

BETWEEN: **FLOYD RAY MERA**
First Appellant

AND: **ATTORNEY GENERAL**
Second Appellant

AND: **VANUATU NATIONAL PROVIDENT FUND
BOARD**
First Respondent

AND: **LETLET AUGUST**
Second Respondent

AND: **PARMOD ACHARY**
Third Respondent

Date of Hearing: 8 November 2023

Coram: *Hon Acting Chief Justice, Oliver A Saksak
Hon Justice Dudley Aru
Hon Justice Mark O'Regan
Hon Justice Richard White
Hon Justice EP Goldsbrough
Hon Justice William Hastings*

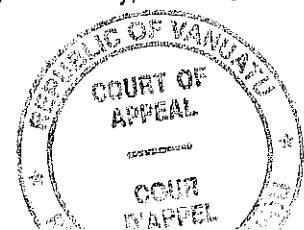
Counsel: *S Aron for the Appellants
G M Blake for First, Second and Third Respondents*

Date of Judgment: 17 November 2023

JUDGMENT OF THE COURT

Introduction

1. The first appellant (Mr Mera) is the Director of the Finance Intelligence Unit (FIU) established under the Anti-Money-Laundering and Counter-Terrorism-Financing Act 2014 (the AML Act). Both Mr Mera and the second appellant (the Attorney General) consider that the Vanuatu National Provident Fund Board (the Board), which is the trustee and manager of the Vanuatu National Provident Fund (the Fund), is a "Reporting Entity" to which the AML Act applies. They consider, in particular, that by reason of the Board's status as a reporting entity, s.50I of the AML Act authorises Mr Mera, as Director of the FIU, to issue a direction to the Board requiring it to "remove" the second respondent, Mr Letlet, and the third respondent, Mr Achary, from their



respective positions as Chairman and General Manager of the Board on the basis that each is a "disqualified person" within the meaning of s.50J of the AML Act.

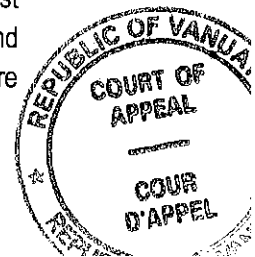
2. By letter dated 25th October 2022, Mr Mera informed the Board of his intention to issue directions to that effect and invited submissions as to why the direction should not be given. Taking the view that the Board is not a reporting entity as defined in the AML Act, the respondents commenced proceedings in the Supreme Court seeking a declaration that the Board is not a "Reporting Entity" for the purposes of the AML Act, a declaration that the AML Act does not give the Director of FIU the power to direct the Board to remove Mr Letlet and Mr Achary from their respective positions, and a declaration that the decision communicated by Mr Mera on 25th October 2022 in respect of the removals of the Mr Letlet and Mr Achary was ultra vires and void. The respondents also contended that, even if the Board is a reporting entity, the decision of Mr Mera of 25th October 2022 was wholly unreasonable in the sense discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 273.
3. The parties agreed at trial that the question of whether the Board is a reporting entity should be determined in advance of the issues concerning the application of the *Wednesbury* test.
4. The primary Judge found that the Board is not a reporting entity for the purposes of the AML Act, although his Lordship did not issue a formal declaration to that effect.
5. The issue on the appeal is the correctness of the Judge's finding. Its determination involves the proper construction of the AML Act and a consideration of the activities of the Board.
6. Shortly before the hearing of the appeal, Mr Letlet and Mr Achary resigned from their respective positions. The issues raised in the litigation in so far as they concern them are, accordingly, now moot. It was common ground however that the issue of whether the Board is a responsible entity for the purposes of the AML Act remains live as between Mr Mera and the Board.

The AML Act

7. We commence by noting some features of the AML Act. Its long title is:

"An Act to provide for the establishment of the Financial Intelligence Unit and to regulate reporting entities to give effect to Anti-Money Laundering and Counter-Terrorism Financing measures, and for related purposes".

8. The FIU is by section 5 vested with a number of powers and functions which, looked at generally, involve the detection and analysis of transactions which are suspected of involving money laundering or the financing of terrorism activities.
9. The concept of a "reporting entity" is central to the scheme established by the AML Act. Amongst other things, the FIU must establish and maintain a register of reporting entities (s.9) and "supervise" reporting entities for compliance with the AML Act (s.8A). Reporting entities are



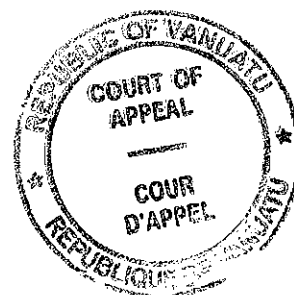
obliged to carry out "the prescribed identification" in respect of persons engaged in defined transactions, including taking action to verify the identity of those persons (s.12 and s.16); keep specified records (s.19); report to the FIU suspicious transactions (s.20 and s.25), large cash transactions (s.27) and international currency transfers (s.28); and carry out, if required by the Director of the FIU, assessments of suspected money laundering and terrorism financing, and provide reports to the FIU.

