IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.17 OF 2009

BETWEEN: **GUY BENARD**
Appellant

AND: **THE GOVERNMENT OF THE REPUBIC OF VANUATU**
First Respondent

AND: **THE ATTORNEY GENERAL**
Second Respondent

Coram: *Chief Justice Vincent Lunabek*
Justice Oliver A. Saksak
Justice John Mansfield
Justice Mark O'Regan
Justice Daniel Fatiaki

Counsel: *Mr Guy Benard in person*
Mrs Viran Trief and Mr. Jenshel for the Respondents

Date of hearing: *20th October 2009*
Date of Judgment: *30th October 2009*

JUDGMENT

1. This is an appeal against a decision of the Supreme Court dealing with a preliminary issue relating to the claim by the Appellant against the Respondents for arrears of salary which were owed to him by the Vanuatu Maritime Authority (VMA). The preliminary issue was: "whether the Defendants [now Respondents] can be liable for any debts of the VMA". In a judgment issued on 2 October 2009, Dawson J found that the Respondents could not be liable for the debts of the VMA and that, as a consequence, the Appellant's claim against the Respondents failed in its entirety.

ISSUE

2. The sole issue for determination by the Court is the same as that which confronted the Supreme Court Judge, namely: whether the Government is liable for any debts of the VMA. Before addressing that issue, we briefly state the factual background to the Appellant's claim.

FACTUAL BACKGROUND

3. The Appellant worked for the VMA under a contract of employment with the Commissioner of Maritime Affairs (the Commissioner). His employment came to an end when the VMA went out of existence as a consequence of the coming into force of the Vanuatu Maritime Authority (Repeal) Act (the Repeal Act) on 1 January 2008. He had not been paid for the period September – December 2007. The Commissioner had made efforts to pay the Appellant but the payments were not effected because of the intervention of the Attorney General, who said that the source of the funds was not a proper source from which such payment could be made. The Appellant then commenced proceedings against the Respondents as a result of this intervention by the Attorney General. Those proceedings were commenced before the Repeal Act was passed. He did not at that time commence proceedings against the VMA, because there was no dispute between him and the VMA as to his entitlement to be paid for the work he had done during the relevant period.

THE VMA

4. The VMA was created by the Vanuatu Maritime Authority Act 1998 [CAP 253] (the VMA Act). There have been a number of amendments to the VMA Act, including a significant amendment in 2002, to which we will return later.

5. The nature of the relationship between the Government and the VMA can be gauged from the following summary of the relevant provisions of the VMA Act:

(a) The VMA was a body corporate and could be sued in its corporate name (Section 3);

(b) All the members of the VMA were appointed by the responsible Minister (Section 4);

(c) The Minister could terminate the appointment of a member of the VMA for various reasons after consulting the VMA (Section 30(2)) and a member appointed by a Minister automatically ceased to be a member if the Minister who appointed him or her ceased to be the responsible Minister (Section 30(6));

(d) The VMA had responsibility for, among other things, regulating and administering the Vanuatu maritime transport industry as well as ensuring compliance with a number of maritime statutes (Sections 5 and 6);

(e) The VMA was the national authority and representative of Vanuatu in respect of matters relating to the maritime transport industry (Section 6(q));

(f) The VMA was required to have regard to the policy of the Government in relation to maritime transport (Section 8);

(g) The VMA was required to consult with a number of interests, including the Government, in performing its functions and exercising its powers (Section 9);

(h) The relationship between the Minister and the VMA was governed by a performance agreement, which was subject to negotiation each year (Section 10);

(i) The Minister was permitted to delegate certain of his or her functions under the VMA Act to the VMA (Section 16);

(j) The VMA's revenue came from Parliamentary appropriations or Government grants. It had to account to the State for all amounts it collected as fees and charges (Section 21);

(k) The VMA required the written approval of the Minister of Finance to borrow money (Section 22);

(l) The VMA's finances were heavily regulated (Part 7);

(m) The Minister had no input into the meetings and voting of the VMA on resolutions (Sections 32 – 35);

(n) The VMA's employees were appointed by the Commissioner without input or control by the Minister (Section 38);

(o) The VMA had power to appoint and pay consultants, specialists and advisers without input from the Minister (Section 39);

(p) The VMA was exempt from taxes (Section 52).

