

**BETWEEN:** VANUATU COPRA & COCOA EXPORTERS  
LIMITED

First Appellant

**AND:** LAURATA KAVA GROWERS ASSOCIATION

Second Appellant

**AND:** MAISON DE VANUATU

First Respondent

**AND:** VANUATU COMMODITIES MARKETING  
BOARD

Second Respondent

RECEIVED

30 NOV 2007

**Coram:** Chief Justice Vincent Lunabek  
Justice Bruce Robertson  
Justice John von Doussa  
Justice Oliver Saksak  
Justice Christopher Tuohy

**Counsel:** Mr Daniel Yawha for the First and Second Appellants  
Mr Bill Bani for the First Respondent  
Mr Tom Joe Botleng for the Second Respondent

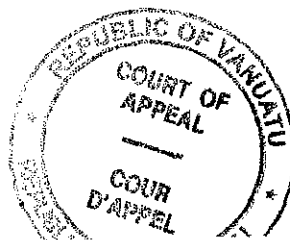
**Date of hearing:** 23<sup>rd</sup> November 2007

**Date of judgment:** 30<sup>th</sup> November 2007

## **JUDGMENT**

### **Issues raised in the Notice of Appeal**

This appeal concerns the functions and powers of the Vanuatu Commodities Marketing Board (VCMB), a statutory agency of the Government established by the Vanuatu Commodities Marketing Board Act [CAP.133] ("VCMB Act"). The appeal also questions the validity of an Agreement made by the VCMB in exercise of its statutory functions with Maison de Vanuatu ("Maison"). The Agreement was signed on 7<sup>th</sup> October 2006, and by its terms came into effect on that day to



appoint Maison the sole importer and distributor in New Caledonia of kava exported from Vanuatu.

The trial Judge, in a judgment dated 29<sup>th</sup> March 2006, upheld the validity of the Agreement in proceedings commenced by Maison in which Maison sought a declaration of validity, specific performance of the Agreement, and damages for breach brought about through VCMB failing to take effective action to prevent export of kava to New Caledonia by other parties who claimed to hold valid export licences. Two of these licence holders, Vanuatu Copra & Cocoa Exporters Ltd ("VCC Exporters") and Laurata Kava Growers Association ("Growers Association") had on their own application been joined as defendants in the principal proceedings. They now bring this appeal. The Notice of Appeal contends that the learned trial Judge had erred in declaring that the Agreement was valid and effective.

VCMB has not appealed against the Orders of the trial Judge, and is a Respondent to the Appeal.

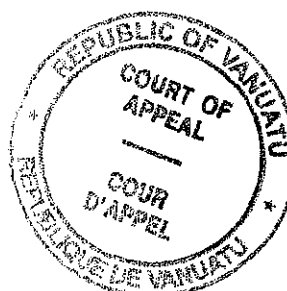
Regrettably, by the time the appeal came on for hearing the parties had become embroiled in new disputes which are being argued before the trial Judge in the course of proceedings to enforce the judgment under appeal. In submissions before this Court the new issues have assumed more importance than the issues formally raised by the Notice of Appeal.

To understand the full picture it is necessary to go into detail.

### **The Legislative setting**

The relevant provisions of the VCMB Act establishing the VCMB, and specifying its functions and powers are as follows:

#### **"2. Control on export and import of prescribed commodities**



From and after the commencement of this Act, no person other than the Board, its agents or persons authorised in writing by the Board shall export or import a prescribed commodity out of or into Vanuatu."

**"4. Establishment of Board**

There is hereby established a Board to be known as the Vanuatu Commodities Marketing Board which shall be a body corporate having perpetual succession and a common seal and may sue and be sued in its corporate name."

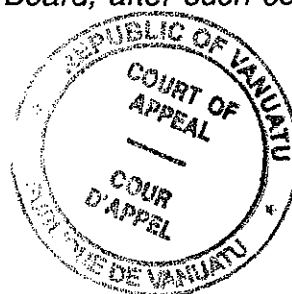
**"6. Functions of the Board**

- (1) The functions of the Board shall be as follows-
- (a) to secure the most favourable arrangements for the purchase, sale, grading and export or import of prescribed commodities;
  - (b) to purchase prescribed commodities or products thereof and to sell, export or import the same;
  - (c) to develop or to assist in the development of the various prescribed commodity industries in the Republic of Vanuatu, including the manufacture and processing of prescribed commodities and related products, for the benefit and prosperity of those industries;
  - (d) to stabilise prices paid for prescribed commodities;
  - (e) to keep and maintain a register which is to contain details of persons purchasing the prescribed commodities and the producers of the prescribed commodities and such other information as the Board considers necessary to be included in the register.
- (2) In carrying out its functions under this Act, the Board shall so conduct its affairs as to avoid the need to rely on Government grants or subsidies."