10. The Director of the FIU has extensive powers to enforce compliance with the requirements of AML Act. Of relevance for present purposes is s.50I, which empowers the Director to direct a reporting entity to remove persons in senior positions of the entity if the Director is satisfied that the person is a "disqualified person".
11. This brief review is sufficient to indicate the central importance of the concept of a "reporting entity" in the AML Act. The expression is defined in s.2 to encompass entities engaged in a wide range of activities. Because of the significance of the definition to the determination of this appeal we set out s.2 in full:

"2 Meaning of reporting entity

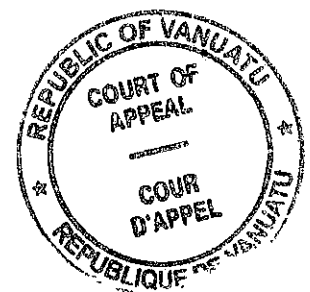
Each of the following is a reporting entity:

- (a) *the Reserve Bank of Vanuatu;*
- (b) *a licensee within the meaning of the Financial Institutions Act [CAP 254];*
- (c) *a licensee within the meaning of the International Banking Act [CAP 280];*
- (d) *a company licensed under the Vanuatu Interactive Gaming Act [CAP 261];*
- (e) *a person licensed under the Casino (Control) Act [CAP 223];*
- (f) *a person carrying on a business under the Gaming (Control) Act [CAP 172] or the Lotteries Act [CAP 205];*
- (g) *a foundation within the meaning of the Foundation Act No. 38 of 2009;*
- (h) *an association within the meaning of the Charitable Associations (Incorporation) Act [CAP 140];*
- (i) *a person carrying on electronic business under the E-Business Act [CAP 264];*
- (j) *a licensee within the meaning of the Company and Trust Services Provider Act No. 8 of 2009;*
- (k) *a credit union registered under the Credit Unions Act [C6] or a co-operative society registered under the Co-operative Societies Act [CAP 152];*
- (l) *a person carrying on a business:*
 - (i) *of administering or managing funds on behalf of an international company within the meaning of*

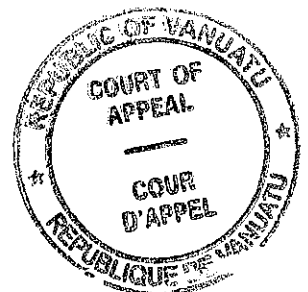


the International Companies Act [CAP 222] or any other person; or

- (ii) as a trustee in respect of funds of other persons; or*
- (iii) as a trustee or manager of a unit trust;*
- (m) a person carrying on a business of an insurer, an insurance intermediary, a securities dealer or a futures broker;*
- (n) a person (other than a person mentioned under paragraph (a), or (c)) (c)), carrying on a business of:*
 - (i) exchanging currency or value; or*
 - (ii) collecting, holding, exchanging or transferring currency or value, or otherwise negotiating transfers of currency or value, on behalf of other persons; or*
 - (iii) preparing payrolls on behalf of other persons in whole or in part from currency collected; or*
 - (iv) delivering currency including payroll;*
- (o) a lawyer, notary or accountant that provides services to a client relating to all or any of the following:*
 - (i) buying or selling of real estates, business entities or properties;*
 - (ii) managing of currencies, securities or other assets;*
 - (iii) managing of banks, savings or securities accounts;*
 - (iv) organising contributions for the creation, operation or management of legal persons or legal arrangements;*
 - (v) creating, operating or managing legal persons or legal arrangements;*
- (p) a person (whether or not the person is a trust or company service provider) providing all or any of the following services:*
 - (i) forming or managing legal persons or legal arrangements;*
 - (ii) acting (or arranging for another person to act) as a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
 - (iii) providing a registered office, a business address or accommodation, correspondence or an administrative address for a company, a partnership or any other legal person or legal arrangement;*



- (iv) *acting (or arranging for another person to act) as a trustee of a trust or a similar position in other form of legal arrangements;*
 - (v) *acting (or arranging for another person to act) as a nominee shareholder for another person;*
- (q) *a person carrying on a business of:*
- (i) *dealing in bullions, precious metals or precious stones; or*
 - (ii) *issuing, selling or redeeming traveller's cheques, money orders or similar instruments; or*
 - (iii) *collecting, holding and delivering currency as part of a business or providing payroll services;*
- (r) *a person carrying on the business of:*
- (i) *lending, including consumer credit or mortgage credit, and financing of commercial transactions; or*
 - (ii) *financial leasing; or*
 - (iii) *issuing and managing means of payment (such as credit and debit cards, cheques, bankers' drafts and electronic money); or*
 - (iv) *issuing financial guarantees and commitments; or*
 - (v) *trading for the person's own account or for the account of customers in money market instruments (such as cheques, bills, certificates of deposit), foreign exchange, financial futures and options, exchange and interest rate instruments, commodity futures trading or transferable securities; or*
 - (vi) *participating in securities issues and providing financial services relating to such issues; or*
 - (vii) *money brokering; or*
 - (viii) *mutual funds or, individual or collective portfolio management; or*
 - (ix) *safekeeping and administration of cash or liquid securities on behalf of other persons; or*
 - (x) *trustee administrator or investment manager of a superannuation scheme, other than a scheme under which contributions are made by salary deductions and withdrawals are for limited purposes such as retirement; or*
 - (xi) *dealing in real estate or sale or hire of motor vehicles; or*



