's proceedings, what the Acting Chief Justice was concerned about were oft repeated allegations of bias made against him by Mr de Robillard. At the heart of the argument was the question of whether an order made by the full Bench on 1 November requiring the continuation of the emoluments for the former Chief Justice should continue until hearing (once the 27 November had passed and the matter had not been dealt with as had been anticipated) or whether some other position should pervail.

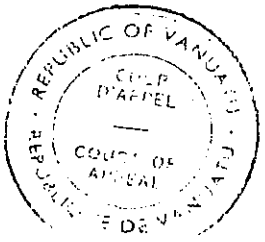
There have been on various occasions correspondence addressed to the Chief Registrar of the Supreme Court by Mr de Robillard about these cases and his demands and requirements. We do not wish to be unduly formalistic about adherence to rules just for the sake of compliance, but as this case has indicated, if matters are done properly and in order in accordance with the relevant rules, the potential for difficulty is minimised and usually avoided.

On 9 December the Acting Chief Justice issued an order 6 in the Chief Justice's proceeding in the following form :

> "As a matter of urgency I wish to hear both counsel on the question of how to maintain the status quo, including the payment of the applicant/petitioner's salary allowance until the hearing of the case."

In the same order the Judge indicated the need to receive written submissions on the point.

It appears that by this stage Mr de Robillard was out of the jurisdiction and in Australia. He sent a 31 page document to the Court which we have not seen. However it is apparent that in it he contended that the Acting Chief Justice should dismiss himself from the case on the



grounds of bias. The Judge recorded his position in relation to this request when speaking about it on 3 March 1997 as follows :

> *"As far as this application is concerned I cannot dismiss myself. I have never decided in advance that the petition [sic] is entitled to payment of salary and emolument depending determination of these proceedings. I have never heard submissions exclusively from the petitioner's counsel and without having given the respondent a right to be heard. There is no other necessity for me as the Judge hearing this matter to answer to other allegations of bias."*

The Acting Chief Justice described how he intended to approach the matter on the basis discussed by the English Court of Appeal in *R v Secretary of State for Education and Science Ex parte Avon County Council* [1991] 1 QB 558. He made particular reference to the comments at 561 and 563 of Glidewell LJ and Taylor LJ (as he then was) respectively.

The learned Judge then indicated that he intended to make orders continuing the payment of remuneration, after which he dealt with a variety of other matters which do not specifically relate to the issue before this Court.

At the hearing on 3 March the Acting Chief Justice again addressed the issue of bias.

He noted that *"his mind was disturbed by allegations of bias and pre-determination and contrary to the rules of natural justice."*

The Judge then said :

> *"I don't want to go further, but this is not true. This is not the position and now, 'cos it is so serious, I want to call on, and this is an Order, to call on Mr de Robillard to go to the defence box. Because it's so serious.*
>
> ...
>
> *I hold you as a contempt of my Court and I will deal with you summarily. This is an order, and I order you to go into the defence box."*

It is apparent there was then a not particularly edifying nor dignified interchange between the Judge and Mr de Robillard relating to issues of his right to representation and his need for time for preparation. At best it might be described as involving extraordinarily vigorous submissions by Mr de Robillard. They were of course important and vital concepts which undoubtedly required attention but that does not justify or excuse the attitude and approach he adopted.

Eventually the Acting Chief Justice indicated that the matter of contempt would be adjourned. There was then further lengthy discussion as to the date of that adjournment. Eventually it was

ordered that the matter was to be heard on Friday 14 March 1997 a 9 am.

The next matter which is drawn to our attention is that on Thursday 13 March 1997 there was called before the Supreme Court a Civil Case *Telecom v Daniel* No 81 of 1996. Mr de Robillard sought to appear for the defendant (a private client). There was a substantial interchange about the right of Mr de Robillard to appear other than in terms of the specific authorisation which had been given to him by the then Attorney-General in October 1996.

This matter degenerated even further than in earlier hearings. It led to the point whereby the Judge ruled that Mr de Robillard had no right to appear and further, he indicated that he should leave the Court.

The scene in the Court staggered from crisis to crisis and eventually concluded with the following interchange :

> "Mr de Robillard: Am I entitled to sit in the back of the Court as a member of the public?
> Judge : No, you just go out.
>
> Mr de Robillard: Well, Your Lordship, I'm still waiting for those photocopies which Your Lordship said
> Judge: Yes, you can go out and get those photocopies.

Mr de Robillard: Could Your Lordship please advise why, the rule, why as a member of the public I'm not entitled to sit in the back of the Court? Why is it when it is a matter of public
Judge: No. You have a conflict with the Court. You just go out.