**"7. Powers of the Board**

In carrying out its functions under this Act, the Board shall have the following powers-

- (a) to purchase prescribed commodities produced in the Republic of Vanuatu which may be offered and delivered to the Board, after such commodities have been graded as suitable for export;



- (b) to control and fix prices from time to time payable to producers for prescribed commodities and to notify such prices;
- (c) to purchase prescribed commodities directly or through an agent and to do all things necessary for, and in connection with, the purchase of such commodities;
- (d) to sell prescribed commodities and to do all things necessary for, and in connection with their marketing, cleaning, storing for export and shipping;
- (e) to appoint agents for the purchase, storage export and import of prescribed commodities for such periods and on such terms and conditions as the Board may require;
- (f) to grant, withhold or cancel any written authority provided for by section 2 and to imposed conditions upon the grant of such authority;
- (g) to purchase, hold, manage and dispose of real or personal property;
- (h) to establish pension scheme or any other welfare schemes for the benefit of its officers and employees;
- (i) subject to the prior approval of the Minister, to borrow or lend money on such terms and conditions as the Board thinks fit;
- (j) to do all that is necessary or required to be done in respect of its functions under this Act."

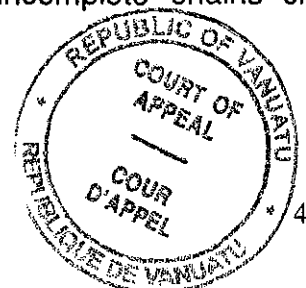
**"22. Directions by Minister**

*The Minister, after consultation with the Board may give to the Board such directions of a general character with respect to the performance of any functions of the Board as appear to the Minister to be requisite in the public interest."*

By Ministerial Order No.15, made in April 2006, the Minister declared kava as a prescribed commodity pursuant to section 3.

**Factual circumstances**

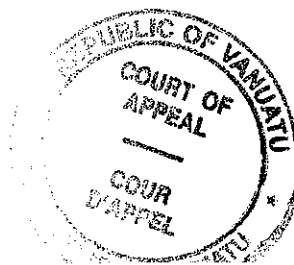
The background facts which gave rise to the principal proceedings, in so far it is possible to ascertain them from the many and often incomplete chains of documents in the appeal book, are as follows:-



The VCMB granted licences to export kava to a number of entities shortly after the Ministerial declaration. On 28 May 2006 VCMB granted a licence to VCC Exporters to export 50 metric tonnes of "fresh" (dried) kava between June and December 2006 to Fiji/New Caledonia, and on 29 May 2006 another licence was granted to the Growers Association to export 50 metric tonnes of "fresh" (dried) kava between May and December 2006 to New Caledonia/Fiji. On 21<sup>st</sup> and 22<sup>nd</sup> June 2006 VCC Exporters and the Growers Association in separate proceedings obtained injunctions against VCMB to restrain it from prohibiting the export of kava to Fiji and further, from interfering with the activities of the licence holders. These injunctions were apparently confirmed again by Order of the Supreme Court on 2<sup>nd</sup> August 2006, although the Order is not before this Court.

On 22<sup>nd</sup> August 2006, VCMB, apparently in an attempt to support an exclusive licence granted to Peter Colmar to export kava to Fiji, resolved to cancel all other licences that would have permitted the export of kava to Fiji, including the licences of VCC Exporters and the Growers Association so far as they related to Fiji. On 31<sup>st</sup> August 2006 a single Judge of the Supreme Court refused an application by Peter Colmar for summary judgment to the effect that the VCMB resolution of 22<sup>nd</sup> August 2006 effectively cancelled all the other export licences. The learned Judge made Orders for an early trial as he considered there were many contentious issues to be resolved. The VCMB however sought to appeal to the Court of Appeal against the refusal to grant summary judgment. The Court of Appeal refused leave to appeal on 28 August 2006, and in the course of its reasons for doing so observed:

*"The learned judge identified a number of matters which caused him to have concerns about the validity of the resolution of 22<sup>nd</sup> August 2006. As argument today has indicated, members of this Court have additional concerns which include the ability of the Vanuatu Commodities Marketing Board simply to pass a resolution which effectively cancels existing licences when no notice have been given to those licence holders, no opportunity to be heard had been given, and no reasons have been given which would justify the cancellation."*



The case was returned to the single Judge as an urgent matter for trial. However, we are informed that the trial has not yet taken place. The history of the Fiji proceedings, as will appear, is relevant to understanding the knowledge of the parties and the context in which the Agreement of 7 October 2006 was made.

Following the Court of Appeal hearing, it seems that the VCMB concentrated on implementing a program for the export of kava to New Caledonia. Uncontested evidence in the appeal papers is to the effect that VCMB with the endorsement of the Vanuatu Council of Ministers during 2005 devised a program in conjunction with Maison whereby Maison was to become the exclusive distributor of Vanuatu kava in New Caledonia. A central participant in the formulation of this program was Georgy Calo who in 2005 was the General Manager of VCMB. He presented the program to the VCMB Board who adopted it in the later half of 2005. In May 2006 his post as General Manager of VCMB ended, and he took on the role as representative of Maison in Vanuatu.