(xii) *dealing in property (other than real estate) exceeding VT1 million or such other amount as may be prescribed;*

(s) *any other person prescribed for the purpose of this provision."*

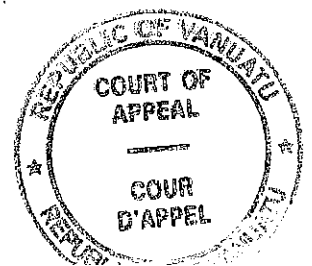
12. It was common ground on the appeal that there has not been any prescription of "any other person" pursuant to s.2(s).
13. The repeated use of the disjunctive "or" in s.2 indicates that an entity will be within the definition of "reporting entity" if it is within any one or more of the listed categories.
14. One cannot help but be struck by the extensive range of persons and entities engaged in financial transactions who are brought within the definition of reporting entity by s.2. It is the evident intention of the AML Act that it should apply to a broad and diverse range of commercial activities.

The Fund

15. The Fund was established by the Government of Vanuatu in 1986 as Vanuatu's first social security system. Its purpose when originally established was to provide the people of Vanuatu with financial support when they reach retirement age. The legislation governing the Fund is the Vanuatu National Provident Fund Act (VNPF Act). Its long title is:

"To establish a National Provident Fund, to provide for contributions to and the payment of benefits out of the Fund, and for matters connected there with and incidental there to."

16. The VNPF Act establishes a scheme by which contributions are paid into the Fund and managed in such a way so as to accumulate over time so as to be a source of a retirement benefit. Contributions will come from 3 principal sources; payments made by employers in respect of their employees; contributions by employees themselves; and contributions by self-employed persons. The VNPF Act also provides that persons may make voluntary contributions to the Fund.
17. Section 14 establishes the Fund and specifies that all contributions required to be made under the VNPF Act together with all other revenue of the Board is to be paid into it. Payments required to be made by the Board under the provisions of the VNPF Act are to be made out of the Fund.
18. Section 2 establishes the Board as a body corporate. Presently, the Board comprises eight persons; two persons representing employers, three persons representing employees; two persons representing the Government of Vanuatu, and the Fund's General Manager.



19. By s.4A, the Board is charged with responsibility for the efficient and proper management and control of the monies of the Fund. Section 4A(2) also provides for the Board to have the following functions:

(2) Without limiting subsection (1), the Board has the following functions:

(a) To approve the following documents of the Fund which are to be prepared by the General Manager:

- (i) the strategic plan; and
- (ii) the annual budget; and
- (iii) the annual implementation plan; and
- (iv) the annual report on the operations of the Fund; and
- (v) any donor report; and
- (vi) the organizational structure of the Fund; and

(b) to approve the Policies and Operations Manual of the Fund, which must be consistent with this Act, and which must specify the following matters:

- (i) the project or scheme selection and prioritization criteria; and
- (ii) the Fund's interest rate structure in respect to loans, types of financial products, criteria for their selection and their terms and conditions; and
- (iii) any other matters relating to the objectives of the Fund; and
- (iv) the investments of the Fund, and

(c) to collect contributions; and

(d) to distribute contributions to members' accounts; and

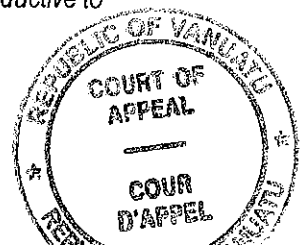
(e) to invest contributions according to the investment guidelines; and

(f) to collect revenue through rental, dividends or any other business or investments; and

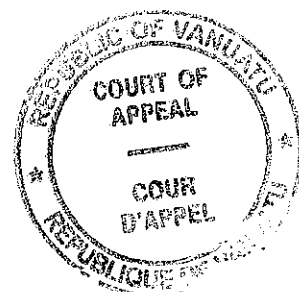
(g) to invest in equity, direct loans and other investments as approved by the Board; and

(h) to carry out any other functions that are necessary or required to be carried out for the purposes of this Act.

20. Section 5(1) vests in the Board power "to do all the things which are necessary or conducive to the carrying out of the objects of the [VNPF] Act".



21. Section 15 constitutes the Board as the trustee of the Fund. Subsection (2) imposes the following specific duties on the Board:
- (a) ...
 - (b) to ensure that the trust property is vested according to the terms of the Trust;
 - (c) to manage the trust property in a prudent, competent and professional manner;
 - (d) to preserve the trust property ;
 - (e) ...
22. Each person for, or by, whom contributions are made to the Fund becomes a member of the Fund. The Board is to establish three accounts for each member: a retirement account, an investment account and a "medi-save" account (s.30) and at the end of each year is to notify members of the balance in their individual accounts (s.31). By s.16 the monies in the Fund are to be invested by the Board according to investment guidelines approved by the Minister after consultation with the Reserve Bank of Vanuatu. The Board must ensure that each investment complies with:
- (a) the investment guidelines; and
 - (b) the prudential standards in place from time to time; and
 - (c) the portfolio composition; and
 - (d) the diversification; and
 - (e) the expected rates of return and the associated risks; and
 - (f) the Fund liquidity; and
 - (g) such other matters as the Board considers appropriate for the prudent management of the investment.
23. The Board is empowered to appoint Fund Managers who meet specified criteria (s16AB).
24. All expenses incurred by the Board in carrying out the provisions of the VNPf Act and in connection with the administration of the Fund are to be paid out of the Fund (s.19). The Board must maintain and have audited proper accounts (s.20) and in each year is to submit a report of its activities, together with the audited accounts, to the Minister (s.21).