6. As noted above, the employment of the employees was a function which was entrusted not to the VMA itself, but to the Commissioner, who was appointed by the VMA (with the consent of the Minister) under Section 12. It was for this reason that the Appellant's employment contract was with the Commissioner rather than the VMA. But it was common ground that the VMA was liable for the payment of his wages.

7. Under the VMA Act as originally enacted, the provision dealing with the VMA's revenues, Section 21(1), read as follows:

"21 Revenues of the Authority

(1) The revenues of the Authority consist of the following:

(a) Such fees and charges payable under:

(i) This Act or the regulations or rules made under this Act; and

(ii) The Acts listed in Schedule 1 or the regulations or rules made under those Acts;

(b) Such grants as may be provided to the Authority by the government;

(c) Such other funds as may properly accrue to the Authority from any other source."

8. However, the VMA Act was amended in 2002. The position which pertained after that amendment is reflected in the amended Section 21, which provided:

"21. Revenues of Authority

(1) The revenues of the Authority consist of:

(a) such amounts as are appropriated by the Parliament;

(b) such grants as may be provided to the Authority by the government or from other sources.

(2) The revenues of the Authority are limited to amounts received under paragraphs (a) and (b) of subsection (1).

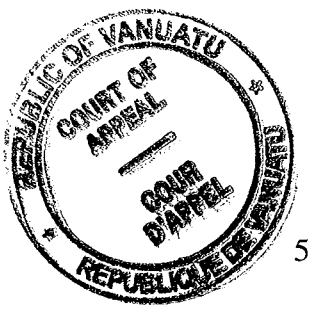
(3) The Authority must pay all fees, charges and any other amounts received by the Authority under this Act or any other Act administered by the Authority into the Public Fund within the meaning of the Public Finance and Economic Management Act [CAP.244] within 7 days after receiving such fees, charges or other amounts."

9. The Appellant placed particular emphasis on this change, which he said converted the VMA from being an independent body to being the equivalent of a Government department. We will return to that aspect of the case later.

REPEAL LEGISLATION

10. The Repeal Act was passed on 31 December 2007 and came into force on 1 January 2008. It simply repealed the VMA Act and provided that the powers, functions or responsibilities of the VMA under any Act other than the VMA Act itself would be exercisable after the repeal by a person appointed by the Prime Minister for that purpose. It also provided that the Prime Minister could appoint a liquidator to the assets of the VMA. A liquidator was eventually appointed by the Prime Minister on 2 July 2008.

11. The instrument under which the Prime Minister appointed the liquidator instructed the liquidator to ascertain, collect and liquidate the assets of the VMA, ascertain and discharge the just liabilities from those assets and remit surplus funds to the Public Fund. Thus the liquidator would be obliged to pay the VMA's debt to the Appellant if there are available assets from which such payment could be made.



THE SUPREME COURT DECISION

12. Dawson J first considered the Appellant's arguments that, in previous Supreme Court cases, the VMA had been referred to as an "arm" or an "organ" of the Government. He said that these were not legal terms, and therefore the cases in which those terms have been used did not assist. Rather, he observed at paragraph 8 that Section 2 of the Public Finance and Economic Management Act 2006 (the PFEM Act) states that a body such as the VMA is a Government agency.

13. The Judge said that the nearest parallel that could be drawn was that of a company incorporated under the Companies Act. The Government could be seen as similar to a shareholder, with a right to set the direction of the company but otherwise leaving it alone to get on with its business within those guidelines. As with a shareholder, the Government could wind up the VMA.

14. The Judge also considered a number of English, Australian and New Zealand cases in which statutory corporations have been found not to be part of the Crown or the State. The Judge said that he considered that the intention of the VMA Act was clear. The VMA was established so that it could fulfil certain functions without the Government having to be involved in its day to day activities. He said that it could not be said that the Government was responsible for decisions of the VMA in areas where the VMA had sole and independent authority to act.

WAS THE VMA A GOVERNMENT AGENCY?

15. As noted earlier, Dawson J observed that the VMA was a Government agency, as defined in the PFEM Act. The Solicitor General did not take issue with that observation during the hearing of the appeal or in her written submissions. That is not surprising because the definition of "Government Agency" in Section 2(1) of the PFEM Act is extraordinarily broad. It includes:

"(d) a corporation (whether established by statute or otherwise) ... that:

(i) is substantially owned or controlled by the Government;

(ii) has a significant financial interdependence with the State by virtue of an allocation in an Appropriation Act; or

(iii) has significant use or control of public money".

