IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Adoption Case No. 03 of 2014**

IN THE MATTER OF : **" MM"**

AND IN THE MATTER OF: **CODE CIVIL ARTICLES 343 – 359**

AND IN THEMATTER OF **AN ADOPTION APPLICATION BY "SAT"**

Before: ***Justice Stephen Harrop***
Appearances: ***Marie Noelle Patterson for the Applicant***
Viran Molisa Trief for the Attorney General as amicus curiae

JUDGMENT OF JUSTICE HARROP
3 JULY 2014

Introduction

1. SAT is a 32 year old man who lives in Noumea, New Caledonia. He has applied under Articles 343-359 of the French Code Civil to adopt MM who is a Ni-Vanuatu girl born on 10 September 2011 in Port Vila to Ni-Vanuatu parents. In the first instance SAT seeks an interim order for custody and guardianship for three months during which the suitability of the arrangement would be assessed.

2. MM's biological parents consent to the application and understand the implications if it is granted. Her mother, now 21, says she had been in a relationship with the father, now 25, for some two months but when she became pregnant with MM he left her and subsequently has not wanted anything to do with her or the child. He is married to another woman.

3. The head of the wider family to which MM's mother belongs, "DS", who is her first cousin, fully supports the application. He has up to 16 family members living on his property but he is the only one who earns an income. He took MM's mother in when she fell pregnant because she had nowhere else to live and was, and remains, unemployed. She is poorly educated and has never worked. He confirms the inability of himself and other family members to help to provide

for MM's needs; in particular he says he cannot afford to pay school fees for her. The mother's siblings cannot afford to help her and MM. DS confirms that other family members have been asked whether they would be willing to adopt MM, but all have refused because they are unemployed and cannot afford to care for her.

4. SAT was himself adopted after being born to a single mother. The adopting parents were the sister of his biological mother and her husband. He has never been married, but according to a social worker's report prepared in New Caledonia, some four years ago he met, and promptly entered into a de facto homosexual relationship with, HG, who is 45. HG has two daughters aged 13 and 11 having separated from their mother in 2009. The girls live every second week with SAT and HG, who purchased a house together in 2012. They both wish to see MM become part of their family unit. HG is very supportive of SAT's application but says that he wishes to allow him to take on the role of father to MM and that he himself would , rather than taking on the role of her "*mother"*, take on that of "*father two"*. He sees himself as being there for MM in the same way as SAT is currently there for his daughters.

5. As is required in New Caledonia, SAT obtained preliminary approval to adopt (before MM was identified as a candidate) from the Department des Actions Sanitaires et Sociales. There is a favourable report from a social worker Lucie Houlet dated 22 August 2013. This was followed by a favourable psychologist's report from Diane Payen in November 2013, although it contemplated the adoption of a male child, that being SAT's stated preference.

6. SAT became aware of the possibility of adopting MM through a common friend of DS and SAT who lives New Caledonia. There have been visits to Port Vila since, followed by Skype contact. On 26 March 2014, a report was prepared by Patricia Gavotto, a Port Vila psychologist, following her observations during a session with MM, her mother, SAT and HG on 3 March and in another during one on 18 March with MM and her mother. Ms Gavotto concludes her report with a favourable opinion of the prospect of adoption of MM by SAT.

Legal Issues

7. On any application for adoption the primary consideration for the Court is whether or not the best interests of the child would be met or advanced by granting it. That said, adoption applications do not occur in vacuum and must meet the applicable legal criteria. This particular

application raises several difficult legal issues which need to be surmounted before the merits can be addressed. I will discuss these in turn.

Can this application be considered and determined solely under the Code Civil?

8. Prior to Vanuatu becoming an independent republic, on 30 July 1980, there is no doubt that there were both British and French adoption laws in force and applied here. The British law was the Adoption Act 1958 (UK) .The French law was the Code Civil (primarily Articles 343 – 359).

