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

CIVIL APPEAL CASE NO. 43 of 2013

BETWEEN: HAM LINI VANUAROROA
First Appellant

AND: MOKIN STEVENS, JAMES BULE, BRUNO LEINKON, SATO KILMAN LIVTUNVANU, DUNSTAN HILTON, GEORGE ANDRE WELLS, HAMARILIU, DON KEN, TONY NARI, KALFAU MOLI, PASCAL IAUKO, CHARLOT SALWAI, STEPHEN KALSAKAU, PAUL TELUKLUK, JOHN LUM, HAVO MOLI, ALFRED CARLOT, WILLIE JIMMY TAPANGARARUA, MARCELINO PIPITE
Second Appellants

AND: REPUBLIC OF VANUATU
First Respondent

AND: HON. MOANA KATOKAI CARCASSES KALOSIL MP, PRIME MINISTER
Second Respondent

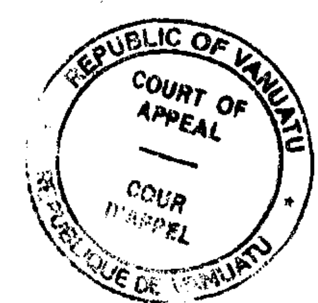
AND: VANUATU TRADE DEVELOPMENT PTY LTD
Third Respondent

Coram: Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: Robin Tom Kapapa for the Appellants
The Attorney General, Ishmael Kalsakau and Frederick Gilu for the First and Second Respondents
No-appearance for the Third Respondent

Hearing: 20 November 2013

Judgment: 22 November 2013



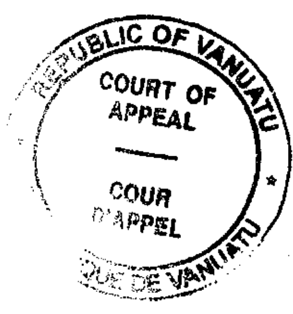
JUDGMENT

1. This is an appeal against the decision delivered by the learned Chief Justice on the 17th of October 2013 following a hearing on 14th October 2013 in Judicial Review case No. 17 of 2013.

2. Before addressing the substance of the appeal, we observe that the description of the second respondent is incorrect. The claim was against a decision of the Prime Minister and the claim should have simply specified the Prime Minister as the relevant party. It was both unnecessary and inappropriate to name the Prime Minister who made the decision under review.

3. In the Supreme Court the applicants claimed:-

   > 1. *The purported "decision" of the First Respondent to grant the purported Concession Agreement dated the 27th July 2013 to the Third Respondent fails to comply with due process and procedures under law and whereby must be called up and quashed as unlawful and without basis;*
   >
   > 2. *The purported decision of the Second Respondent to grant, execute and or sign the Concession Agreement dated the 27th July 2013 is outside his powers to sign and render the "Agreement" null and void and be called up and quashed as unlawful and without basis;*
   >
   > 3. *Further quashing orders as the purported decision of the Respondents made were;*
   >
   >   *(a) In contravention of the* ***Public Finance and Economic Management Act*** *(PFEM Act) section 59, 60 and the* ***Government Contract and Tender Act*** *(GCT Act) section 3, 4, 9, 10, 12 and other parts of the Act;*
   >
   >   *(b) That the Respondents exercised their powers so unlawfully they breached procedural fairness.*
   >
   >   *(c) Costs;*



(d) *Such further or orders as the Honourable Court may consider appropriate;*

4. In the event, the Judicial Review proceeding was struck out and the Court held that the first and second respondents were entitled to costs on an indemnity basis which were to be paid as to one third by the appellants and two thirds personally by their counsel.

5. Grounds of appeal were described as:-

   1) *That the Chief Justice erred in law and fact when he held that the PFEM Act does not apply to the Airport Concession Agreement;*

   2) *That the Chief Justice erred in law when he held that the Prime Minister's prerogative power overrode the requirements of the PFEM Act;*

   3) *That the Chief Justice erred in law and fact when he held that the case was brought prematurely;*

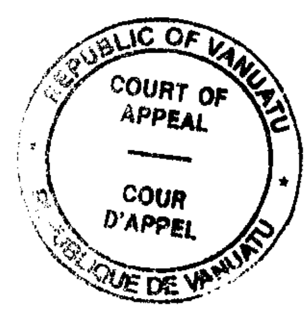
   4) *That the learned Chief Justice erred both in law and facts when he held and decided that the Applicants do not have the locus standi to bring the case;*

   5) *That the Hon. Chief Justice erred in fact and law when he decided that the lawyer for the Appellants should bear ⅔ of the costs personally.*

   6) *Further grounds to be advanced by the counsel.*

6. As we have stated clearly in other litigation in this session, it is a breach of Rule 5 of the Court of Appeal Rules to make the assertion appearing as ground no. 6 – that is, "*Further grounds to be advanced by the counsel*". It is only with leave that any matter not contained in the notice and grounds of appeal can thereafter be advanced. This unsatisfactory practice has been developing and there is a complete misapprehension by a number of counsel as to their ability to change the grounds of appeal as preparation is undertaken. This practice must stop.