25. Members attaining the age of 55 years or becoming totally and permanently disabled are entitled to have the amounts standing to the credit of their accounts paid out (s.38). In addition, the VNPF Act specifies other circumstances in which the amounts standing to the credit of a member's account may be paid out.
26. The Board is authorised to establish, and has established, schemes by which "educational or micro loans" may be made to members (s.44A). We will return to these.
27. Only one annual report of the Fund was adduced into evidence at the trial. That was the 2019 Report which was tendered by the present appellants. The respondents did not tender any reports for the 2020, 2021 or 2022 years although, if prepared and submitted in compliance with s.21 of the VNPF Act, they must have been available.
28. The 2019 Annual Report indicated that at that time the Fund had 75,984 members; that VT2,389,352,103 had been received by the Fund as contributions; and that surcharges (additional amounts payable by those employers who fail to pay the required contributions on time) amounted to VT63,752,784. These surcharges are not credited to the individual members' accounts but become instead part of the general revenues of the Fund.
29. The balance sheet in the 2019 Annual Report indicates that the Fund had net assets of VT22.25 billion. It also revealed that the net return on investment of the monies in the Fund was VT1,049,015,000.

The Appellants' Contentions

30. The appellants contend that the Board is a reporting entity as defined in the AML Act because it is within the following categories in s.2:

(l) *a person carrying on a business:*

(i) ...

(ii) *as a trustee in respect of property of other persons; or*

...

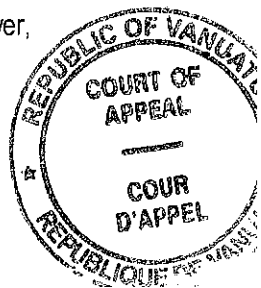
(r) *a person carrying on the business of:*

(i) *lending, including consumer credit or mortgage credit, and financing of commercial transactions; or*

...

(xii) *dealing in property (other than real estate) exceeding VT 1 million or such other amount as may be prescribed.*

31. At first instance, the appellants had also contended that the Board was "a licensee within the meaning of the Financial Institutions Act [CAP 254] referred to in s.2(b) of the AML Act. However, the appellants did not maintain that contention on the appeal.

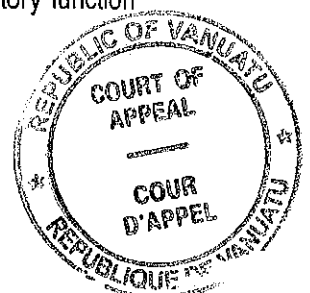


The Decision of the Primary Judge

32. The Judge noted that s.2(l) refers to a person carrying on a "business" of a defined type and that s.2(r) refers to the carrying on of the business of a defined type. He accepted the respondents' submission that the Board does not operate a "business" in the generally understood meaning of that term. Instead, the Judge regarded the Board as undertaking a statutory responsibility to hold funds for the Fund members and to deal with those funds in the best interests of those members. The Judge also considered it significant that the Board does not manage the Fund for its own profit.
33. The Judge regarded s.2(l)(ii) as referring to a trustee company holding and managing funds on trust but doing so with a view to personal profit. He held that the Board did not answer that description.
34. The Judge reached a similar conclusion with respect to s.2(r)(i) and (xii), finding that the activities of the Board did not constitute a business of the kind to which those sub-paragraphs refer.

The Appeal to this Court

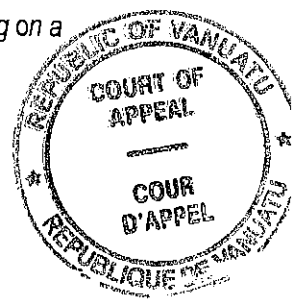
35. On the appeal, the appellants submitted that the Judge should have found that the Board was carrying on a business; that the business involves the making of investments, including significant investments in real estate, as well as entering into other business transactions; and that the Board was doing so as a trustee in respect of the funds of other persons, within the meaning of s.2(l)(ii).
36. In relation to s.2(r)(i), the appellants repeated their submissions at first instance that the Board was carrying on the business of lending and, in relation to section 2(r)(xii), that the Board was carrying on the businesses of dealing with property (other than real estate) exceeding VT1 million.
37. Mr Blake, for the Board, accepted that the Board is a trustee of funds contributed by the members of the Fund and that, in the management of those Funds, the Board buys property, both real and personal, makes loans to its members and otherwise "deals" in property. He submitted however that the Board does not satisfy a fundamental prerequisite for a reporting entity as it does not "carry on a business". Mr Blake submitted that this was so for a number of reasons:
 - a) The Board does not have a licence to carry on business as a trustee under the Business Licence Act or any licence under the Company and Trust Service Provider Act 2010;
 - b) Instead of carrying on a business, the Board acts in discharge of a statutory function under the VNPF Act;



