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

Civil Appeal
Case No. 24/848 COA/CIVA

BETWEEN: VANUATU FERRY LIMITED
Appellant

AND: REPUBLIC OF VANUATU
Respondent

Date of Hearing:	***8 May 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice D. Aru*** ***Hon. Justice E.P. Goldsbrough*** ***Hon. Justice W.K. Hastings***
Counsel:	***M.J. Hurley for the Appellant*** ***L. Huri of the Office of the Attorney-General for the Respondent***
Date of Judgment:	***17 May 2024***

JUDGMENT OF THE COURT

Introduction

1. This appeal arises from the outbreak of Covid, and the declared state of emergency that followed when various regulations and orders were issued controlling the return of ships, airplanes and people to Vanuatu. They had the effect of preventing the Claimant Vanuatu Shipping Ltd.'s ship "Vanuatu Cargo" from returning to Villa for a considerable period. In a judicial review liability judgment on 10 December 2021, the Supreme Court made declarations that certain actions by the Republic of Vanuatu through the Director of the National Disaster Management Office were unlawful.[1] That judgment was not appealed.

2. This appeal relates to the damages judgment by a different judge that followed the liability judgment. That damages judgment was issued on 16 February 2024.[2] This was a damages judgment for losses arising out of the exclusionary shut-down. The judge found that the orders had the effect of preventing Vanuatu Ferry Limited, the appellant ("***Vanuatu Cargo***") from

[1] *Vanuatu Ferry Ltd v Republic of Vanuatu* [2021] VUSC 328.
[2] *Vanuatu Ferry Ltd v Republic of Vanuatu [2024] VUSC 16*

berthing in Vanuatu after it had returned to home waters. This was for the period from 3 July 2020 to 24 July 2020. He disallowed damages for the preceding period of 25 May 2020 to 27 June 2020 when the boat was in dry dock in Brisbane, unable to return home because of the orders. Vanuatu Ferry maintains that it is entitled to payment for that earlier period in the sum of VT10,103,130 together with interest at 5%.

3. The essence of the grounds of appeal were that the Judge, in the damages hearing, had ignored the uncontested evidence that Vanuatu Ferry's vessel had been delayed for 33 days, from 25 May 2020 to 27 June 2020, from entering Vanuatu waters by unlawful and unreasonable decisions of the state. It was also a less important ground of appeal that the Court erred by restricting the award of interest on the sum that was awarded to interest of 5% for the period from the date the entitlement arose on 22 July 2020 to the date of judgment. It is submitted that the interest should be payable until the date of payment. It is also submitted by the appellant that the damages hearing judge made an arithmetical error in its favour, that it proposes be rectified.

Brief background

4. The vessel in question is a Vanuatu trade ship known as the Vanuatu Cargo. In March 2020 it went to Australia for slipway maintenance services. In the same month while it was in Australia a state of emergency was declared in Vanuatu arising from the Covid 19 pandemic. This declaration was seen as preventing the Vanuatu Cargo from returning to its home port of Vila.

5. Through April and May, when the vessel was being repaired, Vanuatu Ferry wrote a number of letters to government entities seeking approval for the vessel's return to Vanuatu when the work was finished.

6. The vessel was ultimately unslipped on 25 May 2020 and was, from that time, ready to return to Vanuatu. However, because of the various prohibitions that will be referred to later, the vessel, with no guarantee that it would be allowed into Vanuatu, remained moored. It was in this position until 27 June 2020, a delay of 33 days.

7. On 27 June the vessel left Australia and sailed to Vanuatu. It arrived at the Port Vila Harbour on 3 July 2020. However, because of the various orders that are in question, and the lack of response from the respondent to the request to allow the vessel to return, there was a further delay of 21 days. Ultimately the crew was able to moor the vessel and disembark on 24 July 2020.

8. It can be seen therefore that there are two periods to be considered. The first was the period when the vessel was in Australia, the second when it was waiting in the Port Vila Harbour to be allowed to moor.