9. Article 95 (2) of the Constitution provides:

> *"Until otherwise provided by Parliament, the British and French Laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom".*

10. The British and French adoption laws have not been expressly revoked following Independence. The Republic Vanuatu has not enacted in any adoption law in place of those laws or any other law relating to adoption. Nor can it be suggested that the continued application of the British and French adoption laws is incompatible with the independent status of Vanuatu.

11. Accordingly, both British and French adoption laws continue to apply *but* their application must wherever possible take *"due account of custom"*. The effect of that important proviso will be discussed below.

12. A fundamental and threshold issue arises: may an applicant elect, and may the Court apply, only one of the French or British adoption laws without reference to the other?

13. The reason this issue is important here is that section 2 (3) of the Adoption Act 1958 (UK) provides: *"An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order."*

14. Mrs Patterson, counsel for the applicant, does not suggest there are special circumstances here which would meet that statutory test. Accordingly after initially filing the application alternatively based on the Code Civil and the UK Adoption Act, Mrs Patterson applied to amend the application so as to have it made solely under the French Code Civil. On 11 June I granted that application but on the basis that there was obviously an issue to be determined as to whether an applicant for adoption, or the Court, may properly deal with the matter solely under the French adoption law without regard to the British law.

15. By contrast with the UK Adoption Act, the Code Civil does not directly address the question of whether there may be an adoption of a female infant in favour of a sole male applicant. By its silence there is then an implication that this is permitted under the Code Civil. It does not say it is permitted but nor does it say it is not. On the face of it then there is a conflict between the two applicable sets of adoption laws; one (effectively) prevents this application succeeding , the other does not although failing to address the point directly.

16. For the applicant Mrs Patterson submits that while the existence of two adoption laws of equal application in force creates confusion, the law relating to adoption is intended to be remedial and beneficial and there is therefore no real conflict, merely difference. She submits that any person wishing to apply for an adoption in Vanuatu is freely and validly able to apply under either law. In short, SAT submits that it is irrelevant that his application could only succeed under one of the two prevailing laws rather than both. Meeting the criteria of one suffices.

17. Because, as with any adoption application, there is no opposing party I appointed the Attorney-General as amicus curiae to assist with submissions on this and some other points. Mrs Trief filed helpful submissions on 10 June. On this issue she submits that, unlike I the choice available to those entering a contract, an applicant for adoption has no right to choose the applicable law. Furthermore, because the British law directly addresses the relationship involved in this application, it ought, as a specific provision dealing directly with the relationship between applicant and child here, predominate in the event of conflict over the general provisions contained in the Code Civil which do not expressly address that kind of relationship. In support she referred to the well-known rule of statutory interpretation namely *generalia specialibus non derogant.*

18. Mrs Patterson referred me to the judgment of the then Chief Justice, Justice d'Imecourt in *Banga v. Waivo* [1996] VUSC 5. This appears to be the only judgment of either the Supreme Court or Court of Appeal of Vanuatu which has discussed in detail the effect on the laws applying during the Condominium of the New Hebrides of Independence on 30 July 1980. I note that the Chief Justice's discussion of "the background development of the laws of Vanuatu" was referred to with approval by the Court of Appeal in *Joli v Joli* [2003] VUCA 27 (see pages 3-4).

19. The case came before the Supreme Court by way of appeal from a judgment of a Senior Magistrate who had awarded Vt 100,000 damages for adultery under section 17 (1) of the Matrimonial Causes Act [Cap. 192]. The learned Magistrate had held that the rules of custom applied when interpreting that Act and that the British and French laws preserved in their application by Article 95 (2) of the Constitution would not apply to indigenous citizens because they had not applied to them prior to Independence. The Magistrate had found that there was a lacuna in the law of Vanuatu so that no law directly covered the situation and the Act had to be interpreted according to *"custom"*. He had based that proposition on article 47(1) of the Constitution which states:

> *"The administration of justice is vested in the Judiciary, who are subject only to the Constitution and the law. If there is no rule of law applicable to a matter before it, a Court shall determine the matter according to substantial justice and whenever possible in conformity with custom"*.