7. The factual circumstances are adequately summarised by the Chief Justice in the judgment in the Supreme Court.



8. Mr. Kapapa commenced his written submission by reminding the Court of Appeal of the provision of s. 48 of the *Judicial Services and Courts Act* [CAP 217]. He drew attention particularly to s. 48(3) which provides that the Court of Appeal:-

   (a) May exercise such power as may be prescribed by or under this Act or any other law; and;

   (b) Has the power and jurisdiction of the Supreme Court; and

   (c) May review the procedure and findings (whether of fact or law) of the Supreme Court; and

   (d) May substitute its own judgment for the judgment of the Supreme Court.

9. In particular counsel relied on the decision of this Court in ***Colmar v. Rose Vanuatu Ltd*** [1]. He submitted that the Court of Appeal is in as good a position as the Judge in the Supreme Court to draw inferences from the facts which were found or were uncontested in the Supreme Court and the Court of Appeal should not hesitate or restrict itself but should look at the entire situation afresh. The Court of Appeal is not at a disadvantage, he submitted, because this is not a case which depends on findings of credibility. The Attorney General spiritedly opposed this argument but we are persuaded it is correct in this context. However, on our appreciation of the appeal it does not affect the outcome as there is no substantial dispute about what is in contention.

10. By the orders of the Chief Justice :-

    a The Judicial Review claim was struck out;

    b The first and second respondents were entitled to costs on an indemnity basis;

    c Such indemnity costs were against the Appellants for one third and Mr Kapapa personally for two thirds.

[1] ***Colmar v Rose Vanuatu Ltd*** *[2011] VUCA 20; Civil Appeal 06 of 2011 (20 July 2011)*

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11. Mr. Kapapa now accepts that it is good law that where there is conflict between the provision of specific legislation and the provisions of general legislation the former will be given priority. Section 3.2 of the **Privately Financed Airport Infrastructure Project Act** 2008 (PFAIP) expressly precludes privately financed infrastructure projects in the civil aviation sector from the provision of the GCT Act.

12. A crucial point argued before us was that the learned Chief Justice did not consider the relationship between the PFAIP Act and the PFEM Act.

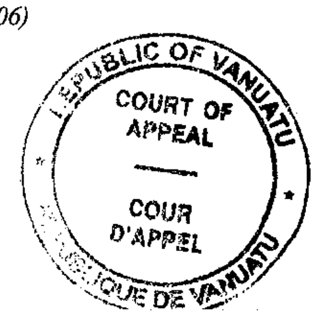
13. Particular weight was placed to the decision in ***Port Denarau Marina Ltd v. Tokomaru Ltd*** [2] were it was said in the Court of Appeal of Fiji:-

> *One pertinent general principle of statutory interpretation is that an earlier statute may be overridden by a later. Another is that general legislation may be regarded as overridden by special legislation.... Neither principle, however, is decisive;* ***and we prefer to base our conclusion on an interpretative approach.*** *As the High Court of New Zealand said in Housing Corporation v. Maori Trustee [1988] 2 NZLR 622, 677* ***the question remains one of interpretation by way of reconciliation of the two statutes.***

14. The PFEM Act provides in its long title that its purposes are:-

> *(a) to ensure effective economic, fiscal, and financial management and responsibility by Government;*
>
> *(b) to provide accompanying accountability arrangements, together with compliance with those requirements;*
>
> *(c) to require the Government to produce –*
>
> > *(i) statements of economic policy;*
> >
> > *(ii) confirmation of adherence to fiscal disciplines prescribed under this Act;*
> >
> > *(iii) budget policy statements;*

[2] ***Port Denerau Marina Ltd v Tokomaru Ltd*** *[2006] FJCA 27; ABU0026U.2005S (6 December 2006)*



(iv) economic and fiscal forecasts and updates;

(v) financial management information;

(vi) comprehensive annual reports.

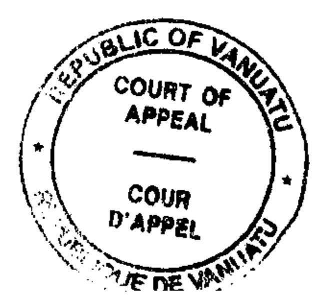
15. Paragraph 1 of the PFEM Act provides that it applies to public resources and public money, to Ministers, Ministry offices and Ministries. It is a comprehensive and overarching framework in respect of financial management in the Republic.