- c) The Board does not generate revenue and profit for itself, as would an entity carrying on a business;
 - d) While the Board does engage in activities with a view to earning a profit, that profit is for the Fund and not for the Board itself; and
 - e) The lending in which the Board does engage is different in character from the lending of institutions such as banks.
38. Mr Blake also submitted that a strong inference as to the statutory intention may be drawn from the circumstance that neither the Board nor the Fund is mentioned by name in the s.2 list of reporting entities. This is in contrast with the Reserve Bank, which is named in s.2(a) and with other entities licensed or regulated under legislation of the Parliament of Vanuatu, with 10 different classes of such entities listed s.2(b) - (k). Mr Blake also submitted that VNPF was such a prominent institution in Vanuatu when the AML Act was enacted in 2014 that it could not have been overlooked in the drafting of s.2. The inference therefore should be drawn that the Board was not intended to be subject to the AML Act.

The Meaning of "Carrying on a Business"

39. S.2(l) refers to a person carrying on a business of the specified type whereas s.2(r) refers to a person carrying on **the** business of the specified kind. It was common ground that no significance was to be attached to this change from the indefinite article to the definite article.
40. The expression "*carrying on a business*" is a composite expression and, while consideration of its individual elements is helpful, it is to be construed as such. The expression has received a good deal of attention in other jurisdictions, albeit in different statutory contexts. The authorities indicate that the expression "*carrying on a business*" and its counterparts is capable of a broad meaning and one which may vary according to context. In Australia, the carrying on of a business is generally understood as involving the conduct of some form of commercial enterprise, systematically and regularly: *Hyde v Sullivan* (1955) 56 SI (NSW) 113 at 119. A number of the later authorities have adopted that meaning.
41. The importance of having regard to context in the task of statutory construction is confirmed by s.8 of the Interpretation Act which requires the intention of Parliament to be derived from the words of the Act having regard to the whole of the Act and the specific context in which the words appear. ~~The overall context is that the AML Act is legislation directed to the detection (and thereby avoidance) of money laundering and the financing of terrorist activities. They are activities which may be engaged in by individuals or groups of persons as well as by corporate entities. The opportunities for money laundering and financing of terrorist activities may be found in the diverse range of activities in which people may engage. These circumstances, and purposes of the legislation, suggest that a broad understanding of the expression "*carrying on a business*" may be appropriate.~~



42. On the other hand, assistance can be derived from other usages of the expression "*carrying on a business*" in the AML Act, in particular, in sub paras (m), (n), (q) of s.2. In each of those subparagraphs, the term seems to be a reference to the conduct of an ongoing commercial enterprise. For example, in s.2(m), the business of an insurer; in s.2(n), the business of preparing payroll or delivering payrolls; in s.2(q), a business issuing, selling or redeeming traveller's cheques or money orders; and in s.2(r), a business of financial leasing and a business participating in securities issues and providing financial services relating to such issues. Other examples of a like kind could be given.

43. We also note that by a number of provisions, the AML Act imposes obligations with respect to a "*business relationship*". That term is defined in s.1(1) to mean:

"A business, professional, or commercial relationship which is:

- a) connected to the professional activities to a reporting entity;*
- b) expected at the time when the conduct is established, to have an element of duration."*

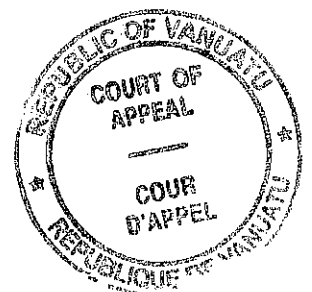
44. In our view, the context of the AML Act as a whole and the usages of the expression "*carrying on a business*" in it indicate that the expression is a reference to the conduct of a commercial enterprise carried on regularly and systematically and generally with a view to profit. That being so, we consider it appropriate to apply the understanding of the expression "*carrying on a business*" stated in *Hyde v Sullivan* and in the later Australian authorities.

45. However, it is one thing to say that the carrying on of a business is an activity ordinarily conducted with view to the making of a profit: it is another to say that it is directed to the making of a profit for the personal benefit of the entity carrying on the business. There is no reason in principle why a business may not be carried on with a view to making a profit for the benefit of another and there are commonplace instances of that being so. For that reason, we do not regard Mr Blake's submission that the Board was not carrying on one of the requisite kinds of business because it was not doing so for its own profit or advantage to be decisive of the issue now before the Court. Nor do we think that any significance should be attached presently to the fact that the Board is not licensed under the Business Licence Act or the Company and Trust Service Provider Act.

Carrying on a Business as a Trustee in respect to the Property of Others?