On 7 October 2006 the Agreement was signed to formalise the implementation of the programme. Relevant terms of the Agreement are:

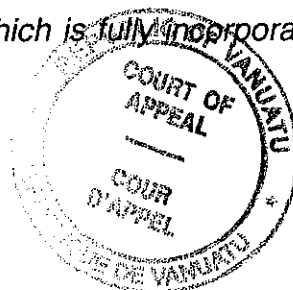
## **"2. PURPOSE OF THIS AGREEMENT**

*After various consultations and discussions between VCMB, the Government of the Republic of Vanuatu represented by the Ministry of Trade Commerce and Industry and Maison du Vanuatu, the following Agreement has been reached between VCMB and Maison du Vanuatu. The Agreement compliments the Government's Kava Policy which was supported and endorsed by the Council of Ministers.*

## **3. AGREEMENT**

*Both parties agree as follows:*

1. *VCMB or through its licensee continue to export the prescribed commodity known as kava to New Caledonia;*
2. *The export of this prescribed commodity will be solely to a company known as Maison du Vanuatu which is fully incorporated under the French company law;*



3. *In return of VCMB accepting Maison du Vanuatu as sole importer and distributor of Vanuatu kava, Maison du Vanuatu will immediately and within seven day of this Agreement coming into force freely allocate or give 15% of its share to VCMB*

#### **4. TERMS OF THE AGREEMENT**

*Both parties agree to the following terms and conditions:*

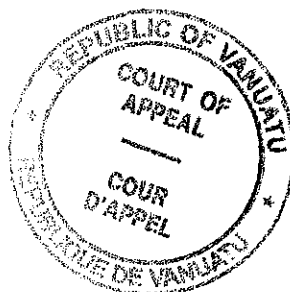
##### **A. VCMB AGREES TO THE FOLLOWING:**

1. *It will abide by the terms and conditions of this Agreement.*
2. *For New Caledonia kava market, VCMB will specify clearly in each licence to be issued to any holder in Vanuatu the sole right to export kava to Maison du Vanuatu and no any other destination in New Caledonia.*
3. *While a current license (sic) is valid the holder shall not export kava to any other destination in New Caledonia.*
4. *VCMB may cancel any licence holder who does not abide by the terms of this Agreement.*
5. *VCMB agrees to export kava to New Caledonia only through Maison du Vanuatu as the sole importer and distributor provided that 15% of its share are freely allocated or given to VCMB and an advance payment of VT5,000,000 be made available to VCMB within seven days from the date this Agreement is signed to assist its financial position.*

#### **10. ENFORCEMENT DATE**

*This Agreement shall come into force on the date of signature by both parties."*

On the signing of the Agreement, Maison paid VCMB VT5,000,000 as agreed in clause 4(A)(5). At a board meeting of VCMB over 14–16 October 2006 the Agreement was discussed. The minutes record:



***“APPROVAL OF AGREEMENT BETWEEN VCMB & MAISON DU VANUATU***

*Since the board has taken decision against the government Program due to maintain the status of VCMB and the Agreement with VCMB and Maison du Vanuatu and the ministry have raised additional clause to be added in the Agreement. The Agreement will engage the Kava Licences, VKPL, VCCE, LOCALEX and NT EXPORTS that will jointly supply kava to Maison du Vanuatu in New Caledonia.*

*The Agreement has also provided for VCMB to have a 15% shares and it may be a 5% share to VKPL, if VKPL goes under the Cooperative Federation but if not then the whole of 15% is directed to VCMB then we will be expecting an estimate amount of VT30,000,000 to VCMB.*

*The first PA to the ministry of Trade stressed that the Agreement must seek further consultation with the Minister before the finalisations of the Agreement.*

*He continue stressing that the amendment of clause 4 of the Agreement and the approval of the Minister on the Agreement if he thinks fit shall only come into effect from the date of his signature on the Agreement.*

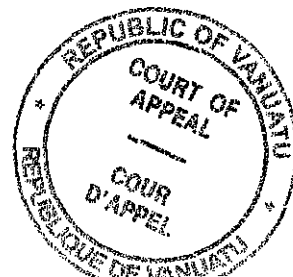
***Resolution:***

*It was resolved unanimously that the Agreement between VCMB & Maison du Vanuatu be approved in Principle awaiting the Minister of Trade's approval.*

*It was also resolved unanimously that the board will negotiate with other Kava Licence Holders VCCE, LOCALEX, NT EXPORTS and VKPL to export kava to Maison du Vanuatu Noumea New Caledonia.”*

*On 17<sup>th</sup> October 2006 VCMB wrote to parties, other than Maison, to whom it had issued export licences in the following terms:*

***“To: All Exporters of the Prescribed Commodity Kava to New Caledonia***





*Subject: Agreement Between VCMB and Maison du Vanuatu on the Importation & Distribution of the Prescribed Commodity Kava in New Caledonia.*

