

**BETWEEN: VANUATU COMMODITIES
MARKETING BOARD**

Plaintiff

AND: CARMILLE (VANUATU)LIMITED

First Defendant

AND: GARDNER SMITH PTY LTD

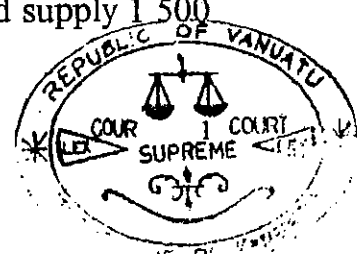
Second Defendant

**Judgment Upon Motion by Second Defendants to
Strike Out the Claim Against the Second Defendants**

By section 2 of the Vanuatu Commodities Marketing Board Act (Cap 133) only the Vanuatu Commodities Marketing Board its agents or persons authorised in writing by the Vanuatu Commodities Marketing Board may export a prescribed commodity out of Vanuatu. There are criminal penalties for individuals and officers of companies who breach this law, section 20. Copra is a prescribed commodity.

First, the plaintiffs allege that the second defendants, Gardner Smith Pty Ltd (GSP) either through the agency of the first defendants or through a deceitful scheme involving the first defendants made two exports of copra, on or about 30 May and 7th August 1996, without the authority of the VCMB. These claims are set out in paragraphs 5 to 11 and 20 to 26 of the statement of claim.

Second, the plaintiffs say that on or about 1st August 1996 the VCMB and GSP made an arrangement under which the VCMB would supply 1 500



tons of copra to GSP. The plaintiffs say that on its face the arrangement appeared to be with the first defendants but in reality it was with the second defendants, because the former either were the latter's agents or because of the deceitful scheme mentioned above. Further, it is alleged this arrangement was entered into as a result of compulsion by a government minister acting under inducement from the second defendants.

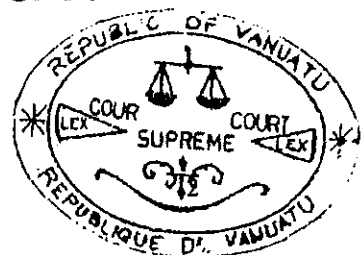
The plaintiffs say that this 1, 500 tons of copra was supplied to the second defendants. Most has now been returned. However, the plaintiffs claim in conversion for the unreturned copra and the loss of use of the returned copra. This claim is set out in paragraphs 12-19 of the statement of claim.

The third claim is set out in paragraph 27. It alleges that the second defendants are fully aware of the Vanuatu Commodities Marketing Board Act and its provisions and deliberately acted in disregard thereof and thereby caused loss and damage to the plaintiffs. The plaintiffs then, in effect, reiterate the transactions of the 30 May, 1st August and 7th August 1996, together with their particulars.

The second defendants seek to strike out all these claims against them. I shall deal with each in turn.

The second defendants' say that as far as the first part of the claim is concerned, the exports of 30 May and 7th August, there is simply no cause of action. The Act prohibits the export of copra save by or with the consent of the VCMB. Failure to observe the prohibition attracts criminal penalties. Further, the plaintiffs' assertion (paragraphs 7 & 22) that, but for the GSP export of the copra, the VCMB would have purchased and exported it is pure supposition.

The second defendants say that the question whether legislation which makes an act illegal renders the person who offends liable for damages at the suit of a person who suffers loss is one of construction of the statute, *Lonrho v Shell Petroleum* [1982] AC 173. The only real exception to this is industrial safety legislation. In any event, the plaintiffs say the VCMB Act was put into being for the "control and regulation of the marketing of prescribed commodities", and not per se for the benefit of the VCMB.



The plaintiffs replied that the action was sustainable. There had been an interference with the plaintiffs exclusive right created by statute to make a profit from the export of copra. They said it was a right similar to a franchise. Further, that there is "the emergence...of tortious liability for harm caused by an unlawful act... directed against a plaintiff". There is a breach of a statutory duty and there is no reason why civil suit should be restricted to industrial safety legislation. Further, GSP should not be allowed to benefit from their own unlawful act. Full details are set out in the plaintiffs written submissions.

Much of the plaintiffs' arguments is based on the interpretation of the Act that the Board was created to make a profit from the export of copra. That is not so. It is certainly enjoined to "conduct its affairs as to avoid the need to rely on Government grants or subsidies". However, its purpose is to control and regulate the marketing of prescribed commodities.

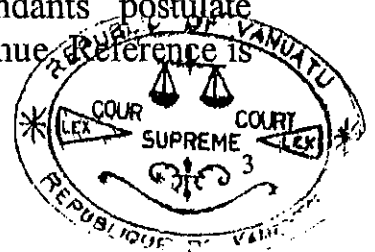
I respectfully accept the argument emanating from the Lonrho v Shell Petroleum case, that it is a matter of statute interpretation as to whether a wrong doer is liable in a civil suit. The VCMB Act contains no specific power. The Board is created to control and regulate certain markets; there are criminal penalties, which are widely directed at officers of companies. The VCMB is not the "beneficiary" of the legislation as, say, a factory worker would be under safety legislation.

The creating of the Board and bestowing of its powers is wholly different from the granting of a franchise or the holding of a 'market' in a particular locality. The word 'market' in that sense is wholly different from the word when it refers to the general trade in a particular commodity.

The plaintiffs concede that the principle someone should not benefit from his unlawful act is generally used as a shield and not a sword. In any event what is alleged here is a failure to comply with a market regulating statute as opposed to an act of violence or fraud which in itself gave rise to the profit sought to be denied to the wrong doer.

I turn to the second head of claim, that of "conversion", paragraphs 12 - 19.

The plaintiffs concede that their pleadings require amendment to allege the disposal of the copra. The second defendants postulate circumstances in which there might be a valid claim in detinue. Reference is



made at paragraph 12, particulars (ii) to the "scheme to deceive" particularised in paragraph 4. The second defendants' say that if that is so then the Minister concerned should be joined as a party.

I can decide this attack on the pleadings now with what is before me, or adjourn it for a final chance to put the pleadings in order. Each course has merit and dismerit. I will postpone consideration of this part of the claim for a set time for the pleadings to be put in 'final order', for which I grant leave, and any further parties joined. I will then hear further argument and make a decision.

The third head of claim is set out in paragraph 27 and the particulars thereto. The paragraph states the "second defendant acted with contumelious disregard for the Plaintiff's rights and in order to defeat the Laws of Vanuatu". The particulars thereto appear to reiterate the claims and particulars made under the earlier heads.

The second defendants say that no cause of action is disclosed. It appears to have been included as a vehicle for incorporating the appended lengthy particulars.

There is little to suggest otherwise. I accept this submission.

Accordingly I strike out the first and third heads of claim (as defined in this judgment).

I postpone consideration of the second head. That means that in respect of the second defendant paragraphs 4 to 11 are struck out save for the preservation of paragraph 4 for the purposes of the second head of claim. Paragraphs 20 to 27 are struck out. Paragraphs (ii) and (iii) of the claim itself against the second defendant are also struck out.

DATED at Port Vila, this 14th day of August 2000

BY THE COURT

R. J. COVEN

Judge