46. We will address the activities relied upon by the Board in the same sequence they appear in s.2.

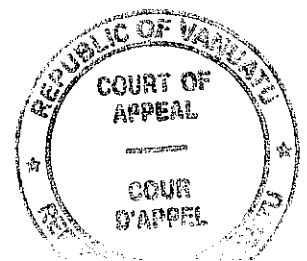
47. Section 2(1)(ii) refers to "*a person carrying on a business ... as a trustee in respect of property of other persons.*"



48. There is ambiguity in s.2(l)(ii). It could be understood as referring to the commercial activity of providing trustee services. Alternatively, it could be understood as referring to the particular commercial activities in which a trustee engages in the discharge of its trusteeship.
49. The first appellant presented his case on the basis that the second of these alternatives is the intended meaning. Accordingly, he emphasised the day-to-day activities in which the Board engages. Counsel noted that the Board makes financial investments which are similar to those made by other financial institutions, including investing monies on fixed interest term deposits, buying Government bonds, making investments in equities and property, and making loans. In addition, the first appellant drew attention to the substantial property investments made by the Board from which the Fund derives lease and rental income.
50. There was no dispute that the Board does, in its trusteeship of the Fund, engage in activities of this type. If the criteria for classification as a reporting entity under s.(2)(l) required engagement in activities of this kind, there is little doubt that the Board should be characterised as a reporting entity.
51. However, we consider that the first of the two alternative meanings outlined above is the appropriate meaning. Read as a whole, s.2(l) seems directed to entities engaged in the business of holding, managing or administering the property of others. That is particularly evident in sub-para (l)(i) which refers to the carrying on of a business administering or managing property on behalf of an international company or any other person. That matter of expression does not seem an apt way of referring to the particular activities undertaken by the person administering or managing the property but is apt as a description of the character of a business.
52. The undertaking for reward of several trusteeships is a recognised form of commercial activity. Given the purpose of the AML Act, it is understandable that the Parliament intended that businesses of this kind should be reporting entities.
53. Applying the meaning which we think appropriate, the evidence indicates that the Fund is the only fund of which the Board is trustee. It does not hold itself out as able and willing to take on the trusteeship of other funds or property. It does not undertake multiple trusteeships as a commercial activity. In short, the Board does not carry on the business of providing trustee services.
54. We conclude therefore that the Board does not “*carry on a business*” as trustee in respect of the property of others and, accordingly, that the Judge was correct to hold that it is not within s.2(l)(ii) of the AML Act.

The Business of Lending

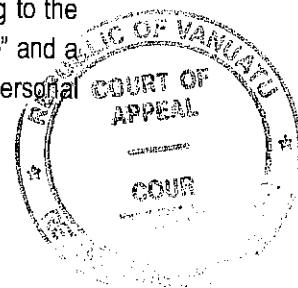
55. Section 2(r)(i) makes a person carrying on the business of “*lending, including consumer credit or mortgage credit, and financing of commercial transactions*” a reporting entity.



56. The Board does make loans using the monies in the Fund. The evidence discloses four principal forms of lending:
- a) educational, or micro loans and other advances to members of the Fund;
 - b) advances, characterised as loans in the 2019 Annual Report, to subsidiaries;
 - c) a loan to Interchange Ltd (ICL);
 - d) a loan to Air Vanuatu Operations Ltd (AVOL).
57. The Annual Report for 2019 also shows that the Board has made a loan to Telecom Vanuatu Ltd (VT804,077,000 on 31 December 2019) but there was no other evidence about that loan and the parties did not refer to in their submissions. In those circumstances, we will not mention it further.
58. Before referring to these four forms of lending in more detail, we note that it was not in dispute that neither the Board nor the Fund (which is not a body corporate) holds a licence to carry on a banking business under the Financial Institutions Act.

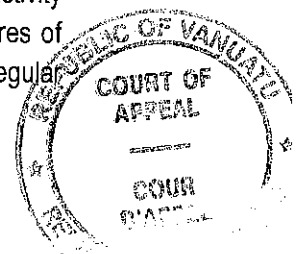
Educational, micro loans and other advances

59. There seemed to be little dispute about the educational and micro loans made from the Fund.
60. In October 2008, the Board established Member Financial Services Ltd (MFSL) to provide educational or micro loans to members of the Fund. It was not suggested that any distinction should be drawn between the Board and MFSL in the determination of the issues on the appeal. The idea in 2008 was that loans could be made to members to pay for school fees or to meet particular personal needs. The amount of a loan could not exceed 85% of the amounts standing to the credit of the members' accounts. Interest is charged on the loans and provision is made for their repayment.
61. Although the loans are unsecured, the amount standing to the credit of the member may be attached, sequestrated, or levied upon in respect of the debt of the member.
62. The 2019 Annual Report recorded that in that year, members took out 4,022 loans against their VNPf savings, that a total of VT499,489,378 was on loan and that the Fund had earned VT59.9 million in interest from loans of this kind. It also recorded that the loans were typically taken out to help pay for school fees, housing materials, personal expenses and traditional ceremonies such as weddings and funerals.
63. The evidence at trial included the loan agreement made with one member made in July 2021. It has the appearance of a standard form loan agreement between members and MFSL. The loan principal was VT157,000; the interest rate (stated to be variable) was then 10.06%; the term was 23 months; fortnightly repayments were required; and the loan was secured by "Your VNPf Guarantee" (which we understand to be a guarantee secured by the amounts standing to the member's credit in his VNPf accounts); and the member had to pay a "processing fee" and a "guarantee fee". In short, the loan agreement seems not to be materially different from a personal



loan which could be obtained from a commercial lender. The loan statements for the loan were in evidence. These showed the regular debiting of interest to the member on the outstanding balance and the making (and accounting for) regular repayments.