20. The Chief Justice allowed the appeal and noted that the *"substantial justice"* jurisdiction in article 47 only applied where there was no rule of law applicable to a matter before the Court. Here the Matrimonial Causes Act was a statute of the Republic which did directly apply. When it was passed in 1985 the French and English laws of divorce were immediately done away with. This was not then a case of needing to resort to notions of substantial justice under Article 47 but simply of applying a statute enacted by the Republic after Independence according to its natural and ordinary meaning.

21. It can be seen from this that *Banga v. Waivo* considered a very different situation from the present. Here there is no statute of the Republic involved and one must look at the effect of Article 95 on the situation. Article 47 does not apply here because there is not only a rule of law applicable to the matter before this Court, but there are two.

22. In the course of a lengthy judgment the learned Chief Justice discussed the pre-Independence legal history and the effect of Article 95 (2). He pointed out that between the Day of Independence and 7 August 1981 Vanuatu had not had its own penal code and accordingly there were, from 30 July 1980 until then, three distinct sets of criminal laws applicable in Vanuatu: the French Penal Code, the English Penal Code and the Native Penal Code made under the Joint Regulation 12 of 1962 which applied only to native New Hebridians i.e. Ni-Vanuatu.

23. The Chief Justice rejected the suggestion that Article 95 (2) meant the pre-Independence status quo applied during this period and held that *"…it is plain that all three laws did exist side by side until 7 August 1981". I suspect that it would have been up to the Public Prosecutor of the day to choose under which law he wished to proceed and up to the Courts to do "substantial justice".*

24. At page 11 the Chief Justice said ,following a discussion about the applicable divorce laws: "…. *it is clear that under Article 95 of the Constitution, the French and English laws that applied on the day before the Day of Independence apply to everyone in Vanuatu, irrespective of Nationality and irrespective as to whether they were Indigenous Ni-Vanuatu or not.* ***They were no longer French or English laws but they became the law of Vanuatu. All those English and French laws that still now apply in Vanuatu…form part of the law of Vanuatu and apply to everyone in Vanuatu irrespective of creed, colour or Nationality.*** *There cannot be a law for the English and another for the French and yet another for the Ni-Vanuatu in the Republic. Article 95 of the Constitution created laws for Vanuatu as a gap filling process. That gap has taken many years to fill and will continue to take many years to fill entirely, but it is gradually narrowing. There are for instance no specific laws of adoption made for Vanuatu, or laws of inheritance regarding intestacy. Does that mean that the Ni-Vanuatu have no laws of adoption that apply to them, or no laws of intestacy that apply to them? I think not. They can choose to proceed under the existing Vanuatu English or French laws. Indeed they do.* ***In events of conflict, the Courts have duty to resolve the matter and do substantial justice…… there is no right of election in the parties.*** *The right of election was abolished when the Protocol of 1914 was repealed on the Day of Independence as stated in the Exchange Notes of 23 October 1979 signed by the representatives of the joint signatories to the Protocol…."* (emphasis added)

25. While these observations are clearly obiter, they are with respect helpful.

26. The position clearly is then that there are no longer French or English laws in Vanuatu but only the law of Vanuatu. Some of the law of Vanuatu undoubtedly *derives* from French and English laws that were in force prior to Independence. In this case because Vanuatu has not enacted any adoption legislation, Article 95(2) means (subject to custom being taken into account wherever possible) that the previously-applied British and French adoption laws together form part of what may be called " the adoption law of Vanuatu". Neither has precedence over the other and they both apply to everyone.

27. Looked at in this light, the current application should not be seen as an application pursuant to the Code Civil but rather as an application made pursuant to the law of Vanuatu relating to adoption. That law has two antecedents, namely the French and British laws. It is therefore artificial, and inconsistent with the observations of the Chief Justice in *Banga v.Waivo*, to compartmentalise any adoption application within the framework of either the French or the British law on adoption.

28. This approach is consistent with what the Court of Appeal said in *Joli v Joli* at page 4: "*The effect of Article 95 was to make the law in force immediately after* [strictly the Court ought to have said before] *independence, whether derived from French law or English law or otherwise, law of general application to everyone within the Republic equally without distinction based on nationality or origin."*

29. In my view therefore, any application for adoption in Vanuatu since Independence has to be considered in the light of the contents of *both* the antecedent French and British laws.