The first decision of 10 December 2021 relating to liability

9. The decision, while not challenged, is essential background, as it sets out the grounds of liability from which the damages could be considered. In that decision, having recorded the background facts, the Judge considered the lawfulness of government orders numbers 71 and 77 issued under the authority of the Disaster Risk Management Act 2019. The various findings were set out in paragraphs 146 and 147 of the judgment, which are a neat summary of the decision:

> *"146. In conclusion, I answer the issues as follows:*
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> *a. Issue 1: Did the Director of Immigration receive VFL's letter to him dated 3 June 2020? **"Yes"**.*
>
> *b. Issue 2: By refusing from 15-22 July 2020 to permit food and water to be delivered to the Vessel's crew, did the State breach its obligations under the Convention to ensure the safety of crew members at sea? **"Yes"**.*
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> *c. Issue 3: Were Decisions 1 and 2 made in breach of the State's obligations under Article 28 of IHR and therefore unlawful? "**Yes**."*
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> *d. Issue 4: Given that the State through its various Ministries, Departments and entities was on notice from at least 28 May 2020 that the Vessel was shortly to be en route to Vanuatu waters, were Decisions 1 and 2 of such irrationality and unreasonableness as to warrant the Court's intervention under Wednesbury principles? "**Yes**."*
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> *147. Accordingly, judgment is entered for the Claimant and the following declarations made:*
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> *a. Declaration that the decision of the Defendant, through its Director of the National Disaster Management Office, of 2 July 2020 by reliance on Orders No. 71 and 77 of 2020 to refuse to allow the Claimant's vessel registration no. RV-6443 known as Vanuatu Cargo to enter the port of Port Vila, Efate, Republic of Vanuatu was unlawful;*
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> *b. Declaration that the decision of the Defendant, through its Director of Immigration and Passport Office, of 2 July 2020, to refuse entry for all passengers on board Vanuatu Cargo to enter the port of Port Vila, Efate, Republic of Vanuatu, was unlawful; and*
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> *c. Declaration that Orders No. 71, 77 and 94 of 2020 with reference to locally registered ships were of such unreasonableness as to warrant the Court's intervention under Wednesbury principles and were unlawful."*

10. The Judge had earlier found that Vanuatu Ferry had previously brought the plight of the vessel being unable to return to Vanuatu to the attention of the authorities. This was a relevant matter for the government's consideration of Covid related Orders No. 71 and 77 of 2020. The orders did not specifically provide for how locally registered ships were to be treated, but the State did

not recognise such ships as an exception, and in doing so it failed to take into account relevant consideration.[3]

11. The Judge went on to find that the government agency's failure to respond to the Vanuatu Ferry queries was not reasonable. The Minister appeared to have a closed mind.[4] The Judge held:[5]

> *"The unreasonableness of the State's actions is underscored by the making of Order No. 94 of 2020 eleven days after the Decisions were made. That Order prohibited the entry into Vanuatu waters of all locally registered vessels who were outside Vanuatu waters. The Order was for vessels who were outside Vanuatu waters. However, the situation of locally registered ships already in Vanuatu waters (the Vessel) continued to be completely overlooked."*

12. Although the Judge in her decision did not specifically refer to bad faith, she did quote from the decision of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*.[6] She emphasised and quoted Lord Greene MR's statement in that case that in a judicial review the decision in question could be held to be unreasonable and unlawful when:[7]

> *"It is so unreasonable that it might almost be described as being done in bad faith; and in fact all these things run into one another."*

13. Given this quote, and the strength of the Judge's criticism, we have no doubt that she considered that the respondent had acted in bad faith, not in the sense of dishonesty or malice, but by acts of extraordinary unreasonableness. This was a highly relevant finding, as in submissions the respondent sought to rely on s 44 of the Disaster Risk Management Act 2019 which provides:

> ***"44. Immunity from legal proceeding***
>
> *The following persons are immune from any legal proceedings for any damage, loss, death or injury sustained during a state of emergency or because of anything done or omitted to be done in good faith under this Act:*
>
> *(a) the Minister on behalf of the State; and*
> *(b) the Director General; and*
> *(c) the Director; and*
> *(d) an emergency services officer; and*
> *(e) any other person nominated by the Director to carry out his or her functions under this Act."*
>
> [Emphasis added]

14. As can be seen, the exclusion from liability does not apply if there has been bad faith. The section had been raised before the Judge, and by the strong terms in her judgment it can be

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[3] *Para 140.*
[4] *Para 141.*
[5] *Para 142.*
[6] *[1947] EWCA Civ 1 and [1948] 1 KB [223] at [229].*
[7] *At page 229.*

assumed that she had found bad faith. Therefore s 44 immunity did not arise. Presumably she would have reached the same decision if s 20 of the National Disaster Act 2000 had been relied on, which also has a good faith requirement in its immunity provision.