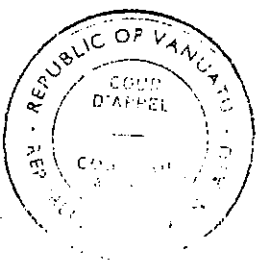
Mr de Robillard: I have no conflict with the Court
Judge: You have a conflict. That's my view. Just go out. Just go out!"

That was hardly an auspicious overture to the scheduled calling of Cases 140 and 144 of 1996 the next day, Friday 14 March.

The Friday hearing began with a suggestion that there was a difference between a document which had been handed to Mr de Robillard on Wednesday 12 March and a document dated 3 March which the Judge had read in Court.

Mr de Robillard made it abundantly clear that he was not ready to proceed with the Chief Justice's proceedings or the action against him personally at that stage.

There had again been a series of letters written by Mr de Robillard to the Chief Registrar of the Court.



It appears that at least some of these had also been copied to the President of the Republic, the Prime Minister, the Minister of Justice, the Attorney-General and counsel for the applicant petitioner in Civil Cases 140 and 144. This is no way for counsel on any occasion to deal with an adjournment request or any interlocutory issue which may arise. The rules of Court in this Republic may benefit from some amendment, consolidation and rationalisation, but they are sufficient to deal with matters of this sort. This was no excuse or justification for the barrage of correspondence which was sent.

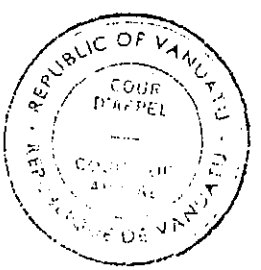
In Court on 14 March Mr de Robillard again indicated his inability to find counsel within the time he had been given. He returned again to the issue of whether the Acting Chief Justice should disqualify himself. Substantial reliance was placed by him on an opinion from an Australian Silk. A further interminable interchange on the issue of bias (or absence of it) then arose. The Court had earlier ruled on this matter. It was not open for further debate. Mr de Robillard could have appealed the determination made but he was wrong to otherwise keep harping on about it.

The issue of whether Mr de Robillard was entitled to appear as counsel in Vanuatu was traversed yet again. The Judge eventually informed

counsel that a formal complaint for contempt of Court against Mr de Robillard had been lodged with the Public Prosecutor. It appears that this was as a result not only of what had happened at earlier stages in the proceeding but also because of statements made by Mr de Robillard on television. The Acting Chief Justice said that he intended to disqualify himself from hearing that issue of contempt. He said it would be dealt with by the office of the Public Prosecutor. It would be heard by another Judge. Time would be provided so that Mr de Robillard could obtain counsel.

The Acting Chief Justice next indicated that he was concerned about getting on with the hearing of Civil Cases 140 and 144. He said that he thought it was proper for another counsel to deal with the substantive issues in those cases rather than Mr de Robillard.

That heralded another heated interchange. It involved interminable dialogue on exactly who were the parties to the Chief Justice's proceedings. In all of it the Acting Chief Justice made it clear that he had reached the view that because of what had happened it was not appropriate for Mr de Robillard to continue to act.



It appears that at this stage of the hearing the then Attorney-General happened to be in Court. There were direct discussions between the Bench and the Attorney-General about the matters. Issues were raised about the payment of Mr de Robillard for the work which he had done to date and the possibility of his having a lien on the files relating to Civil Cases 140 and 144 of 1996 if the Attorney-General were to withdraw the instructions for Mr de Robillard to act for the various defendants in these cases.

This led to further discussions about the status of Mr de Robillard as a legal practitioner in Vanuatu in the course of which the Attorney-General requested :

> "My Lord, I must ask that some of the documents taken by Mr de Robillard from my office in my absence be returned to me immediately."

The Attorney-General then repeated :

> "I must ask that the Court orders de Robillard to return some of the documents - original documents from my office yesterday in my absence to be returned to me immediately."

There had been an earlier interchange in which Mr de Robillard had been extremely critical of an expletive which the Judge had used in Court. The Judge and counsel returned to an unremitting dialogue on that diversion before returning to the substance of whether

Mr de Robillard had acted properly in taking documents from the Attorney-General's office. Mr de Robillard indicated that he had the authority of the Secretary of the Law Council to have access to the office in the presence of Mr Ham Bulu. Mr Bulu who was also apparently in the Court, became involved in the interchange.

In fact Mr Bulu could provide little assistance as the critical discussion the previous day had evidently taken place with Mr Jack Kilu.

It was at this point that the Judge (after what the transcript describes as a longish silence) said :

> "Judge: Will you be in your office Hon. Attorney this afternoon?
> Attorney-General: Yes. I will be in my office this afternoon."