30. In most cases, where there is no conflict between the two laws, it will not matter which pre-Independence legislative vehicle is selected by an applicant or applied by the Court. I accept, as indeed Chief Justice appeared to in his obiter comments, that either could be chosen in the first instance.

31. However in this case, there is at least an indirect conflict between the two laws (it would be direct if the French law expressly said an adult male may adopt a female child). One law contains what is essentially a prohibition on this application succeeding and the other does not directly

address the issue of that disqualifying relationship. I approach the matter on the basis that the French and British laws *together* form the law of adoption of Vanuatu, at least until the Republic enacts its own legislation. This is not to give primacy to one or the other but the effect of it is that an applicant for an adoption here in Vanuatu has to meet the criteria of *both laws* (or more accurately all aspects of the post-Independence law of adoption in Vanuatu), at least where there is any conflict between them.

32. Since Independence there is no longer one adoption law for the French, another for the British and yet another for Ni-Vanuatu. Before Independence, SAT could have applied solely under the Code Civil but now, in my view, he cannot, any more than he or anyone else may apply solely under the UK Adoption Act.

33. This approach finds some support in that of Sey J in *Montgolfier v Gaillande* [2013] VUSC 39, which appears to be the only other case where the possibility of conflict between French and British laws has been directly in issue. That case involved an application by the defendants (to a claim for breach of an executrix's and testamentary trustee's duty) for an order that the issues be determined under the French Code Civil. Justice Sey referred to *Banga v Waiwo* , to *Joli v Joli* and to a 2004 paper by Sue Farran entitled *'Family Law and French Law in Vanuatu: An Opportunity Missed?*". In that paper Ms Farran ventured the opinion :

> *"Where there is no national law on the matter, then it would seem that there is the option, stated in Banga v Waiwo, for the courts to proceed under the existing Vanuatu English or French laws. If there is a conflict, or perhaps a choice of two alternative paths to follow, the the Courts have a Constitutional duty to resolve the matter and do substantial justice"*

34. Justice Sey noted that the parties agreed there were some issues in the case which had to be decided according to common law principles and concluded (at paragraph 17): *"…in a bid to resolve the matter and do substantial justice, I would need to take a pluralistic approach to this case and apply both the Common Law and French Civil Code as and when necessary"*.

35. There was an unsuccessful appeal to the Court of Appeal: *Gaillande v Montgolfier* [2013] VUCA 28. On the issue of the applicable law, the Court said (paragraph 24) that there was little material to support the assertion that the French law was in relevant respects different from the common law applied by Sey J. For present purposes it is noteworthy that the Court gave no

indication that a "pluralistic approach" was wrong and that the Supreme Court ought in the face of conflict to have chosen which law to apply rather than have regard to both.

36. There is no statutory authority to guide the Court where two conflicting laws apply; by contrast Art 45 refers (only) to the "substantial justice "approach being required where *no* law applies. The suggestion by the Chief Justice in *Banga v Waiwo* that a similar approach is appropriate where two conflicting laws is not supported by any authority and probably should be seen as a pragmatic obiter suggestion involving resort to inherent jurisdiction.

37. In my view, where there is a conflict of this kind, an applicant must meet the criteria in both laws. If that is not done, and relevant criteria in one part of the Vanuatu law on a topic are ignored, then inconsistency and unfairness will result. The days of opting for which law a party wishes to apply to their case finished at Independence.

38. Although this is a case with no defendant, if a "choice" approach is valid here, then it must also be valid in the more usual adversarial civil case. However, it would be unworkable for the claimant and defendant (and indeed other parties, as are often involved) to be able to choose different and conflicting laws from amongst those which applied before Independence. Equally so in a criminal case were the prosecution and defence able to choose the applicable law.