The second decision relating to damages

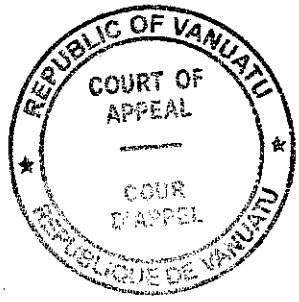
15. A finding of bad faith was certainly the assumption of the second Judge who considered damages at the subsequent hearing. That is the judgment which is under appeal. In writing the damages judgment the Judge referred specifically to the respondent having acted in bad faith in promulgating the orders and not allowing the Vanuatu Cargo to return. The Judge therefore accepted Vanuatu Ferry's submission that s 44 did not apply and there was no immunity from damages for the respondent. Presumably again he would have taken the same position if s 20 of the National Disaster Act had been raised. There has been no cross-appeal, and this part of the judgment was not challenged by Vanuatu Ferry.

16. What was challenged by Vanuatu Ferries, and what is the subject of this appeal, was the Judge's determination as to the quantum of damages. The Judge first declined to award damages for damage to reputation, and that aspect of his judgment is not appealed. What was, however, the subject of the appeal was his determination[8] that the respondent was only liable for costs incurred for 21 days while the vessel was anchored off Port Vila harbour from 3 July 2020 to 24 July 2020. The total sum for that period was, in his calculations, VT10,103,130. The consequence was that the respondent failed in its claim for the longer and earlier period the ship was delayed departing Australia, and it is this part of the judgment that is challenged. It is argued for Vanuatu Ferry that the Judge failed to give any valid reason as to why the claim by Vanuatu Ferry for losses while the vessel was kept in Australia from 25 May 2020 to 27 June 2020 was disallowed. It is submitted that the appeal should be allowed as a consequence, and extra damages of VT 10,826,222 awarded.

Discussion

17. We agree that it is not apparent from the words of the judgment why the Judge distinguished between the losses arising in Australia while the vessel was unable to leave Australia, and the losses that arose when the vessel was unable to berth in Vanuatu.

18. There may have been distinction drawn between the government action in relation to the two periods. In the period up to the vessel arriving off Vanuatu on 3 July 2020, the communications from the government about the state of emergency had all been general and not specific to the circumstances of Vanuatu Ferry. Vanuatu Ferry had written on a considerable number of occasions asking for permission to come to Vanuatu, but there had been no response. The vessel had therefore remained in Australia. However, the situation became more acute when the vessel arrived off Vanuatu on 3 July 2020.



[8] *At paragraph 23 of his decision.*

19. On 3 June 2020 the Vanuatu Ferry's commercial manager had written to the director of Immigration and provided two passports and associated visa and permits along with a repatriation plan for the director's consideration. The crew were in the vessel. There was no formal response to that letter. There was then further correspondence from Vanuatu Ferry to which there was no response. Then on 11 June 2020 by Order No. 81 of 2020 the state of emergency was extended for another 30 days. The Judge might have seen a distinction between the time from when the ferry was off the coast of Vanuatu and able to come into port immediately, and the preceding period when it was stuck in Australia.

20. We have reservations about the finding of *Wednesbury* unreasonableness in the liability judgment in relation to the regulations or the lack of response to Vanuatu Ferry's request for entry. Further as will be seen below we query whether any damages at all could have been ordered for either period. However, it is not for us to determine that, as there has been no cross-appeal against these findings in that judgment. However in relation to this appeal against the refusal to order damages for the first period, there are fundamental issues as to the availability of damages which we now address.