After what is noted as a further lengthy silence the Judge said :

> "Judge: Mr de Robillard, can you provide, can you give this document, the instrument of appointment, the original, to the Hon Attorney this afternoon at two?
> Mr de Robillard: Yes Your Lordship"

There was then some questioning about whether the Judge would release Mr de Robillard from an undertaking he had given to Mr Kilu to return the documents and eventually the Judge said :

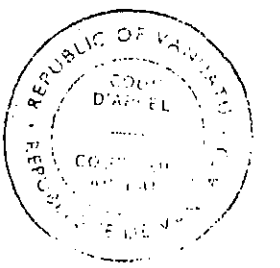
> "Judge: You are so ordered to deliver to the Attorney-General this afternoon at 2:00 pm - that's the Order ..."

The question then returned to the issue of costs and the appointment of Mr de Robillard under the Legal Officers Act CAP 118. Once again this is an example of a matter which had been previously dealt with but upon which Mr de Robillard determined that the issue should be ventilated further.

There was some questioning about whether the document of 24 October (which is expressed in somewhat open language) did anything more than support the first instrument of appointment. The Attorney indicated that it did not.

Eventually this led to the point where Mr de Robillard said :

> "Mr de Robillard: All I'm seeking Your Lordship, is an Order that I will not be required to hand up the documents until such time as my costs, my reasonable costs, are paid by the government.
>
> Judge: What you have to understand is that the Order is already made. I cannot accept such practices anymore. The Order is made ordering you to deliver the



documents, all the documents relating to this matter to the Attorney-General, including his instrument of appointment with the original document of your appointment.

Mr de Robillard: Yes Your Lordship

Judge: So I'm not coming back to that anymore. The Order is made. The Order is made and that is the term of my Order. Now as far as your Costs is concerned, because you have to live with that, about your Costs and then in case you have some difficulty, you can apply to this Court.

There then began yet another unseemly interchange about property and constitutional rights. Eventually the Judge said :

"I am not going to listen to that anymore. My order in relation to that - don't touch it anymore. It's clear and proper. This afternoon at 2:00 you will provide every document relating to those two cases."

There was then an adjournment of the substantive proceeding until 21 March. The Attorney-General had previously advised the Court that the defendants would be in a position to proceed at that time with 140 and 144 of 1996.

It is common ground that at about 1.40 pm on the afternoon of Friday 14 March, Mr de Robillard went to the Attorney-General's Chambers. In submissions on his behalf it was suggested that it was established that he had with him at that time the documents which were the subject of the morning's orders. Substantial time in the appeal was

taken up with this aspect. During the hearing it was accepted that the fact that he had the documents with him was an inference to be drawn from the fact that he had gone to the Chambers. Eventually on the last morning of the hearing, Mr Adams drew to our attention an interchange which took place during the hearing on Thursday 27 March when after a number of attempts to get a simple yes/no answer, Mr de Robillard eventually said to the Court :

> "Before 2 pm I went to the Attorney-General's office, yes to deliver those documents because Your Lordship has made the order."

We note and weigh those words, but they cannot be treated in isolation. Other comments and contemporaneous acts and omissions also require attention and appropriate weight.

At one point in his submissions counsel suggested that Mr de Robillard was a man of integrity "but was in prison for two months for being 20 minutes early just to maintain the dignity of the Court." We would not typify this case in that way. The contempt procedures are effectively a means of enforcing obedience. Court orders bind everyone against whom they are made. It is essential to the smooth administration of justice that the Court has the means to enforce Court Judgments and orders. In Canada O'Leary J expressed it as follows in

Canada Metal Co Ltd v Canadian Broadcasting Corporation (No 2) (1975) 48 DLR (3d) 641 at 669 (Ont) :

> *"To allow Court orders to be disobeyed would be to tread the road toward anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn ... If the remedies that the Courts grant to correct ... wrongs can be ignored, then there will be nothing left but for each person to take the law into his own hands. Loss of respect for the Courts will quickly result in the destruction of our society."*

In the United Kingdom Sir John Donaldson said in *Howitt Transport Ltd v Transport and General Workers' Union* [1973] 1CR 1 at 10 :

> *"orders of any Court must be complied with strictly in accordance with their terms. It is not sufficient, by way of answer to an allegation that a Court order has not been complied with, for the person concerned to say that he 'did his best' ... But if a Court order requires a certain state of affairs to be achieved, the only way in which the order can be complied with is by achieving that state of affairs."*

There can be no doubt that orders should be obeyed and undertakings to the Court honoured unless and until they are set aside. If a party wishes to challenge an order then the proper course is to apply to have it set aside or to appeal. Lord Donaldson MR said in *Johnson v Walton* [1990] 1 FLR 350 at 352 :

> *"It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the Court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place."*

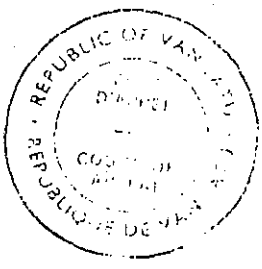
That approach was followed by the Privy Council in *Isaac's v Robertson* [1985] AC 97 in which the appellant had been held in contempt for disobeying an injunction notwithstanding that the order should never have been made. Lord Diplock rejected the contention that "void" orders can be ignored with impunity.