39. If a "substantial justice" approach is appropriate, then I consider that requires an approach which leads to consistency of outcome whichever choice is taken. Substantial justice does not only involve considerations limited to those within the case at hand. In a precedent-based system where one Court's decisions bind or at least influence another there ought not to be different outcomes on the same facts derived from a choice of applicable law. Uncertainty (or "confusion" as Mrs Patterson herself acknowledges) and inconsistency do not advance "substantial justice" in the wider sense.

40. My conclusion is that because a relevant part (and one equally as forceful as any other part) of "the law of Vanuatu on adoption" says (subject to an exception which does not apply here) that a male may not adopt an infant female, then this application cannot succeed.

41. Alternatively, and in case I am wrong in that conclusion, although this situation is clearly different from those where the well-known principle of statutory interpretation, *generalibus*

specialibus non derogant is usually applied, I accept Mrs Trief's submission that the conflict in this case between the two equally applicable laws should be resolved by applying it, by analogy.

42. The maxim is typically applied where there is inconsistency between statutes or within the same one and there is a need for reconciliation and for divination of Parliament's intention. See generally *Statute Law in New Zealand* (JF Burrows, LexisNexis, 3rd edition 2003, pages 307 and 313-317) and *Statutory Interpretation in Australia* (DC Pearce and RS Geddes, LexisNexis, 6th edition 2006, pages 144-146 and 257-261). The maxim means that where there is inconsistency between a general and a specific statutory provision on an issue, the latter is usually held to apply over the former; the general yields to the specific.

43. Here the two adoption laws were passed by different Parliaments (the French and the British) with the intention that they apply to the people represented in those Parliaments. There can have been no concern about inconsistency between them until Independence in Vanuatu when Article 95 of the Constitution suddenly made them equally applicable in this country; previously in Vanuatu there had been a right to choose or opt under which law applied. The conflict then became a potential problem and on this application, for the first time it seems, resolution is required.

44. The British law specifically addresses and (essentially) proscribes the making of an adoption order in respect of an infant female in favour of an adult male. The French law contains no indication the issue was considered by the French Parliament but by clear implication (by absence of any reference) there is no impediment to that kind of adoption. Accordingly there is a specific and a general provision which are, at least indirectly, in conflict. Resolution of that conflict is required where both laws apply with equal force, as they do.

45. In my view the originally British part of the law of Vanuatu must in this situation be held to apply over the conflicting originally French part, because of its express consideration of the relationship between the adult applicant and the child candidate. The general must yield to the specific.

46. Put another way, because one of the conflicting laws ("the specific") directly considers the relevant relationship between applicant and child, it should be applied over the other ("the general") which merely by default appears to permit the application to succeed**.**

47. I therefore conclude that this application may not be determined solely under the Code Civil. The adoption law of Vanuatu equally includes what is an effective prohibition on it being granted. SAT must satisfy the criteria in both aspects of the Vanuatu law of adoption. He cannot do so because he falls foul of section 2(3). Alternatively, the general French law must accede to the specific British law. Either way the application cannot succeed. This conclusion is enough to dispose of the application but, in case I am wrong in reaching it, I move on to consider two other threshold issues which would still need to overcome by the applicant.

The Effect of the Proviso to Article 95 (2) of the Constitution

48. For convenience I repeat here the important Article 95 (2): *"Until otherwise provided by Parliament, the British and French laws in force and applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent they are not expressly revoked or incompatible with the independence status of Vanuatu* ***and wherever possible taking due account of custom****."* (emphasis added)

49. On a plain reading this means that the British and French laws in force immediately before the Day of Independence do not, or at least may not, apply in the same way after Independence as they did before it. Article 95 (2) says that their continuation of application is not untrammeled but has a qualification, namely that wherever it is possible to do so the Court must take due account of custom. Conceptually therefore the outcome of the application of either a British or French adoption (or other) law prior to Independence may well be different, indeed very different, after Independence, once custom is taken into account. As well, it may be exactly the same. It depends on the nature and extent to which custom impacts on the situation in question.

50. To choose a potentially (though certainly not actually) relevant example, if there were a strong custom in Vanuatu of adult males adopting female children, the Court may well be driven to conclude, post-Independence, that such an adoption application ought to be granted whereas prior to Independence it would have been effectively prevented from doing so by s2(3) of the UK Adoption Act 1958.