*Your attention is hereby drawn to the above subject matter.*

*After various consultations and discussions between VCMB, the Government of the Republic of Vanuatu represented by the Ministry of Trade Commerce & Industry and Maison du Vanuatu, the above Agreement was signed between VCMB and Maison du Vanuatu on 7<sup>th</sup> October 2006. The Agreement is in line with the Government's policy on the prescribed commodity kava. The VCMB Board had approved the Agreement in principle during a Board Meeting on 16<sup>th</sup> October 2006.*

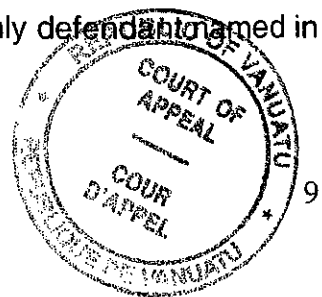
*This therefore means that any exportation of the prescribed commodity kava to New Caledonia must only be to Maison du Vanuatu and not any other private individuals or corporations. Please make all necessary arrangements to ensure that all your next export of the prescribed commodity kava to New Caledonia should all be addressed to Maison du Vanuatu and not any other private individuals or corporations.*

*Please take notice that you may face some difficulties with your next export if you do not comply with this note.*

*Christian Lui  
Chairman"*

On 16<sup>th</sup> November 2006 the proceedings in this matter were commenced in the Supreme Court, CC 216 of 2006, by Maison against VCMB. The primary allegation in the particulars of claim is that VCMB has failed to perform its obligations under the Agreement as it continues to issue licences and to allow third parties to export kava to persons other than Maison in New Caledonia.

On 25<sup>th</sup> November 2006 Maison obtained an interlocutory injunction in the following terms (even though at that time VCMB was the only defendant named in the proceedings):



"1. That pending final determination of the claim filed in this proceeding, the Defendant its agents, employees including any other persons who were granted authority by the Defendant to export kava to New Caledonia are restrained from exporting kava to any other companies and persons in New Caledonia except through Maison du Vanuatu."

In the days following the grant of the injunction the Growers Association and VCC Exporters made applications to the Supreme Court to be joined as Defendants in CC 216 of 2006, and in due course that happened.

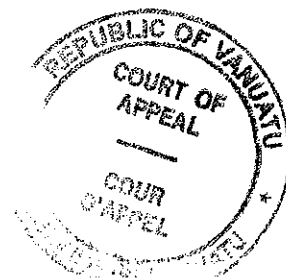
It is not apparent on the evidence before the Court of Appeal whether the interlocutory injunction made on 25<sup>th</sup> November 2006 remained in place. There is some evidence which suggest that VCC Exporters and the Growers Association continued to export kava to New Caledonia.

Whilst it is pleaded that there were new licences issued by VCMB that did not require that the export of kava destined for New Caledonia be shipped only to Maison, the evidence does not show that any new licences were issued between 7 October 2006 and the commencement of the proceedings on 16 November 2006.

On 28<sup>th</sup> December 2006 a letter was written by the Minister, apparently to one of the parties, to the effect that he had *"never approved the Agreement"* and that *"(he) cannot allow VCMB to be part of this deal as it was without my approval"*.

In oral submissions during the hearing of this appeal the Court was informed by counsel that VCMB issued new export licences to VCC Exporters and the Growers Association in July 2007 which did not require export to Maison (only). These events occurred not only after the issue of the principal proceedings, but after the judgment under appeal had been given.

### **Submissions of the parties**

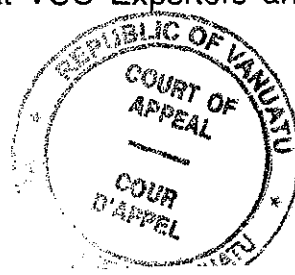


Before the trial Judge, Maison contended that the power of the Board in s.7(f) of the VCMB Act authorises VCMB to impose new conditions on existing export licences, including on those held by VCC Exporters and the Growers Association, requiring them to supply only Maison, or alternatively to cancel their licences. Further it was contended that VCMB was required by clause 4(A)(3) of the Agreement to take one of these steps in exercise of the power in s.7(f). It was Maison's case that the Agreement was validly made, and did not require the prior consent of the Minister, as contended by other parties to the proceedings.

The VCMB at first contended that the Agreement was validly made by it, but part way through the trial changed its position to contend that the Agreement was invalid as s.22 of the VCMB Act required prior specific approval of the Minister to the Agreement, clause by clause, which had not been given.

VCC Exporters and the Growers Association contended that if the Agreement was valid, neither s.7(f) nor clause 4(A)(3) could permit any restriction to be placed on the export licences which they already held at 7 October 2006. In particular s.7(f) only permitted conditions to be imposed on licences at the time of their issue, not subsequently. Further, the injunctions made on 21 and 22 June and 2 August 2006 prevented VCMB from interfering with their export licences. In any event, VCC Exporters and the Growers Association contended that no condition or restriction could be placed on their existing licences without them first being given the opportunity to be heard, the point raised by the Court of Appeal in its judgment on 28 September 2006.