As was said long ago by Lord Sterndale MR in *R v Poplar Borough Council (No 2)* [1922] 1 KB 95 at 103 motive is irrelevant to establishing a case of contempt :

> *"Unless and until the time comes when the law of this country is that a person may disobey an order of the Court or the laws as much as he likes if he does it conscientiously the question of motive is immaterial."*

Where there has been intentional defiance of a Court order a committal order may well be appropriate to mark the gravity of the contempt and the Court's disapproval as well as to act as a deterrent to other potential contemnors.

We are however reminded that the function of contempt is coercive rather than punitive. Courts must never lightly make a committal order. The admonition of Kay J in *Gay v Hancock* (1887) 56 LT 726 made well over a century ago is equally applicable today :



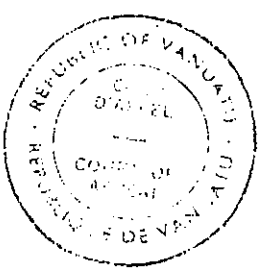
"This Court should exercise very great care in putting into force its power of sending persons to prison."

At no point in this lengthy litigation chronicle was there any sworn evidence directly on the vital point of compliance. Mr Adams offered to call his client and offers were made on behalf of others to give evidence about what Mr de Robillard had (or did not have with him) on his one visit to the Attorney-General's Chambers on Friday 14 March. Inasmuch as it was not necessary to determine the case we did not take the step of hearing further evidence on the point.

Much more important in the ultimate determination of this case was the recognition of essential procedures and the unswerving observation of them which cannot be emphasised enough.

Lord Donaldson MR said in *M v P (Contempt of Court: Committal Order), Butler v Butler* [1993] Fam 167 at 174 that the procedures are designed to ensure that :

"(1) no alleged contemnor shall be in any doubt as to the charges which are made against him;
(2) he shall be given a proper opportunity of showing cause why he should not be held in contempt of Court;
(3) if an order of committal is made, the accused (a) knows precisely in what respects he has been found to have offended and (b) is given a written record of those findings and of the sentence passed upon him."



In *R v Hill* [1986] 1Crim LR 457 (where the appellant was held in contempt after abusing the Judge) the Criminal Division of the Court of Appeal held that the following steps, were appropriate and should be taken to safeguard the Court's authority :

1. the immediate arrest and detention of the offender;

2. telling the offender distinctly what the contempt is stated to have been;

3. giving a chance to apologise;

4. affording the opportunity of being advised and represented by counsel and making any necessary order for legal aid for that purpose;

5. granting any adjournment that may be required;

6. entertaining counsel's submissions;

7. if satisfied that punishment is merited, imposing it within the limits fixed by statute.

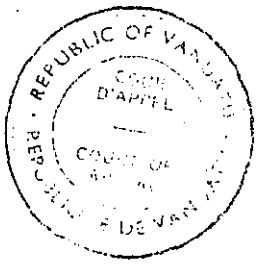
A very significant part of the argument advanced on behalf of Mr de Robillard was that there was uncertainty about what the orders of 14 March required. That argument we reject. If one reads the entire transcript there can be not the slightest doubt that the Acting Chief Justice was requiring both the handing over of the litigation files

in proceedings 140 and 144 of 1996 to the Attorney-General and the return of the legal status documents which had been taken from his Chambers on the Friday afternoon. The stipulated and agreed time was 2 o'clock. It would be to take leave of reality to suggest that Mr de Robillard was thwarted by the absence of the Attorney-General from his Chambers until 1.42 pm. All that had gone before and all the subsequent behaviour can only leave an enormous question mark as to whether this was not yet another attempt by Mr de Robillard to try and argue with the Judge and circumvent his order in some way. He knew what was required of him. He did not need anything in writing to inform him of his obligations. Despite the enormous skill of the advocacy on his behalf, one needs to look with care at the contemporaneous information and documents to get the true flavour of what was occurring.

Mr de Robillard left a note which was in the following terms :

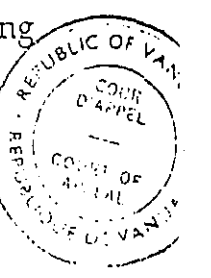
> "Oliver,
> I called at 1.40 pm but you were not here. Would you pls telephone me so we can make an appointment. Thanks.
> Roger"

It was also marked "received 1.42 pm" which was the time the Attorney-General returned to his office.



The information available suggests that there was no immediate contact between Mr de Robillard and the then Attorney-General. Mr de Robillard says he rang the Chambers on at least two occasions that afternoon. Eventually he saw the Attorney-General at quarter to 5 near the market and he asked what was happening. Mr de Robillard has said that he was told to come back to the Attorney-General's office on Monday afternoon. There might have been room for some equivocation about that but for the subsequent events. On the following Sunday Mr de Robillard left for Australia. There has been serious objection taken to the fact that the Acting Chief Justice at one point suggested that he had run away. Perhaps there was room for argument about that term but there can be no doubt that he left without warning or making any arrangements to deal with the requirement.

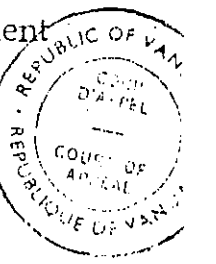
If one takes at face value his assertion that he had gone on the Friday afternoon to return the documents (and it was just because Mr Saksak was not there that the handing over did not take place) then issues might well have arisen as to Mr de Robillard's intention, attitude and behaviour. However if he went to hand them over his current claim that he wanted to return the documents but was prevented from doing



so does not lie easily with the submissions made as to the uncertainty of what was required of him.

He knew that there was an order for return. 2 o'clock was the stipulated time. At quarter to 5 when he talked to Oliver Saksak he was making another appointment because he knew he still had to comply. The fact that he left the country on the Sunday cannot be ignored. Before going he made no arrangements to return any documents. Despite all that happened he never raised the possibility of handing them over until the matter was specifically raised in this Court on 5 May. There is in our view a substantial internal contradiction and unresolved conflict in his position. Although it is not necessary to make a specific finding on the point, the attitude which is portrayed in the transcripts of the various hearings (which we have had the benefit of reading), his clear and unequivocal actions in departing from the country without making arrangements and his continuing failure to hand the documents over upon his return, raise serious doubts about how convincing the desire to comply (so eloquently advanced on his behalf) really was.

Letters written on 19 March 1997 (and faxed by Mr de Robillard from Sydney to the Chief Registrar) indicate that there was still an argument



as far as he was concerned about all sorts of issues. In neither of the faxes he sent that day is there any indication of his desire to return the documents or his intention of complying with the order of the Court.

Similarly on 20 March Mr de Robillard wrote again to the Chief Registrar again about a variety of issues. There is not the slightest indication of an intention to comply with the Court's orders. There is a peppering of other matters and threats to take action for damages and the like.

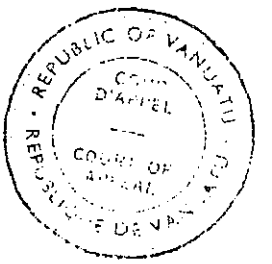
A further faxed message sent that day again is ominously silent on the issue of a desire, let alone an intention, to comply.

Mr de Robillard comes to this Court with a posture of self justification, indignation and outrage. He invites this Court on the available material to conclude that at all times he was willing, able and in fact keen to comply with the orders. We find his protestations inconsistent with the available material and his contemporaneous acts and omissions.

The relevant law is clear and unequivocal and is referred to earlier. It was not the subject of any substantial dispute before us. The basic law

was correctly summarised by the Acting Chief Justice in his reasons for the order made on 27 March 1997 when he said :

> *"A contempt of court is an act or omission calculated to interfere with the due administration of justice :* see Bowen LJ in **Helmore v Smith** (1887) 35 Ch. D 436 and 455. *It is a Civil Contempt of Court to refuse or neglect to do an act required by a judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specified act, on the faith of which the court sanctions a particular course of action or inaction* (see Hinchliffe J P.N.G. LR (1987) 227).
>
> In **Hadkinson v Hadkinson** (1952) 2 All ER 567 at 569, Romer LJ, in the Court of Appeal said :
>
> > *It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.* Lord Cottenham LC said in **Chuck v Cremer** (1864) - Coop T Cott 205; 47 ER 820 :
> >
> > *A party who knows of an order whether null or void, regular or irregular, cannot be permitted to disobey it ... It would be most dangerous to hold that suitors or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed.*
>
> *The above citation is extracted from the judgment of* Hinchliffe J P.N.G.L.R. (1987) 227 (at p 231). *I agree with their Lordships' views and I accept them as my own and there is no reason why their views should not be followed in Vanuatu on that point."*



It appears to us to fly in the face on the totality of the material to suggest that when he left the jurisdiction on Sunday March 16, Mr de Robillard did not know that he was wilfully flouting an order of the Court. There is not the slightest doubt that he believed that the order was irregular or even void. That however provided no justification for his failure to comply with what was his plain and unqualified obligation.

He could hardly have been surprised when upon his return to the jurisdiction he was arrested.

In light of what had not happened on Friday 14th an application had been made on Monday 17 March for enforcement action. A warrant for arrest had issued. The reasons for decision of the Acting Chief Justice suggest that when the order was initially made on the Monday afternoon for Mr de Robillard to be arrested and brought before the Court to show cause why he should not be imprisoned for contempt of Court, the Judge was not aware that he was out of the jurisdiction. Later in the afternoon he learnt that was the position.

The real crux of the matter in the appeal is what occurred when following his arrest Mr de Robillard was brought before the Court on

27 March 1997 to show cause why he should not be committed for contempt. The proper designation of what was then occurring was a civil contempt. We interpolate to note that in our judgment it was appropriate that the earlier problems about contempt had been referred to the Public Prosecutor with an indication that another Judge would hear the matter and the adjourning of them for a fixture.

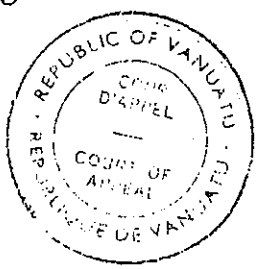
There is no question but that s 23 of the Courts Act provides a summary jurisdiction for contempt. The section is as follows :

> "The Supreme Court shall have power to punish summarily for Contempt of Court, by imprisonment for a term not exceeding 1 year or at the discretion of the Court a fine."

The Acting Chief Justice in his reasons for judgment noted that :

> *"In this matter, I decided to use the summary jurisdiction for contempt under s 23 of the Courts Act CAP 122. The reasons being that during the hearing of 27 March 1997, I had lots of difficulty to control my Court,. I therefore think that it is a compelling necessity for me as the presiding Judge to use my summary jurisdiction for contempt to maintain order in the Court.*
>
> *Further during the hearing of 27 March 1997, I had been the subject of accusations and attacks by the Defendant/lawyer, which justify, in my view, a compelling necessity to use the summary power under Section 23 of the Courts Act CAP 122."*

Hindsight and time to reflect are always an advantage. One needs to ensure (particularly in an appellate Court) that such advantages do not



remove matters from the human action, activity and inter-play which were inherent in the first instance hearing.

We however are of the view that the Court lost sight of the fact that the issue was a civil contempt of Court. There had been a failure or neglect to deal with the Court's order requiring the return of documents. The Acting Chief Justice noted the provisions of Order 45 r 7 of the Western Pacific High Court (Civil Procedure) Rules 1964 and Order 61 Rule 21. The submission now made is that these were not the appropriate provisions and that other avenues were available and should have been employed. We are persuaded that there were provisions in the Rules which should have been employed.

In the course of dealing with the problems which emerged at the hearings in March 1997, Mr de Robillard allowed his enthusiasm and commitment to his cause to lead him into error in the way that he behaved towards and treated the Court. If that was the real cause of the Judge's concern, it should have been dealt with along with the other matters which he had referred to the Public Prosecutor.

We are clear that the failure to return the documents (which was the discrete matter the Court was considering) did not justify the invoking

of the summary power of contempt. A reading of the transcript of 27 March is an unhappy chronicle of Mr de Robillard persistently endeavouring to avoid the reality of his failure to comply by the introduction of a variety of extraneous matters in ways which can only be described as inflammatory and inappropriate. Regardless of how his behaviour and attitude might be characterised, there are certain basic principles which must apply in any circumstance even one as emotion charged as this.

On a careful reading of the transcript of March 27, it emerges that there was an initial interchange which continued for sometime in the morning. If one reads it with any degree of objectivity, it was a rehashing of matters which had been raised interminably before Mr de Robillard left the jurisdiction. It eventually concluded with him being taken off to the prison and then being returned in the afternoon.

The first fundamental issue raised is the contention that it was not clear whether what Mr de Robillard was facing was civil contempt or otherwise. The record does not support that submission. There are a number of clear and unequivocal indications that this was a civil contempt as opposed to the question of criminal contempt which was with the Public Prosecutor.

Secondly it was submitted that it was not clear what was said to constitute the contempt. Again despite the pages in the transcript of argument which would have done credit to medieval semanticists, there cannot be any sensible possibility that Mr de Robillard did not know that the complaint was his failure to return the files. It is bordering on the absurd to suggest that on 27 March the issue was whether the documents were to be returned by 2 pm or at 2 pm. It is abundantly clear that the Court was concerned with the fact that until the files were returned to the defendants in 140 and 144 of 1996 (as the clients were demanding) two very important cases in the life of Vanuatu could not be heard. It defies logic to suggest that the issue then was one of the precise time of return. The reality is that at no stage was there any suggestion of a willingness by Mr de Robillard to comply even 13 days after the stipulated date. His constant stream of words were directed to other issues and concerns. He constantly avoided the central and critical fact that he still had the files.

It is a fundamental principle that a person in contempt must be given the opportunity to answer the charges against him or her; *Doyle v Commonwealth of Australia*(1985) 60 ALR 567. That involves allowing the person's legal representative adequate time to call such

evidence as is necessary for a defence; *Duo v Duo* [1992] 3 All ER 121 (CA). The defendant must also be offered the opportunity to cross-examine any witnesses; *Aslam v Singh* [1987] 1 FLR 122.

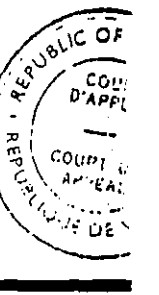
There is no doubt that the Court has the power to intervene immediately but given that a committal order is the ultimate sanction against an individual, the Court should use that power with great caution and only in circumstances in which it is absolutely necessary to act immediately; *Ansah v Ansah* [1977] Fam 138 at 143 per Ormrod LJ; *Danchevsky v Danchevsky* [1975] Fam 17 at 22 per Lord Denning MR.

A wise practical approach is to be found in the words of Lawton LJ in *Moran* (1985) 81 Cr App Rep 51 at 53 where the principles relating to the procedural safeguards in an appeal against summary committal were summarised as follows :

> *"The following principles should be borne in mind. First, a decision to imprison the man for contempt of Court should never be taken too quickly. The Judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight thoughts are sometimes better than thoughts on the spur of the moment. Thirdly, the Judge should consider whether the seeming contemnor should have some advice. ... if the circumstances are such that it is possible for the contemnor to have advice, he should be given an opportunity of having it."*

As against those general words of sage advice the next fundamental question to be asked in the instant case is whether it was essential for these civil contempt proceedings to be heard and concluded on that day. We are not persuaded that this was necessary. A delay to the next day or even for another week (bearing in mind that this was a civil contempt alleged to have occurred because of a failure to comply with an order to return documents) would not have been unreasonable. The matter although requiring a speedy resolution, did not have to be dealt with in just a few hours. Any litigant in any proceeding should have a reasonable time to prepare a case and present a defence. This was not provided. We are not satisfied that there was sufficient justification for denying Mr de Robillard that fundamental right.

Associated with that point were various requests for time to obtain legal representation. We are of the view that the circumstances in which a person can be dealt with, without a lawyer (particularly where their liberty is in jeopardy) will be extraordinarily limited. What happened here does not fall within them. We appreciate and understand what appears to be the Acting Chief Justice's concern that this was yet another manoeuvre to play for time and thus avoid compliance with the order. Nonetheless we are persuaded that the decision to proceed to conclude the hearing within a period of just a

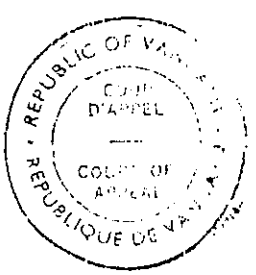


few hours (during when this man was incarcerated) was in all the circumstances a further failure to ensure that he was dealt with in a fair and proper way as required by the principles of natural justice.

We note that the former Attorney-General came to the Court on the afternoon of 27 March. He was used by what the Bench described as "providing information to the Court". There is no doubt that he was not sworn. What he had to say was not provided as evidence. The learned Judge at one stage said :

> *"Mr Saksak Oliver is not called by this Court as a witness. Its an information provided this Court, you understand that."*

With respect we must say that we do not understand that assertion. There can be no doubt that the information which was given by the former Attorney-General was treated as having probative value. If a Court is going to use material to sustain an adverse finding the label put on it is not the critical factor. Mr de Robillard was entitled to challenge and question Mr Saksak who was effectively a witness against him. That is a fundamental right which the exigencies of this case did not justify a denial of.



Next, Mr de Robillard was entitled to be heard in his own defence. That principle is easy of expression, but having read the records of various of these hearings, we can appreciate and understand how difficult this was for the Judge to deliver. Despite the fact that he is a trained lawyer (and asserts that he is an officer of the Courts of Vanuatu) his inability or unwillingness to accept rulings, to confine himself to matters of relevance, and to provide focus and discipline in his behaviour was not to his credit. It seems that every time Mr de Robillard sought to speak he reverted to matters which he wanted to get off his chest rather than the issues which were properly before the Court. The most amazing aspect of this evidential saga is that at no stage until he was directly confronted with it by this appeal Court on 4 May, was there an addressing of the fundamental issue in dispute by Mr de Robillard. Despite all that he has said, and all that has been said on his behalf, we are sure that if at any stage this intelligent, articulate and able man had indicated to the Court an intention to comply with its orders, matters would never have taken the turn they did.