64. In November 2022, by reason of a decision of the Board, MFSL ceased making loans and the outstanding loans have been classified as "*legacy loans*".
65. MFSL did not make loans to non-members. Nor did it take deposits from members or non-members as a source of funds for the making of the loans.
66. Since November 2022, the Board has established a lending scheme known as the "*Student Education Support Scheme*" (SESS). This operates in much the same way as did MFSL, save that the amount standing to the credit of a member may now also be used as a form of guarantee for a loan made to a qualifying student who is not a member.
67. Section 62 of the VNPF Act establishes, with relatively little detail, "*The Member Benefit Protection*" which we understand to be a scheme allowing the Board to advance to members' medical benefits, housing benefits, agricultural benefits, natural disaster benefits and any other benefits it may determine.
68. Following Tropical Cyclones Judy and Kevin in early 2023, the Board established a scheme by which members could obtain early access to monies standing to the credit in their accounts and borrow from the Fund. We understand this to be a Member Protection Benefit scheme. The scheme allows for a withdrawal of 30% of the combined balance of the member's Investment and Medi-save accounts and the borrowing of up to VT50,000, subject to the borrower not exceeding 85% of the combined amounts standing to member's credit in the Investment and Medi-save accounts.
69. Persons who are not members of the Fund cannot borrow from the Fund under the scheme.
70. The evidence at trial included documents relating to a Disaster Recovery Loan of VT50,000 made to one member in March 2023 following Cyclones Judy and Kevin. Those documents did not include the loan terms but did include an indemnity from the member to the Fund.
71. In addition, the evidence included some documents relating to a student loan made under the SESS to a student (apparently not a member of the Fund) but supported by guarantees from two members.
72. There was no dispute at the trial that the documents for each of these forms of loan were examples of the many loans made by the Board under the respective schemes.
73. The evidence concerning the educational and micro loans, the SESS loans and the Member Benefit Protection loans indicates that the Board does, in a significant way, engage in the activity of lending, and that it does so in a regular and organised way with many of the features of commercial lending (loans for a fixed term, the charging of interest, the requiring of regular



repayments the provision of security). Moreover, under the SESS, loans can be made to non-members.

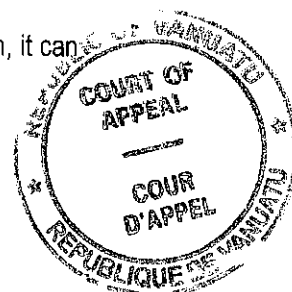
74. It is true that the loans are in some respects an advance of the members' own monies in the Fund and, at least in the case of the Member Benefit Protection, the advances are described as "benefits". However, the description given to the advances cannot alter their underlying character as loans. It is relevant that the interest charged on the various forms of loan is a significant source of income for the Fund.
75. It is also true that the fundamental function of the Board is the administration of a scheme for the provision of retirement benefits and that the making of loans to members may be an incident of that overall function. Nevertheless, the activities of the Board in making the educational and micro-loans, SESS loans and the disaster relief loans indicate, in our view, that the Board is carrying on the business of lending.
76. This conclusion is sufficient to indicate that the appeal must be allowed.

Loans to Subsidiaries

77. The appellants referred to loans made from the Fund to FMSL and BOUFFA. Each of these entities is a wholly owned subsidiary of the Fund. It is MFSL which made the educational and micro-loans. The 2019 Annual Report indicated that BOUFFA is a land holding company.
78. The advances by the Fund to these companies appear to be in a nature of intra – company loans. As such, they can hardly be evidence that the Board is carrying on the business of lending funds in the way described above.

ICL Loans

79. ICL is the owner of the submarine communication cable for the whole of Vanuatu. In 2014, the Board provided ANZ Bank with a VT800,000,000 term deposit as a guarantee for a loan from ANZ to ICL. It is unclear what, if any, consideration the Fund received from IPL in respect of the provision of the guarantee but from ANZ it received only interest on the term deposit. In 2020, the Board agreed to advance monies from the Fund to ICL so that it could discharge its indebtedness to ANZ. In that way, the Board became the lender to IPL instead of ANZ and thereby entitled to the agreed higher rate of interest than it was receiving on its term deposit with the ANZ.
80. It is pertinent to add that the Fund owns 37.5% of the equity in ICL.
81. The loan to ICL appears to be one of a kind. Given its history and being a one off loan, it can hardly be regarded as evidence of the Board carrying on the business of lending.



The Loan to Air Vanuatu Operations Ltd (AVOL)

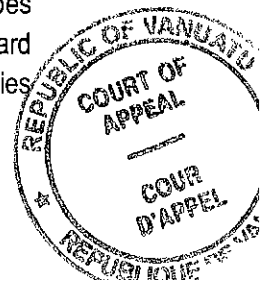
82. The 2019 Annual Report indicates that, before April 2018, the Fund had advanced two loans to AVOL. The first was in August 2009 for VT340,000,000 and the second was in 2013 for VT660,000,000. In April 2018, the two loans were amalgamated into to one. The loan is for a fixed term and earns interest. At least when the two individual loans were made, they were secured by Government guarantees. It is unclear whether that continues to be the case.
83. The evidence did not indicate the circumstances in which the Fund came to make the two loans. There was however no indication in the evidence that the Board had held itself, or the Fund, out as sources of commercial loans in 2009 and 2013. Nor was there evidence that the Board made the loans as part of a commercial of activity. We do not consider that they should be regarded as evidence of the Board carrying on the business of lending.