16. The appellants referred particularly to two provisions of the PFEM Act:-

> ***59. Authority for the giving by the State of guarantees and indemnities***
>
> *Except as expressly authorised under this Act, it is not lawful for a person to give a guarantee or indemnity that imposes an actual or a contingent liability on the State.*
>
> ***60. Power to give guarantees and indemnities***
>
> *(1) Subject to subsection (3), the Minister on behalf of the State, may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of any person, organization, or Government agency but may only do so:*
>
> *(a) with the prior approval of a simple majority of Parliament;*
>
> *(b) after consultation with the Director-General;*
>
> *(c) where such guarantee or indemnity is consistent with the fiscal responsibility provisions of this Act.*

17. The learned Chief Justice took the view that section 59 and 60 applied only to the Minister of Finance. We respectfully do not agree. The definition of Minister in the Act means the Minister from time to time responsible for finance and reading that definitional provision alongside section 30 of the Interpretation Act it is beyond question that this provision applies to any minister dealing with a situation which involves finance.

18. We are satisfied the PFEM Act can apply to an agreement made pursuant to the PFAIP Act.



19. There is no conflict between the PFEM Act and the PFAIP Act. The PFAIP Act sets out procedures for selecting a concessionaire and negotiating a concession contract. The PFEM Act supplements such provisions by providing extra control pursuant to section 59 and 60 of the PFEM Act where those sections are relevant.

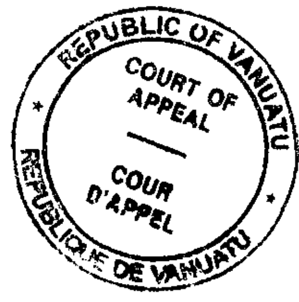
20. The appellant submitted that the PFAIP Act does not provide for a blanket exclusion of all other laws relating to financial control. It is submitted that had Parliament intended that the PFEM Act should not apply to agreements made under PFAIP Act, it would have especially said so. The fact that the PFAIP Act expressly excluded agreement made under its provisions from the GCT Act, but did not exclude agreement made under the provision of the PFEM Act indicates that on a plain reading of the statute there is no exclusion involved.

21. In his written response the Attorney General sought to argue otherwise and particularly that this had not been the appellants' case in the Supreme Court. That cannot be so. It was a specific pleading and central to the original application. By the end of the appeal hearing it was accepted by the Attorney General that the PFEM Act could apply in this case.

22. Two other preliminary matters arise. First the learned Chief Justice said in his judgment:-

> *"Finally, I accept the submissions that the Applicants also do not have the locus standi to pursue this proceeding. The fact that the Applicants are members of Parliament and are of the opposition bloc clearly highlights their choice of option as deposed in their evidence other than the option decided by the Government. This fact establishes the intention of the Applicants not necessarily to see that the Government Contract and Tenders Act have been complied with but rather to fulfil their choice of option. That is a matter outside the jurisdiction of the courts of law."*

23. We are unable to agree with that conclusion and before us the Attorney General accepted that simply because an applicant was a Member of Parliament or part of an opposition block he could not have standing. There is no reason why people in that category are precluded from commencing or maintaining an application challenging the activity of a Government and its Ministers.



24. There are often political overtones in litigation but parties are not denied an opportunity to advance legal complaint if the circumstances otherwise allow it.

25. The second matter related to comments in the judgment, and which appear in the submissions made by the Attorney General, that certain matters are within *"the prerogative of the Prime Minister"*.

26. It may be imprecise language but there should be no misapprehension that the Prime Minister in this Republic has any prerogative powers. He has clear powers under the Constitution and in various Acts of Parliament and following decisions of the Council of Ministers. However, none of these are in law prerogative powers. It is inappropriate to classify them in such manner.

27. It was accepted before us that the question of the lawfulness of promissory notes is premature. Parliament is undertaking an inquiry. It has made no decision and it is not for, the court to interfere in anticipation. The jurisdiction of Parliament regulates this decision-making although an ultimate conclusion can eventually be subject to challenge in the courts; but not now. That was a conclusion reached by the Chief Justice and is now accepted by the appellants.

28. This case as prosecuted on appeal really boiled down to a simple question of whether two provisions in the concession contract come within the provisions of section 60 of the (PFEM) Act. Those provision are as follows:-

> ***2.4 Non-Fulfillment of Concession Company CPs***
>
> *If any of the Concession Company CPs has not been fulfilled on or before the Cut – Off Date, then unless waived in writing by the Government, the Government may by written notice to the Concession Company terminate this Agreement and thereupon, the Government shall pay to the Concession Company all costs and expenses incurred by the Concession Company as of the date of termination directly and solely in respect of the Project, including the costs of caring out the technical survey and the Bauerfield Airport Runway Remedial Works and preparing the Bauerfied Airport Runway Technical Report as contemplated in Clause 3.5, reasonable legal costs, reasonable consultancy costs and disbursements, and subject to receipt of*

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such payment, the Concession Company shall return any Promissory Notes which it has received to the Government's Representative, and thereafter, no Party shall have any claim of any nature whatsoever against the other under this Agreement.