However that having been said, we are clear that before this man could be imprisoned he had to be heard on issues which were relevant. We are not satisfied that despite all the problems he created he was given a

fair or proper opportunity to be heard. However people behave before a Court, and however frustrating, infuriating and disrespectful any litigant may be (even when they are professionally trained) the absolute obligation of the Court to provide a fair hearing cannot be reduced.

Associated with this aspect of what our American cousins would call due process is the fact that Mr de Robillard was subjected to questions which in our view were inappropriate. Instead of providing him with an opportunity to give an explanation, there were demands made of him to answer questions which he should not have been required to answer. This may have arisen because of his own attitude and behaviour. However the Bench can never be responsive to the indiscipline before it. The fundamental rights which are enshrined in the constitution of this country and recognised in all civilised societies must be permitted despite the provocations to which a Bench is exposed.

The true nature of what went on in March 1997 is graphically portrayed in the helpful record of proceedings which was provided to us. The approach is confirmed in the attitude and words of the notice of appeal prepared by Mr de Robillard. This includes an identification

of some breaches of fundamental rights which must always be granted and which we find were not. What we can only categorise as an arrogant impudence also emerges. The suggestion that the failure of the former Attorney-General to be in his office when Mr de Robillard called at 1.40 pm was causative of the non-compliance and that everything that went wrong thereafter was his responsibility is revealing. That attitude and approach is neither compelling nor attractive.

If one stands back from the struggle of words what was required of Mr de Robillard was crystal clear. This man's determination to obfuscate and avoid is plainly apparent. It is regrettable that in the process fundamental rights which Mr de Robillard was entitled to enjoy the benefit of were denied. It is certainly not difficult to understand how what happened did happen.

In all this we are reminded of words of the Privy Council in *Re Erebus Royal Commission*[1983] NZLR 662, 685 :

> *"To say of a person who holds judicial office, that he has failed to observe a rule of natural justice, may sound to a lay ear as if it were a severe criticism of his conduct which carries with it moral overtones. But this is far from being the case. It is a criticism which may be, and in the instant case is certainly intended by their Lordships in making it to be, wholly disassociated from any moral overtones. In an earlier section of this judgment their Lordships*

have set out what they regard as the two rules of natural justice that apply to this appeal. It is easy enough to slip up over one or other of them in civil litigation, particularly when one is subject to pressure of time in preparing a judgment after hearing masses of evidence in a long and highly complex suit. In the case of a judgment in ordinary civil litigation this kind of failure to observe rules of natural justice is simply one possible ground of appeal among many others and attracts no particular attention. All their Lordships can remember highly respected colleagues who, as trial Judges, have had appeals against judgment they had delivered allowed on this ground; and no one thought any the worse of them for it. So their Lordships' recommendation that the appeal ought to be dismissed cannot have any adverse effect upon the reputation of the Judge among those who understand the legal position, and it should not do so with anyone else."

The same undoubtedly applies in the present circumstances to some failures in this difficult and emotion charged encounter.

SUPREME COURT OF THE REPUBLIC OF VANUATU

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JUDGE'S CHAMBERS

Our ref : .....

Your ref : .....

FAX

Tuesday 17 June 1997

To: Mrs R B Naviti
Chief Registrar
Supreme Court - Vila Fax: 22692

From: K. Mataskelekele - J

Ref/Case: **Court of Appeal, Civil Appeal Case No.1 of 1997 - Civil Contempt of Court - Christian Roger de Robillard - the Appellant**

TEXT: I have had the opportunity to read the Reasons for Judgement of the Court delivered by Robertson J in this case and I agree with them. End.

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

Kalkot Mataskelekele

KALKOT MATASKELEKELE
JUDGE

REPUBLIC OF VANUATU COUR D'APPEL REPUBLIQUE DE VANUATU

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File

11th June, 1997

The Hon. Justice Robertson
High Court of New Zealand
Waterloo Quadrant
P O Box 60
AUCKLAND
New Zealand

DearJustice Robertson,

SUBJECT: CIVIL APPEAL CASE NO, 1 OF 1997, IN THE MATTER, CIVIL CONTEMPT OF COURT v. CHRISTIAN ROGER DE ROBILLARD

I refer to your early correspondence and the latest dated 6th June, 1997.

I apologize for not responding earlier as I have been travelling out of Port Moresby a bit.

I have read the draft and I am grateful for your vivid thoughts. I endorse same and have nothing to add.

Yours sincerely,

SIR JUSTICE LOS, CBE

Faxed at 9:20
today 11.6.97
LOS.

REPUBLIC OF VANUATU
COUR D'APPEL