Availability of damages for judicial review

21. It is well settled that actions brought in reliance on public law to enforce the due performance of statutory or other regulatory duties by way of prerogative writ or judicial review do not give rise to a claim of damages, independent from an established private law cause of action. The classic statement was that of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*:[9]

> *"The question is whether, if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority. It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action ..."*
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> [Emphasis added]

22. This statement has been cited in many decisions in Australia and New Zealand.[10] The inability to obtain damages in Vanuatu for judicial review has been referred to in academic writing[11], as well as academic writing in New Zealand[12] and Australia.[13]

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[9] *[1995] 3 All ER 353 at [363]–[364].*

[10] *McNamara v Auckland City Council [2012] NZSC 34, [2012] 3 NZLR 701; Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725; and Lock v Australian Securities and Investments Commission (ASIC) [2016] FCA 31, (2016) 334 ALR 250.*

[11] *Jenshel's Annotated Civil Procedure Rules Vanuatu at 17.9.3*

[12] *Baigent Damages for Breach of Natural Justice and Eva McRae Public Interest Law Journal of New Zealand (2021)*

[13] *Military Awards for Public Law Wrongs: Australia's Resistant Legal Landscape Ellen Rock and Greg Weeks UNSWLJ (2018) 1159.*

23. The position is also made clear by the Civil Procedure Rules 2002. Part 17 provides the judicial review, and clause 17.9(i) sets out the orders that a Court may make in judicial review. As could be expected they include what was traditionally the prerogative bits of mandamus, certiorari and prohibition, and the ability to quash decisions, and send them back to the decision maker or direct the decision maker to reconsider and make a new decision. There is no reference to the right to award damages. By direct implication, there is no right of damages for judicial review. Before this Court Mr Hurley accepted that damages were not available in Vanuatu if based solely on judicial review.

24. However, it was judicial review, and judicial review only, on which the damages claim was pleaded in the Statement of Claim, and on which the damages claim rested. The damages decision was not channelled through a private law cause of action. Surprisingly the proposition that there was no jurisdiction to order such damages was not put by the Republic to either of the Judges.

25. If judicial review was the basis for upholding part of the damages claim, it was an error. Given the lack of jurisdiction to award damages the appeal cannot be upheld, unless it can be shown to be properly based on an existing private cause of action. We now turn to that question.

Private law claim for damages

26. It is the case that the facts that give rise to a successful judicial review application may also provide a basis for a claim based on a private law wrong such as tort or nuisance.

27. During the appeal Mr Hurley advanced a claim for damages on the basis of negligence. He argued that the Republic owed "a duty of care to allow a Vanuatu registered vessel to return to Vanuatu waters notwithstanding the Covid state of emergency". The Republic breached this duty of care by delaying the Vanuatu Cargo's arrival in Villa, which made it liable in negligence for damages resulting from the delay.

28. In Vanuatu, the three stage test set out in *Caparo v Dickman*[14] applies in considering whether a duty of care arises. The House of Lords, in that case, set out three requirements in establishing duty, first, reasonable foreseeability of harm to the claimant, second, proximity or neighbourhood between the claimant and the defendant and, third, whether it is fair, just and reasonable to impose a duty of care in such a situation. *Caparo* was considered by the United Kingdom Supreme Court in *Robinson v Chief Constable of West Yorkshire Police*:[15]

> *"Properly understood, Caparo thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents (unless it is necessary to consider whether the precedents should be departed from). In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against*

[14] *[1991] All ER 568.*
[15] *Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 at [29].*

imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable."

29. The issue of whether a duty of care can arise in relation to a government Covid regulation that causes a party loss has not been fully argued before us. It is an important point. There are strong policy reasons against finding such a duty when there is a state of emergency arising from a fast spreading and potentially deadly pandemic. The authorities have to make quick decisions under pressure to contain the danger. It is a matter of fact that Covid regulations around the world have resulted in businesses being gravely inconvenienced and closed down, and personal losses of many types. In the absence of malice or fraud, it seems unreasonable for the Courts to financially penalise the decision makers in relation to these regulations, should they cause loss. In a true state of emergency, which undoubtedly existed in the relevant period, Parliaments have to make urgent decisions for the greater good of the public, and unelected Courts as a matter of policy should be cautious about assessing the reasonableness of the steps taken, providing they are taken in good faith.