16. It is to be noted that those 3 categories are disjunctive. Thus, it needs only to be shown that a corporation established by a statute is owned or controlled by Government for it to come within the definition.

17. It is clear that the VMA was a corporation (as the VMA Act said it was "a body corporate") and that it was established by a statute. It seems clear that it was owned by the Government and even clearer that it was controlled by the Government, given that all of its members were appointed by the Minister.

18. It also seems that the VMA had, by virtue of Section 21 of the VMA Act, financial interdependence with the State by virtue of an allocation in an Appropriation Act. In effect, we were told that, even after the repeal of the VMA Act, appropriations were made to the VMA by Parliament. The Solicitor General suggested that these were not appropriations to the VMA itself, but rather appropriations to the Ministry of Finance for the purpose of authorising the Ministry to make a grant to VMA. It is not necessary for us to resolve that for the purpose of this appeal.

19. We also consider it likely that the VMA could be said to have had significant use of public money, given that its revenue was entirely sourced from appropriations made by Parliament or grants from the Government.

20. In summary, we can see no basis on which we could differ from the observation made by the primary Judge that the VMA was a Government Agency as defined in the PFEM Act.

IS THE GOVERNMENT LIABLE FOR THE DEBTS OF A GOVERNMENT AGENCY?

21. The term "State" is defined in Section 2(1) of the PFEM Act as follows:

> ""State" *means the State in right of the Government of Vanuatu and includes every ministry, ministerial office* ***and Government agency****."* [Emphasis added]

22. The effect of that definition is that a finding that a body is a Government agency is also a finding that it is "the State" for the purposes of the PFEM Act.

23. The question that then arises is whether the Government is liable for debts owed by the State. That question is answered by Section 57 of the PFEM Act. Section 57(1) says the Government is not liable to contribute toward the payment of debts or liabilities of the State, but that subsection is expressly made subject to Section 57(2). Section 57(2) specifies that Section 57(1) does not apply in relation to, among others, "any sum the State is liable to pay to any creditor of the State." As the term "State" is defined to include a Government agency, that provision can effectively be read as providing that the Government is liable for "any sum a Government agency is liable to pay to any creditor of the Government agency".

GOVERNMENT LIABLE FOR VMA DEBTS

24. That seemed to us to provide an unarguable answer to the Respondents' arguments that the Government is not responsible to pay for the liabilities of the VMA. However, as we had not heard argument from the Solicitor General on the above interpretation of the PFEM Act, we issued a minute outlining the tentative conclusion outlined above and asked for submissions from both parties. We have now received and considered those submissions.

25. The Solicitor General noted that the point was not argued in the Supreme Court, though the Appellant disputed that. We do not intend to resolve the dispute, because we accept that the point was not the focus of the Supreme Court decision and, if it was raised there, it was only as a peripheral aspect of the argument. So we accept that the point has come to the fore only in this Court.

26. The Solicitor General also noted that the observation of Dawson J that the VMA was a Government agency was an observation, not a finding made after considered argument from the parties. Again, we accept that. But it is telling that the Solicitor General did not seek to convince us that the VMA was not a Government agency. We do not see any basis for doubt that it is.

27. The Solicitor General did, however, submit that the interpretation of Section 57 that we have set out above was wrong. She argued that Section 57(2)(d) did not create a liability of the Government that did not already exist. It just stopped Section 57(1) from extinguishing debts that otherwise existed. We are unable to read down the clear wording in that way.

28. The Solicitor General also argued that Section 57 had to be read down because it appeared in Part 13 of the PFEM Act, which is headed "LOANS AND SECURITIES". The explanatory note for that Part confirmed that it dealt with matters to do with loans, securities, guarantees and indemnities. The argument was that all sections in Part 13 deal with loans, securities, guarantees and indemnities so section 57 should be read down to apply only to debts arising from such arrangements. We cannot accept that argument because it is clear from the words used in Section 57 that it is not intended to be limited in that way. For example, Section 57(2)(a) refers to "any sum the State is liable to contribute pursuant to any Act" and Section 57(2)(c) refers to a sum the State is liable to pay a creditor "by virtue of a cause of action that the creditor has against the State". Neither of those references can sensibly be limited to liabilities in respect of loans, securities and the like.