51. I asked Mrs Trief on behalf of the Attorney General to provide evidence and make submissions about the attitude which custom would have to this application. She filed a sworn statement from

Chief Senimao Tirsupe Mol Torvakavat, the President of the Malvatumauri Council of Chiefs. The Malvatumauri Council of Chiefs is Vanuatu's National Council of Chiefs as referred to in Chapter 5 of the Constitution. It has a general competence to discuss all matters relating to custom under article 30 (1) of the Constitution. In short, it is the authorized repository of knowledge and advice on all matters of custom, tradition and cultural matters in Vanuatu.

52. The President says that based on custom, Christian principles and the concern for the sustainability of clans/tribes to continue, the Malvatumauri resolved at its 17 October 2013 meeting that it did not agree with same-sex marriage in Vanuatu and that marriage is between a man and woman only. He then says: "*Therefore the adoption of a ni-Vanuatu child by a gay person is not tolerable because it could cause moral impacts on the child concerned because of the situation of same sex household or marriage does not suit the context of social living in Vanuatu.*" He concludes: "*With all due respect to the individual rights of every person, this is the view that the Malvatumauri has reached.*"

53. In her submissions, Mrs Patterson submits that because there are existing laws applicable in this case, custom is "not the relevant legal reference". She submits that if the President's evidence were accepted by the Court it would be in contradiction with the applicable law and therefore could not be maintained. She therefore submits that custom law cannot apply in this case.

54. I do not accept this submission. The French and British laws continue to apply after Independence *but only* on the basis that wherever possible due account is taken of custom. This is a case on which it is not only possible but in my view appropriate to take account of the way that custom views this proposed adoption, indeed to do so in a substantial way. As in most cultures, family life is central to the Ni-Vanuatu communities. The views of the Malvatamauri on a critical issue such as "gay adoption" must be taken very seriously indeed, especially because the question of "gay marriage" has so recently been the subject of a resolution. Internationally there are now 15 countries which permit same-sex marriage; 8 of these have moved to permit it since 2010. I expect that that recent groundswell is what caused the Malvatamauri to consider the matter in October 2013. They have clearly and firmly resolved against that international trend.

55. There is uncontradicted evidence from the President of the body which the Constitution recognizes as the repository of customary wisdom and advice which unequivocally states that this application would not be tolerated by custom. Article 95(2) says only that custom must be

taken due account of, rather than being determinative, of the extent to which pre-Independence laws apply. That said, in this particular case, especially given the family-related subject matter of the application and the strong and recent rejection of the wider question of same-sex marriage by the Malvatamauri, I consider the President's evidence is, independently of my earlier conclusion, fatal to this application because the applicant is homosexual.

56. The impact of custom on this application is not as great as may first appear. As noted below (paras 71-72) the Code Civil did not, as at 30 July 1980, permit adoption by a same-sex *couple.* It is a small step from that to hold that it does not permit adoption by a single homosexual person.

57. In other words, even if the application otherwise ought to succeed on application of the relevant articles of the Code Civil, it must be dismissed once due account is taken of custom.

58. Mrs Patterson submits that such a conclusion would amount to a breach of article 5 of the Constitution which guarantees equal treatment under the law of everyone and non-discrimination.

59. I do not accept that submission. SAT is being treated the same under the law as any other adult male applying to adopt a female child in Vanuatu. If custom says something adverse about his application because he is homosexual, that does not amount to unequal treatment before the law.

60. SAT is not being denied equal treatment under the law but his application, like anyone else's, has to be considered in light of customary matters where Article 95 (2) applies because the Republic has not yet enacted its own statute covering the topic of adoption.

61. As to whether article 5 of the Constitution guarantees that there is no discrimination on the ground of sexual orientation, in the absence of detailed argument on the point, it seems to me that that kind of discrimination may not be prevented in Vanuatu.