Conclusion on the Activity of Lending

84. Of the four forms of lending to which the appellant referred, it is only first which we consider can properly be regarded as indicating that the Board is carrying on business as a lender. However, that is sufficient to indicate that the appeal should be allowed.

Dealing with Property other than Real Estate

85. The appellants contended that the Judge should also have found that the Board carries on the business of "*dealing in property (other than real estate) exceeding VT1 million or such other amount as may be prescribed*" within the meaning of s.2 (r)(xii). There was no suggestion that any other amount had been prescribed for the purposes of this sub-paragraph.
86. The appellants' submissions at trial with respect to s.2(r)(xii) were relevantly brief. They were to the effect that, by receiving, investing, accounting for, and paying out when required, the monies of the Fund, the Board was dealing with those monies and that these are "*property*" for the purposes of the sub-paragraph. We note that the term "*property*" is defined in s.1(1) of the AML Act in very broad terms and is capable of encompassing the monies in the Fund.
87. The Judge rejected the submission of the appellants, holding that the activities undertaken by the Board did not constitute a "business". We reach the same conclusion, although we would prefer to say that the activities in which the Board engages in relation to the monies in the Fund do not constitute the carrying on of the business of dealing with property of the specified kind. Our reasoning with respect to the business of a trustee in respect of the property of others in relation to s.2(l)(ii) is equally applicable here. The Board does not hold itself out as being in the business of dealing in money; it does not conduct a business of money management; and it does not deal with monies other than those in the Fund. In dealing with that money, the Board discharges functions and responsibilities imposed by statute. We do not agree that the activities



in which it does engage in the discharge of its statutory responsibilities constitute the carrying on of the business of dealing in money.

Trustee of a Superannuation Scheme

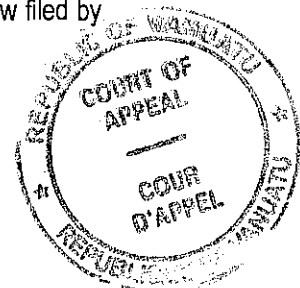
88. At the trial, the appellant argued that the Board was also within s.2(r)(x) of the AML Act which provides: *"a person carrying on the business of trustee administrator or investment manager of a superannuation scheme, under which contributions are made by salary deductions and withdrawals are for a limited purpose such as retirement"*.
89. The appellants did not repeat their trial submissions on the hearing of the appeal and it is understandable they did not do so. As Mr Blake pointed out, s.2(r)(x) shows that the Parliament did give attention to the question of whether a trustee administrator or investment manager of a superannuation scheme should be a reporting entity. It decided that such trustees and managers should be a reporting entity but not if they are the administrator or manager of a scheme under which contributions are made by a salary deductions and withdrawals are fully limited purposes such as retirement. The VNPf Act appears to establish a scheme of just that kind.
90. In any event, the reasoning above concerning s.2(l)(ii) is equally applicable to s.2(r)(x).

General Considerations

91. We accept Mr Blake's submission that it is striking, given the Fund's size and prominence in Vanuatu that it, unlike the Reserve Bank of Vanuatu, is not mentioned by name in the s.2 categories. Moreover, despite attention being given to entities licensed or regulated under particular legislation of the Parliament of the Vanuatu, the AML Act makes no express reference to the Board, the Fund or to the VNPf Act itself. As the Fund could hardly have been overlooked by the Parliament, there may have been an intention that neither the Board nor the Fund should be a reporting entity. However, we are to construe the AML Act according to its terms. On that basis, we are satisfied that the Board is, by its lending activities, within s.2(r)(i) and that it is therefore a reporting entity.

Disposition of the Appeal

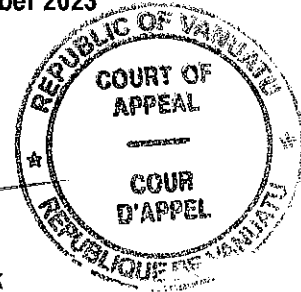
92. ~~For these reasons the appeal is allowed. The finding of the trial Judge that the Board is not a reporting entity within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act is set aside. As the issues concerning Mr Letlet and Mr Achary are now moot, there is no need to remit the matter to the Supreme Court for consideration of the respondent's reliance on the decision in *Wednesbury Corporation*. The application for judicial review filed by the present respondents on 3 November 2022 is dismissed.~~



93. The respondents are to pay the appellants' costs of and incidental to the appeal fixed in the sum of VT100,000. They are to pay the appellants' costs of the trial in a sum to be taxed, if not agreed.

DATED at Port Vila this 17th day of November 2023

BY THE COURT



Hon. Acting Chief Justice Oliver A Saksak