VCC Exporters and the Growers Association also contended that under s.6(1)(a) of the VCMB Act, the Board is required to secure the most favourable arrangements for the purchase, sale, grading, export or import of prescribed commodities and the Agreement is not the most favourable as it creates a monopoly. On the contrary the most favourable arrangements would include the other exporters as participants in the market. They contended that as the most favourable arrangement has not been secured, the Agreement is invalid from the outset. No point was taken before the trial Judge that VCC Exporters and the



Growers Association had no standing to be arguing about the validity of a contract to which they were not a party.

### **Judgment at trial**

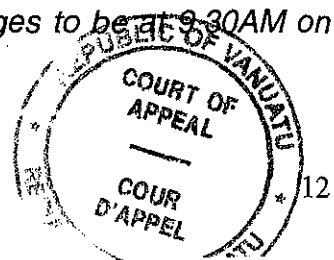
The learned trial Judge held that the Agreement was validly made by the VCMB in exercise of its statutory powers. Section 22 empowers the Minister to give directions of a general character where he thought it appropriate to do so, but did not require the Minister to approve specific contracts entered into by the VCMB. Moreover, in this case a general direction had been given by the Minister and the Agreement was in accordance with it. As the specific consent of the Minister was not required, the Minister's assertion in his letter of 28 December 2007 that the Agreement required his approval had no bearing on the validity of the Agreement.

The trial Judge held that the Agreement came into force in accordance with its terms upon being signed on 7<sup>th</sup> October 2006, and that the subsequent deliberations of the VCMB Board on 14-16 October 2006 did not, and could not, alter the operation of the Agreement which was already in force.

The trial Judge also held that s.7(f) only permitted a condition to be attached to a licence at the time of grant, and did not authorise the attachment of new conditions to the licences of VCC Exporters and the Growers Association during their currency.

The learned trial Judge made the following Order dated the 29<sup>th</sup> March 2007:

1. *The Agreement is valid and enforceable.*
2. *VCMB must do all things necessary so as to specifically perform its obligations under the Agreement within 30 days of the date of this Order.*
3. *Defendant (VCMB) to pay the Claimant's costs of and incidental to these proceedings on an indemnity basis, to be taxed if not agreed.*
4. *Defendant to pay the Claimant's damages.*
5. *First conference to determine the amount of damages to be at 9.30AM on 22 May 2007."*



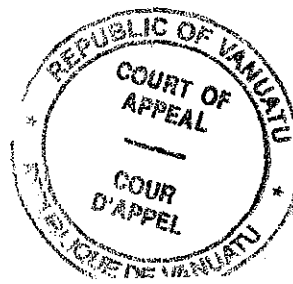
In a subsequent Order, the trial Judge on 1<sup>st</sup> June 2007 clarified that paragraph 1 of the above Order is enforceable only against VCMB, and *"if others have valid licences from VCMB to export kava to other people in New Caledonia, that is a different matter."* And in a minute dated 5<sup>th</sup> July 2007 issued after hearing an application by Maison to restrain VCMB from issuing further licences for export of kava to New Caledonia, the Judge said it was not necessary to make further Orders, but added: *"However the parties are reminded that the decision issued on 29<sup>th</sup> March 2007 made it very clear that the Agreement entered into between VCMB and Maison du Vanuatu is valid and enforceable. That means that if VCMB wishes to take any action that is contrary to that decision i.e. issue new licences for export to New Caledonia, it must come first to the Court to seek variation of the Orders of 29<sup>th</sup> March 2007. Once it has obtained such variation Orders then it may do what is authorised under such varied Orders."*

Notwithstanding this statement counsel inform us that later in July 2007 VCMB issued further licences permitting export of kava to importers in New Caledonia without any variation of the Orders made on 29 March 2007. Then, having issued these licences, VCMB later "suspended" them. It is these events which counsel spent time discussing before this Court. But first the issues raised by the Notice of Appeal require discussion.

### **Consideration of the appeal**

At the outset it is important to consider the interpretation and effect of the terms of the Agreement. Before the trial Judge the parties seem to have assumed, without detailed consideration, that the Agreement was intended to require VCMB to interfere with the existing licences of other exporters, and that simply by entering into the Agreement VCMB had done so.

With a commercial contract like this Agreement, its terms must be construed in the context in which it is made and having regard to the common knowledge of both parties about the market in which the Agreement is to operate.



The evidence about the role of Mr Calo and the participation of the Minister in designing the programme for export of kava to New Caledonia is significant. Both Maison and VCMB must be taken to have known full well that there were already other parties holding current licences to export kava to New Caledonia. Moreover they both well knew of the June and August 2006 injunctions. In these circumstances if the terms of the Agreement are capable of a meaning that recognises and honours the obligations of VCMB under the other licences and under the Court Orders, that interpretation should be preferred to one which would put VCMB in breach of the authorities given to other licensees, and in contempt of Court.