62. Article 5 (1) says: "*The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language* ***or sex*** *but subject to respect for the rights and*

freedoms of others and to the legitimate public interest in defence, safety, public order, wealth and health…." (emphasis added)

63. By contrast, in New Zealand, the prohibited grounds of discrimination under section 21 of the Human Rights Act 1993 include sex, marital status *and sexual orientation*, which means "a heterosexual, homosexual, lesbian or bi-sexual orientation". On this basis, discrimination on the ground of *"sex"* is a different thing from discrimination on the grounds of sexual orientation. On the face of it then, Article 5 may not provide entitlement to freedom from discrimination on the ground of sexual orientation.

64. In summary then I consider that the proviso to Article 95 (2) independently means, once appropriate account is taken of the uncontradicted evidence of the President of the Malvatumauri Council of Chiefs, that this application must be declined.

Is there is any event an impediment to the success of this application under the Code Civil?

65. Article 343 of the French Code Civil says (in English): *"Adoption may be petitioned by two spouses not judicially separated, married for more than 5 years"*.

66. Article 357 says, among other things,: *"In case of adoption by two spouses, the name conferred on a child is the husband's name."*

67. The current application by SAT is not an application by him and his de facto partner HG, but rather an application by him alone. That said, I consider I am entitled to look at the reality of the application, especially when making an adoption order is discretionary. It is in substance an application that MM become a member of the family which SAT and HG have formed. If the application is granted she would become "the third daughter" in the family and, as HG put it, she would have SAT as father one and himself as father two. Understandably and quite properly SAT has called in aid of his application the favourable family environment into which MM would be welcomed.

68. Quite properly the three expert reports which have been done consider (and approve) the family environment into which MM would be going were the application granted. For example the psychologist Patricia Gavotto refers to the earlier reports carried out in New Caledonia and says

on page 3 of her report: "*The review of the psychologist report and the social worker report and the observations made in session of the interactions between the child and* ***both candidate parents****, indicate to me that* ***they*** *will respond to [MM's] needs promptly and* ***their*** *ability to perceive and interpret her needs seem appropriate and satisfactory." (emphasis added)*

69. In her conclusion she says: "*Based on the above and on the condition that I have access to future, social & psychological reports of [MM] in her new home setting, to maintain the link and to assess both the developmental risks and opportunities of a prepared change of residence* ***and parents****, I believe that offering a more stimulating and structured environment, with* ***two stable parents*** *who demonstrated greater capacity to provide secure attachment, encouragement and opportunities for growth, will be in the best interest and welfare of this child." (again, emphasis added)*

70. In reality then, if not in form, this is a joint application then by SAT and HG to adopt MM. SAT is intended to be the *primary parent* but in all practical respects this is a joint application by SAT and HG to become MM's adoptive parents.

71. Under the Code Civil as it stood in 1980 an application by a homosexual couple is clearly not permitted. A joint application requires two spouses not to be separated and to have been married for more than 5 years (in passing I note that SAT and HG have not yet been together that long). That can only be a reference to an "orthodox" heterosexual marriage between a man and a woman, since same-sex marriage has been legal in France only since Loi No 2013-404 came into force on 18 May 2013. That law also gave same-sex couples the right jointly to adopt children. Obviously as at 30 July 1980 the Code Civil did not permit adoption by a same-sex couple.

72. This conclusion is confirmed by Article 357 which refers to the child being conferred on an adoption by two spouses with *"the husband's name"*. That can only refer to the male spouse in an orthodox marriage, the other party being his wife.

73. In my view then even though this is technically an application by SAT as an individual male over the age of 30 years, in reality and in the discretion of the Court it ought not to be granted because not only the French law but also the British law as at 30 July 1980 did not permit same-sex marriage or adoption by a same-sex couple (same-sex marriage and adoption has only been

possible in the United Kingdom since the Marriage (Same Sex Couples) Act 2013 came into force on 13 March 2014).

Conclusion

74. Regardless of whether the proposed adoption would be in the best interests of MM, and without casting any aspersion whatsoever on SAT or HG or the others who support it, I am satisfied that for the above three independent reasons, this application must be dismissed. In summary the reasons are:

    a) Section 2 (3) of the Adoption Act 1958 (UK) is a part of the law of Vanuatu on adoption. It cannot be avoided by an application being made under another part of that law, the Code Civil. The subsection says that an adoption order shall not be made in respect of a female infant in favour of a sole applicant who is male unless the Court is satisfied that there is special circumstances which justify as an exceptional measure the making of an adoption order. There are no such circumstances here and Mrs Patterson does not submit there are. Accordingly that part of the law of Vanuatu on adoption prevents the Court making the adoption order sought here.

    b) The pre-Independence adoption laws contained within the Adoption Act 1958 (UK) and the French Code Civil apply post-Independence but only on the condition that wherever possible due account must be taken of custom. Here the unchallenged advice given to the Court by the President of the Malvatumauri Council of Chiefs is that custom would not tolerate the granting of this application. In the circumstances, that means the application must be dismissed even if section 2(3) has no impact on it.

    c) Although SAT has applied as an individual for an adoption order, the reality is that this is a joint application by him and HG, as a same-sex couple. Neither the French Code Civil nor the UK Adoption Act 1958 as at 30 July 1980 permitted adoption in favour of a same-sex couple.

The Policy of the Republic of Vanuatu on Inter-Country Adoption

75. One of the questions on which I asked Mrs Trief to make submissions was the wider question of how the interests of the Republic of Vanuatu would be affected, if at all, by this inter-country adoption, were the Court to sanction it. I further asked whether the Republic had a view generally on its young children being adopted by applicants from another country and, if so, what was that view?

76. Mrs Trief's response was that the Government does not have a formal policy on inter-country adoptions although it is acknowledged that the matter is not new to Vanuatu. She suggested the Government might proceed immediately to assist in securing the rights of MM by requesting a bilateral agreement with France through the French Embassy. That would provide a basis for understanding between the two countries in this case and in any subsequent cases. She also noted that this proceeding may well provide impetus to the Government to take steps to accede to the 1993 Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption as well as establishing bilateral agreements with other countries.

77. It is of course a matter for the Parliament of this Republic, not the Court, to decide whether to enact any particular legislation and to decide whether it ought to become a signatory to the Hague Convention. I note though, as pointed out by Justice Spear in a preliminary ruling in Adoption Case 23 of 2010 on 25 February 2011 (*Re: the child "M")* , that the Hague Convention is designed to give effect to Article 21 of the UN Convention on the Rights of the Child. This provides:

> **Article 21**
> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
>
> **(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country or origin;**
>
> **(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;**
>
> **(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;**
>
> **(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.**
>
> (emphasis added)

78. The Republic of Vanuatu ratified the UN Convention on the Rights of the Child in 1993. France did so in 1990. However, as Justice Spear noted, when France ratified the Hague Convention in 1998 it declared that this specifically excluded its overseas territories, obviously including New Caledonia.

79. Given that the current application is certainly not the first by residents of New Caledonia to adopt a Ni-Vanuatu child and will surely not be the last, I respectfully urge the Government to consider working with the Government of France on this issue in an effort to reach an agreement about how applications for such adoptions may be dealt with in future. I also respectfully urge the Government to give consideration to ratification of the Hague Convention and to the enactment of Vanuatu's own Adoption Act. I request that Mrs Trief supply a copy of this judgment to the appropriate officials and Minister(s).

Conclusion

80. The application is dismissed.

81. I thank both counsel for their helpful submissions. Though it is obvious, I wish to emphasise that the outcome of this application has been based solely on the determination of legal points and has nothing to do with its merits or an assessment of the best interests of MM. Its dismissal therefore is no reflection at all on SAT or HG nor indeed on the thorough investigations undertaken by the experts or the support for the application provided by MM's parents and the head of her mother's family, DS. I know there will be considerable disappointment at the outcome. I recognise the substantial efforts that have been made to bring the application to this point. I assure all involved that I have given this matter lengthy and anxious consideration, always conscious, particularly, of the effect my decision will have on the life of MM .

BY THE COURT