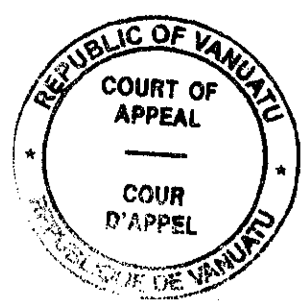
2.5 Non-Fulfillment of Government CPs

If any of the Government CPs of the Condition Precedent set out in Claude 2.1 (a)(v) has not been fulfilled on or before the Cut –Off Date, or if any Material Adverse Change contemplated in Clause 2.1 (a)(x) occurs at any time by the Cut-Off Date, then unless waived in writing by the Concession Company, the Concession Company may by written a notice to the Government terminate this Agreement and thereupon, the Government shall pay to the Concession Company all costs and expenses incurred by the Concession Company as of the date of termination directly and solely in respect of the Project, including the costs of carrying out the technical survey and the Bauerfied Airport Runway Remedial Works and preparing the Bauerfied Airport Runway Technical Report as contemplated in Clause 3.5 reasonable legal costs, reasonable consultancy costs and disbursements, and subject to receipt of such payment, the Concession Company shall return any Promissory Notes which it has received to the Government's Representative, and thereafter, no Party shall have any claim of any nature whatsoever against the other under this Agreement.

29. Accepting as we do that the PFEM Act applies to the Concession Contract, and accepting as we do the word "*Minister*" should not be read down to be restricted only to a particular minister responsible for finance, the issue is whether these provisions constitute either a guarantee or an indemnity (or both) in terms of section 60 of the Act.

30. It is no part of the court's duty under its jurisdiction to enquire into or comment upon anything other than the lawfulness of Government action. It would be wrong for us to intrude upon the wisdom, prudence, efficacy or appropriateness of proposed action. This is a simple demonstration of the separation of powers which is of core importance in the Republic.

31. A guarantee or indemnity is a mechanism whereby a party adopts responsibility for an obligation of a third party and over which the guarantor or indemnifier has no control. That is



not this case. The Government has done nothing more than contractually acknowledge what the courts would require in any event. If there is a termination the Government will pay for the benefits it has gained. That is neither a guarantee nor an indemnity (cf. the decision of the Court of Appeal of the Cook Islands, ***Attorney General v. Apex Agencies***[3]).

32. Like the Chief Justice, we are of the view that the contractual provisions are not within that classification.

33. Accordingly, we consider that the decision made in the Supreme Court to strike this proceeding out was correct in law and the appeal must be dismissed; although on a slightly different basis.

34. There remains the question of costs.

35. The Chief Justice first determined that there should be indemnity costs and secondly that counsel who appeared for the claimants (the appellants here) should pay two thirds of those costs.

36. The award of indemnity costs is unusual under our system. It is appropriate only in exceptional circumstances and in the confines of this case we are of the view that it would only be appropriate if it could properly be said that there had been a misuse of the court by a party.

37. As this case requires a consideration of important matters and their consequences, that is a great distance from what actually occurred. The Attorney General accepted in his submissions before us that the matter could not be properly categorised as a misuse of the court.

38. We are therefore of the view that it was not within the available discretion of the Supreme Court to order indemnity costs. The defendants in the court below were entitled to costs on the standard basis as there were no exceptional circumstances to justify any other approach.

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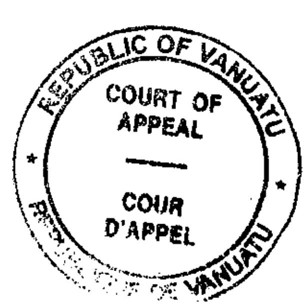
[3] ***Attorney General v Apex Agencies Ltd*** *[2010] CKCA 1; CA 07-10 (19 July 2010)*



39. We do not overlook that the Attorney General had written a letter indicating that he may ask for indemnity costs. In this letter, no reasons were given for that approach and none have become apparent to us.

40. It is even more unusual to require counsel personally to pay any part of the costs which are awarded against the party represented. It is an ultimate response which the court will use when counsel have been gravely irresponsible and persists with a matter which could never succeed. Comments and reactions in this appeal demonstrate that this case is not in that category. There were matters which could be argued and litigated and we find no justification for an order personally against counsel.

41. Accordingly, to that extent alone the appeal must succeed. The order in respect of costs in the Supreme Court is set aside. The successful defendants (in the Supreme Court) are entitled to standard costs.

42. In light of the differences of approach in this appeal, which we have not found inappropriate, there is no justification for any orders for costs in this court. The parties will be responsible for their own costs.

FOR THE COURT

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Hon. Justice Bruce Robertson