29. The Solicitor General strongly warned of catastrophic consequences for the Government if the interpretation outlined above were adopted by the Court.

because it would mean the Government is liable for debts of Government agencies that it did not intend to accept liability for. We are unable to assess how "catastrophic" the consequences will be, but we cannot allow such consequences to divert us from deciding the case on the basis of what seems to us to be the unambiguous wording of the section. In any event, those consequences are limited to historic debts because the definition of "Government agency" has now been removed from the definitions in the PFEM Act by Section 1 of the Public Finance and Economic Management (Amendment) Act 2009, which came into force on 18 May 2009. The definition of "the State" has also been changed. The outcome of those amendments is that the reference to "the State" in section 57(2)(d) is now a reference to "the Republic of Vanuatu", so the scope of the liability of the Government under section 57 has been narrowed to avoid the "catastrophic" consequences. And we are mindful that Section 1(2) of the PFEM Act allowed the Minister to exclude a Government agency from the application of the whole or part of the PFEM Act by publishing a Gazette notice to that effect. That mechanism allowed the Government to manage the liabilities it accepted under section 57 but there was no suggestion that it was used in relation to the VMA.

30. For the reasons set out above, we come to a different conclusion on the issue before us from that reached by Dawson J. But we do so on a basis that was not fully aired before him and therefore not addressed in his judgment.

LIMITED SCOPE OF THIS DECISION

31. If it were not for that broad definition of "Government agency" in the PFEM Act (prior to the 2009 amendment), we would not have been inclined to conclude that the VMA was within the concept of "State" on normal principles.

32. There is a good deal of jurisprudence on the method of determining whether a statutory corporation is part of the State or Crown or independent from the State. The position is carefully summarised in the leading text by Professor W. Hogg, "Liability of the Crown" [3rd Ed 2000]. Professor Hogg points out

that the Courts traditionally determined the question by asking whether the functions of the public corporation are such that they properly belong within the "province of Government". But this has now given way to a control test, where the question whether a public corporation as an agent of the Crown depends upon "the nature and degree of control which the Crown exercises over it" (see page 334). The fact that a board is appointed by Ministers (as is the case in relation to the VMA), is not, however, decisive: see Metropolitan Meat Industry Board v. Sheedy [1927] AC 899. In the present case, we would not have considered the degree of ministerial control (exemplified by Section 9) as sufficient for that purpose.

33. However, Professor Hogg makes it clear that any analysis must be governed by the statutory framework. As he puts it, if a statute expressly provides for a public corporation to be an agent of the Crown (or State), then it will be an agent for the Crown/State (see page 337).

34. The Appellant made much of the change in the revenue arrangements for the VMA in 2002. He said that the requirement that the VMA account to the Government for fees and charges it collected, which meant it had to rely on appropriations and grants for its revenue, meant that effectively it became a Government department from that time onward.

35. We accept that the funding arrangements in place after the 2002 change did make the VMA more akin to a Government department. But this would not have led us to conclude it was "the State" if it were not for the express provisions of the PFEM Act as it stood at the relevant time.

CONCLUSION

36. In summary, we conclude that, at the relevant time, the VMA was a Government Agency for the purposes of the PFEM Act, and that the Government is therefore liable for its debts under Section 57 of the PFEM Act. We therefore allow the appeal and remit the matter back to the Supreme Court for resolution of the Appellant's claim and, if it is established, entry of

judgment against the First Respondent for the amount owed to the Appellant. We understand there is no dispute as to the amount owed to the Appellant by the VMA, though the Solicitor General indicated there may be a dispute about the validity of the contract under which the Appellant's claim arises in terms of the Government Contracts and Tenders Act [CAP 245]. Whether that Act applies to employment contracts entered in to by the Commissioner is not a matter on which we heard argument and if that argument is to be pursued it will have to be resolved in the Supreme Court.

37. We make it clear, however, that we have made this decision only in relation to the PFEM Act. Our decision should not be seen as a conclusion that a body like the VMA is "the State" for the purpose of other legislation or entitled to immunities and powers which apply to the State and which are provided for in other Acts and instruments.

DATED at Port-Vila this 30th day of October 2009

BY THE COURT

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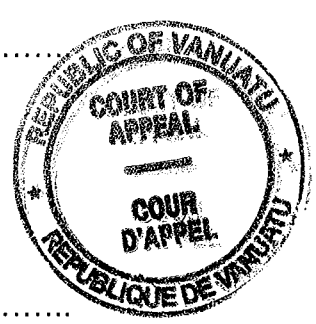
Vincent LUNABEK CJ



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Oliver A. SAKSAK J

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John MANSFIELD J

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Mark O'REGAN J

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Daniel FATIAKI J