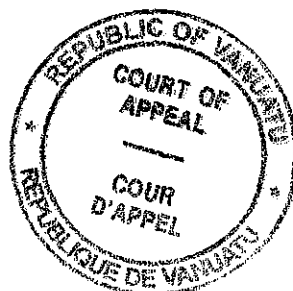
Looking then at the terms of the Agreement, its purpose is to appoint Maison as the sole importer and distributor of Vanuatu kava in New Caledonia. That object can be achieved by having several exporters in Vanuatu so long as exports made by them are to Maison as the sole distributor in New Caledonia.

This situation is recognised by the language of the Agreement. Clause 3.1 provides that the "*VCMB or through its licensee*" will export kava to New Caledonia. Clause 3.2 requires that the export will be solely to Maison.

Clauses 4(A)(2), (3) & (4) attracted the attention of the parties at trial. They require careful reading. Clause 4(A)(2) requires that "*VCMB will specify clearly in each licence to be issued to any holder in Vanuatu the sole right to export kava only to Maison*". This language speaks to the future. It imposes an obligation on VCMB in relation to future licences. It says nothing about existing licences.

Clause 4(A)(3) by its terms speaks of current licences. However that clause needs to be read with clauses 4(A)(3) and (4). We repeat clauses 4(A)(3) and (4):

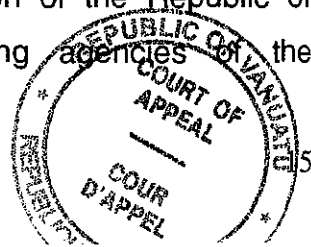
3. *While a current licence is valid the holder should not export kava to any other destination in New Caledonia.*
4. *VCMB may cancel any licence holder who does abide by the terms of this Agreement."*



Taken literally, the clauses could suggest an intention that VCMB is required to interfere with the terms of existing or "current" licences held by other people. However it will be noted, first, that the Agreement is between only VCMB and Maison. Clause 4(A)(3) cannot have any contractual effect on licence holders who are not parties to the contract, a point implicitly made by the trial Judge in his explanatory Order of 1<sup>st</sup> June 2007. So the terms of the Agreement cannot impose any obligation on non-parties to do anything. In a strict sense, non-parties cannot by the Agreement come under any obligation to "abide by the terms of this Agreement". Other export licence holders, like VCC Exporters and the Growers Association do not fail to "abide by the terms of this Agreement" if they continue to operate under their current licences.

To give a realistic meaning to clauses 4(A)(3) and (4) we think they should be understood to refer to a situation where the VCMB has granted further licences subject to the condition required by clause 4(A)(2). On this basis, the effect of clause 4(A)(4) would be to require VCMB to cancel such a licence if the licence holders did not comply with the condition requiring they supply only to Maison. On this construction of clauses 4(A)(2), (3) & (4), do not purport to have any effect upon the rights of holders of licences to export kava to New Caledonia that existed on 7<sup>th</sup> October 2006.

There are reasons for this conclusion besides the background context in which the Agreement was made. As a matter of law, it could not be open to VCMB to arbitrarily alter or cancel the terms of existing export licences held by third parties. As the Court of Appeal recognised in the reasons for the decision of 28<sup>th</sup> September 2006, an administrative decision making body like VCMB must extend natural justice to licence holders before taking action which adversely affects their vested interests. In the present context, VCMB could not act lawfully to add a restrictive condition to an existing licence, or to suspend or cancel a licence, without giving the licence holder an opportunity to be heard. Moreover, the VCMB could only alter, suspend or cancel a licence if there was a lawful reason for doing so. Licences like the export licences held by the VCC Exporters and the Growers Association, constitute valuable property. The Constitution of the Republic of Vanuatu, Article 5, obliges the Government, including agencies



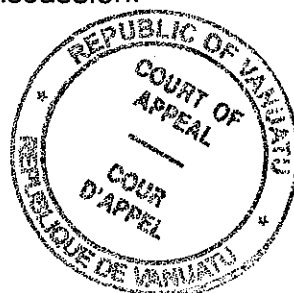
Government like VCMB, to act in accordance with constitutional fundamental rights. Article 5(1)(j) of the Constitution protects people in Vanuatu against Government action which would constitute an unjust deprivation of property.

To construe clauses 4(A)(3) & (4) as authorising VCMB to alter or cancel licences held on 7 October 2006 by third parties or to impose new restrictive conditions without compensation would be unlawful. On the construction of clauses 4(A)(2), (3) and (4) we propose, that situation does not arise.

In passing we note that VCMB in the days following the Agreement did not seek to use Clauses 4(A)(3) & (4) to impose new licence conditions on current licence holders. The letter to them from VCMB dated 17<sup>th</sup> October 2006 amounted to no more than a request to licence holders to address further exports to New Caledonia to Maison. Whilst the last sentence of the letter may contain a lightly concealed threat of unidentified difficulties if shipments were directed elsewhere, the letter did not change the existing licence conditions.