30. The spectre of indeterminate liability is a significant concern where the class of persons to whom the Republic would owe a duty is wide and unconstrained. This is a frequent concern in cases where government regulation cause economic loss.[16] That the respondent is the Republic is not a sufficient answer to this concern. As the New Zealand Court of Appeal stated in *Attorney-General v Carter*:[17]

> *"There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. Whether it be a case of failing to issue or of issuing a survey certificate, the threat of legal liability for economic loss might subject the survey authority to inappropriate pressures to the detriment of the overall public interest. For this kind of reason the trend of authority is generally not to hold the regulator liable to the regulated for economic loss, even if negligence can be shown: ..."*

31. As far as we are aware no country has imposed a duty of care in relation to the issue of Covid prevention orders. There is not a sufficient degree of proximity. Generally a duty of care is found in analogous circumstances only when the relationship between the plaintiff and the defendant is exceptional or special[18]. More importantly there are the strong policy reasons we have referred to for not finding a duty of care. We consider that in relation to this claim for damages in this case for the period in question, the Republic did not owe a duty of care to Vanuatu Ferry that could give rise to the tort of negligence, and therefore in relation to the judgment under appeal, any resulting damages arising from breach.

32. We must also record that as a matter of fact we are far from satisfied that there would have been any breach of a duty of care even if it was found to arise. The government was under great

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[16] *Attorney-General v Strathboss Kiwifruit [2020] NZCA 98, [2020] 3 NZLR 247 at [257].*
[17] *Attorney-General v Carter [2003] 2 NZLR 160 (CA) at [35], citing Yuen Kun Yeu v Attorney General of Hong Kong [1988] AC 175 (PC).*
[18] *Bulemene v Republic of Vanuatu 18 February 2022 21,3787 COA/CIVA*

pressure in the first half of 2020 to take all the measures to keep the population safe from a disastrous Covid outbreak. In those circumstances bold decisions had to be made and the implications of those decisions on particular businesses could not all be each evaluated and properly considered and determined. It would be unreasonable to penalise the government for the failures in those areas. We are aware that this observation runs contrary to the finding of *Wednesbury* unreasonableness in the liability hearing, but as we have stated, that finding has not been appealed by the Republic.

33. We therefore dismiss the appeal against the damages judgment in relation to the period from 25 May to 3 July. We agree with the judge that there were no damages claimable from the Republic for the period in question.

The Sum Awarded

34. The Judge awarded damages of VT10,103,130 with interest at 5% on 22 July 2020 from the date of judgment. It appears to be accepted by the parties that that figure was wrong. As Mr Hurley was good enough to point out, the amount actually claimed for the last period of 3 July 2020 and 24 July 2020 was VT8,184,916. Although this is not an issue that had been noted by the Republic, we are grateful to Mr Hurley for pointing this out and will allow the appeal effectively by consent by reducing the sum awarded by VT1,918,214.

Interest

35. Mr Hurley submits that the Judge erred in limiting the interest of 5% to the date of judgment. He should have awarded damages through to the date of payment.

36. We accept this submission, and indeed it did not appear to be opposed by the Republic. In most common law jurisdictions there is an express provision for interest to run on a judgment sum from the date of judgment to the date of payment. However, there does not appear to be such a provision in Vanuatu, or if it was . Accordingly it is the practice in Vanuatu to direct that interest is paid until the judgment is paid in full, and accrues in the meantime on the unpaid balance.

37. That was the approach that we considered to be correct and we will allow the appeal in this regard.

38. The appellant has failed on the central issue in this appeal, and should pay the costs of the respondents in this Court.

Result

39. The substantive appeal against the Supreme Court decision refusing to award damages for the 33 days the Vanuatu cargo vessel was delayed in Australia is dismissed.

40. The award of damages for the period allowed of 21 days from 3 July 2020 to 24 July 2020 is reduced to the amount claimed of VT8,184,916.

41. The interest award at paragraph 23 of the judgment is varied by dividing that interest at the rate of 5% pa is to be paid from 24 July 2020 until the date that the state pays the judgment sum in full, the interest will accrue in the meantime to the unpaid balance should there be payment in part.

42. The appellant is to pay the respondent's costs of this appeal fixed at VT200,000.

DATED at Port Vila, this 17th day of May 2024

BY THE COURT

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Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU