

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Appellate Jurisdiction)

CIVIL APPEAL CASE No.29 of 2003

BETWEEN: GUY BENARD
Appellant

AND: VANUATU INVESTMENT
PROMOTION AUTHORITY (VIPA)
First Respondent

AND: BLUE WAVE LIMITED
Second Respondent

Coram: Justice Bruce Robertson
Justice John von Doussa
Justice Daniel Fatiaki
Justice Oliver Saksak

Counsels: Mr. Guy Benard in person
Mr. M. Edwards for the VIPA
Mr. H. Toa for Blue Wave Limited

Date of hearing: 5th & 7th May 2003

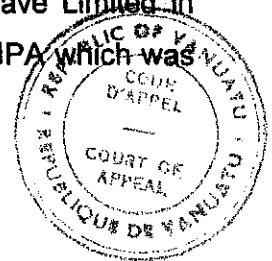
Date of judgment: 9th May 2003

JUDGMENT

This relatively simple and straightforward case has involved a number of procedural steps during the week.

Mr. Benard in person commenced proceedings against the Government of Vanuatu complaining that a Foreign Investment Certificate was not being renewed and that he and members of his family were being removed from the jurisdiction.

An application was made for orders to have before the Court the correct parties who were alleged to be the company Blue Wave Limited in whose name the relevant Certificate was registered and the VIPA which was the statutory body vested with relevant authority.



The learned Chief Justice was satisfied that in accordance with the well established principle that a shareholder and/or a director of a company had no individual standing to take proceedings in respect of wrongs alleged against the company. Accordingly the applicant in respect of the appeal against the decision of the VIPA was altered to the company which holds the licence instead of Guy Benard.

There was also an amendment with regard to the responding party. An Order was made that it should be the VIPA rather than the Government. This alteration is not in contention before us.

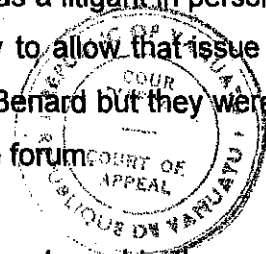
What is raised in the appeal is that Guy Benard as an individual wants to be a party in his own right as well as the Company. It is all somewhat artificial because Guy Benard as a director and shareholder of Blue Wave Limited will be the person who will inevitably be giving evidence on its behalf. However it is seen by Mr. Benard as a matter of overwhelming principle that he should not be precluded. His desire or perception on its own would not be a reason to intervene but there is more to this case.

His appeal is against an interlocutory Order. In terms of the Section 21 of the Court of Appeal Rules, he can only appeal to the Court of Appeal if granted leave by the primary Judge in the Supreme Court. If that leave is refused he can seek leave from the Court of Appeal.

When the Court of Appeal begun sitting this week the appeal was listed for hearing although there was no leave granted or refused in the Supreme Court. At that stage there was simply no jurisdiction for us to hear the matter. It should not have been listed.

There are always problems when the Court has a litigant in person. We stood the matter down from Monday to Wednesday to allow that issue to be addressed. Papers were prepared and filed by Mr. Benard but they were filed in the Court of Appeal which was not the appropriate forum.

Accordingly on Wednesday morning when we returned to the case, we were faced with an application for leave to appeal to us whereas the law



clearly provided that it had to be made to the Supreme Court. To add to the difficulties Mr. Benard was confused as to when the matter was to be heard and was not present. While trying to find him we discussed with counsel for the VIPA some of the peculiar aspects of this case. As a result Mr. Edwards was eventually brought to the view that it would be better for the point raised to be determined. He indicated to us that he was willing to concede to leave being granted when it was called in the Supreme Court.

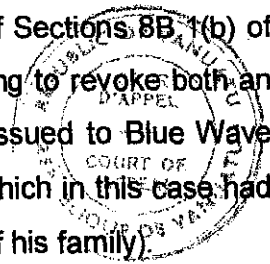
It was still however a matter for the Supreme Court. The matter was stood down so that the applicant Guy Benard and other relevant counsel could appear before the Chief Justice, indicate that the leave was not oppose and ask for a decision to be made. Leave was eventually granted.

Only once leave had been granted by the primary Judge could we become formally seized of the matter.

This case is unusual. The business operation which is at the heart of the dispute was commenced by Mr. Benard before the current regime under the VIPA Act 1998 came into effect. There is clear evidence that there were rights held by Mr. Benard as an individual. But it is clear that when the Act was passed it had to be complied with. Mr. Benard, for whatever reasons, decided that the necessary certificate should be sought, and it was granted, in the name of Blue Wave Limited.

Even after this legal state was brought about, officers employed by the VIPA seemed to have been muddled in their own activities as to who it was who had rights. The position, as between an individual and the Company as the holder of the Certificate, was never rigorously maintained.

In addition it was specifically drawn to our attention (and this was not raised in the Supreme Court) that under the provisions of Sections 8B 1(b) of the VIPA Act, the Board has the power by notice in writing to revoke both an investor's Approval Certificate (which in this case was issued to Blue Wave Limited) and all relevant Residence and Work Permits (which in this case had been issued for the benefit of Mr. Benard and members of his family).



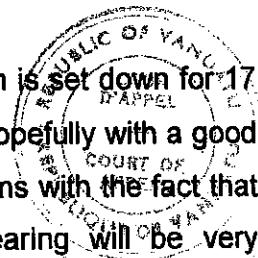
Mr. Edwards' strenuous argument was that the one was totally dependent upon the other and that no separate cause of action arose. He may well turn out to be correct in that submission but because it involves a matter of fundamental natural justice, we are not persuaded that the person whose residence and/or work permit is in jeopardy cannot be seen as a person who in terms of the legislation is dissatisfied by the decision taken.

We do not question the fundamental integrity of the judgment of the Supreme Court. Companies and their shareholders and directors are quite separate and different entities. However we have considered the combination of the history of this matter, the confusion within the Board after the company became the holder of the Approval Certificate, the provisions of Section 8B 1(b) and the fact there are proceedings on foot by Mr. Benard in his right. When they are taken in combination adherence to the principles of natural justice and economy of the effort in having all related litigation dealt with together we are persuaded that everything which could arise between Blue Wave Limited and Guy Benard and the Authority should be decided at one time. Thereby we are conserving to the greatest extent possible the scarce resource of judicial time. In principle it is sensible and pragmatic to permit Mr. Benard to be a party in his own right in this proceeding.

On the basis on which this case was presented in the Supreme Court the decision taken by the primary Judge was inevitable. New and different slants have been advanced before us which are sufficient to suggest that a pragmatic course has much to commend itself at this time.

It appears that already there have been difficulties because Mr. Benard wishes to raise in this case a number of matters which are clearly irrelevant to the issues to be determined. The appeal which the Act provides is in a relatively confined area.

We are advised that in respect of the hearing which is set down for 17 May there is to be a conference next week. Mr. Benard (hopefully with a good deal of advice and support from Mr. Toa) will come to terms with the fact that what is relevant, admissible and probative in this hearing will be very



constrained. Issues about which he feels a sense of grievance may not be able to be appropriately raised or ventilated.

We are certainly not persuaded that in the normal run of events, shareholders and/or directors of a company will have any individual rights of audience in these sorts of cases. But in the very peculiar circumstances of this case, we are persuaded that it makes sense both on a principled and at a pragmatic level for Mr. Benard to be given standing to advance his individual position before the Supreme Court.

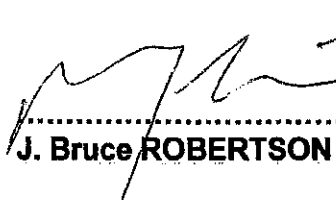
An amended proceeding has been prepared by Mr. Toa which highlights the underlying complaint. We would have thought that there would be sense in rather greater particularization being provided before the hearing commences so that time, effort and energy are not wasted on matters which will not assist in a proper determination of the case.

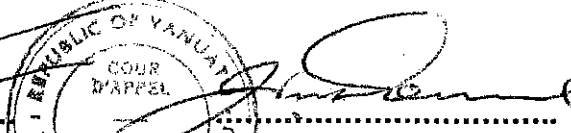
In all the circumstances there is no justification for any order as to costs being made either way in respect of the proceeding before the Court of Appeal.

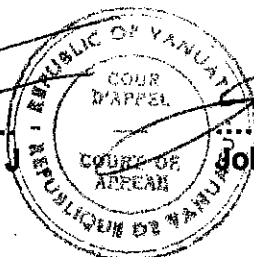
The appeal is allowed. Guy Benard is joined as a party in his own right alongside Blue Wave Limited. The consequences of this order should be considered and fully addressed at the pretrial conference which is scheduled in respect of the substantive matter prior to its hearing in about 10 days time.

Dated at Port-Vila this 9th day of May 2003

BY THE COURT


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J. Bruce ROBERTSON J


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John von DOUSSA J




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Daniel FATIAKI J


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Oliver A. SAKSAK J