For the above reasons we consider the Agreement should be construed to mean that VCMB and Maison intended that existing licence holders would continue to enjoy their current export licence rights to export kava to importers of their choice in New Caledonia (provided of course that the existing conditions of those licences as to quality, quarantine requirement and so on were met). However the Agreement requires that new export licences issued to third parties after 7<sup>th</sup> October 2006 will contain a condition that the New Caledonia importer must be Maison.

This conclusion renders many of the issues canvassed at trial by the parties academic. However arguments that the Agreement required the specific consent of the Minister under s.22, that the Agreement was not authorised by the statutory functions and powers of VCMB because it did not secure the most favourable arrangements, and that s.7 (f) of the VCMB Act empowers VCMB to add a licence condition during the currency of the licence require discussion.

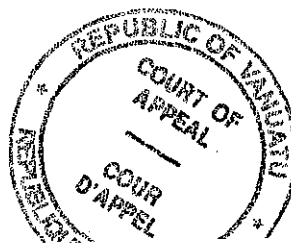




It should be noted that these issues arose at trial between Maison and VCMB, the two parties to the Agreement. However, before this Court these issues were not discussed by either of these parties who are Respondents, not Appellants. Both parties to the Agreement accept the decision that the Agreement is valid and binding. In these circumstances it is difficult to see how the Appellants have standing to challenge the validity of the Agreement. The issues which the Appellants have about their licences, both those issued in 2006 and the more recent ones, are issues between them and VCMB. The issues concern VCMB's statutory powers and functions and involve questions of administrative law that would more appropriately be dealt with in judicial review proceedings against VCMB.

However, we think the issues raised by the Appellants can be dealt with briefly. Section 22 contains a power of the kind commonly reserved to a Minister where a government function is devolved to a statutory entity. The power entitles the Minister to give directions of a "*general character*" after consultation with the Board. The section contemplates that directions may be given on matters on government policy and in respect of the performance of any of the functions of the Board as the Minister thinks necessary in the public interest. However, s.22 cannot be construed as imposing a requirement on the Board that the Board obtained ministerial consent to every commercial contract the Board wishes to enter into. To require this would be contrary to the purpose of the Act itself which is to give the day to day performance of the functions set out in s.7 to a Board constituted by people with a cross section of relevant interests.

That is not to say that in a specific case that the Minister may not by direction in advance of a transaction require that the Minister must be involved in consultation or even that the Minister must ultimately give consent to a transaction. However that need arises because of directions given to that effect, not by force only of the general words of s.22. In this case no directions were given that required prior approval to transactions implementing the general program endorsed by the Government, and in so far as directions of a general character had been given in relation to that program, the evidence shows the directions were followed.



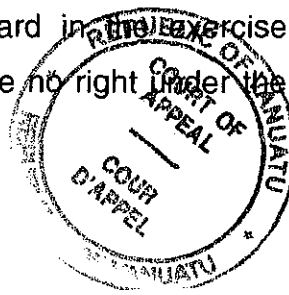
The minutes of the meeting of 16<sup>th</sup> October 2006 are not easy to follow, but as we understand them, they record that the Board acknowledged that the Agreement had been completed "*against the Government program*" (i.e. in the context of that program). However, since the Agreement was made the Ministry had raised the need for an additional clause that would "*engage*" the current export licence holders so that they would export only to Maison du Vanuatu.

As the circumstances surrounding the present litigation show, this was a gap in the implementation of the program that the Agreement failed to adequately address. The minutes record not that there was any doubt about the validity of the Agreement but that the Minister wanted an amendment to be negotiated to Clause 4 in terms that he would approve.

Even if this is not the correct interpretation of the minutes, as the trial judge held, the Agreement had already come fully into effect according to its terms on 7<sup>th</sup> October 2006. The VCMB accepted the advance payment VT5 million and nowhere in subsequent documents is there any suggestion that VCMB was holding the money in escrow pending some later approval to bring the contract into force.

The VCMB, as a statutory authority, had general power to enter into the Agreement without outside approval from the Minister or any other authority. The Agreement came into effect according to its terms on 7<sup>th</sup> October 2006, and any attempt by the Minister thereafter to intervene could not affect the validity of the contract.

The argument that an interested member of the public, such as the existing export licence holders, can attack the validity of the Agreement on the ground that the object and effect of the Agreement was not the most favourable arrangement for the purchase, sale, grading and export or import of prescribed commodities within the meaning of s.6(1) (a) of the VCMB Act is misconceived. The statutory functions of the Board prescribe objectives that the Board should strive to achieve, but the judgment as to whether policies adopted by the Board meet those objects is exclusively the domain of the Board in the exercise of its collegiate expertise and advice. Outside interests have no right under the Act or



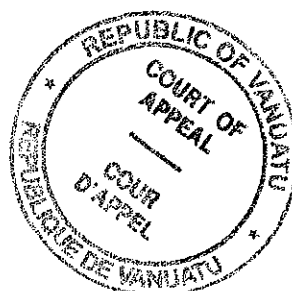
otherwise to contest the appropriateness of Government or Board policy in a Court of law. The appropriateness of Government or Board policy is a matter for executive government and its administrative authorities. Courts are not equipped to make judgments on policy issues of this kind, which are said to be "*non justiciable*" for that reason.

The final issue concerns s.7 (f). In our opinion the language of this section is clear. The Board has the power to grant a licence, to withhold a licence, to suspend a licence, and to impose conditions upon the grant of a licence. The power to impose conditions is expressly a power exercisable "*upon the grant of a licence*". All these powers must of course be exercised in accordance with established principles of administrative law and for lawful reason. Subject to these requirements, if the VCMB considers it necessary to vary the conditions of a licence during its currency, it would be necessary for the Board to cancel the existing licence and to substitute another by grant of a new licence containing new conditions.

In our opinion the trial judge did not fall into error in holding that the Agreement was valid and enforceable as declared in paragraph 1 of the final Order now under appeal.

It is however necessary to refer to the consequential orders made in paragraphs 2 and 4.

Paragraph 2 ordered VCMB to do all things necessary so as to specifically perform its obligations under the Agreement within 30 days of the date of the order. The generality of this order is so broad as to be incapable of enforcement. Orders for specific performance need to specify the acts which must be performed with sufficient particularity for the Defendant to be left in no reasonable doubt as to what is required to comply with the order. Even though the VCMB has not appealed against any part of the Order, we think paragraph 2, should be set aside.



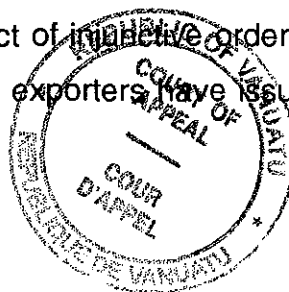
The difficulty which paragraph 2 in its present form is that it does not reflect findings about the proper interpretation of the Agreement. Before specific performance of a contract is ordered the Court must decide precisely what the Defendant is required by the contract to do. Had the construction of clauses 4A(2),(3) and (4) been considered at trial the it would have become apparent that Agrèement did not purport to change the position of exporters who already held licences, and that continuing exports by VCC Exports and the Growers Association were not inconsistent with VCMB's obligations. In these circumstances there was no occasion to make any order of specific performance against VCMB.

A further issue which paragraph 2 did not address is whether, in the case of a statutory authority, a mandatory order such as specific performance could interfere with the proper exercise of the discretionary functions vested in the Board, and whether in all the circumstances an award of damages would provide an adequate remedy.

We understand from what counsel said in their submissions that paragraph 2 of the Order has already given rise to difficulty as there are ongoing hearings before the trial Judge for the enforcement of the Order for specific performance. Contempt proceedings against members of the VCMB Board have been threatened, apparently because of the issue of the new licences in 2007. In turn this has prompted the Board to suspend the new licences.

Without commenting on the merits of what the Board may have done in 2007, it must be stressed that the proceedings before the trial Judge concerned the validity of the Agreement and events which occurred before the issue of the proceedings on 16 November 2006. Those proceedings were brought by Maison against VCMB.

It is not appropriate that in enforcement proceedings under the judgment administrative law issues between VCC Exporters and the Growers Association and VCMB should be decided or be the subject of injunctive orders against VCC Exporters or the Growers Association. If those exporters have issues with VCMB



about their 2007 licences they should commence separate proceedings against VCMB.

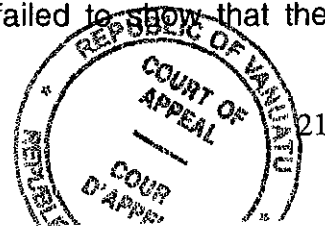
The effect of an Order of this Court setting aside paragraph 2 of the Order under appeal will be to put an end to the current enforcement proceedings and any orders made in them.

Paragraph 4 of the order under appeal requires "*Defendant to pay the Claimant's damages*". Plainly this means such damages as are later assessed by the Court. This is clear from the succeeding paragraph of the order. In light of the interpretation we place on the Agreement it may be that Maison has no claim for damages for events before the date when the proceedings were commenced. Apparently VCMB has issued new export licences to third parties in 2007. If that is so, these licences might constitute a breach of the Agreement. That is not a question which is before this Court, nor, strictly would it be part of CC 216 of 2006 as the new licences were issued after the proceedings CC 216 of 2006 were commenced.

That is a matter which the parties need carefully to consider before proceeding further with a damage assessment before the trial judge.

We also note in passing that Clause 9 of the Agreement provides for penalties on breach of the Agreement. The particulars of claim in CC 216 of 2006 include a claim for liquidated damages under Clause 9. We simply observe that the Claimant cannot recover both compensatory damages and liquidated damages under Clause 9 as that would amount to "*double dipping*".

The issue of costs of the appeal is complex. The Appellants were joined at trial as interested parties. As the interpretation of Clause 4 of the Agreement was not really considered at trial, is difficult to know how far and to what extent the Order made at the conclusion of the trial impacted on the Appellants. However they have pursued this appeal arguing that the Agreement was invalid and in the alternative not effective to prevent them continuing to operate under the export licences current at 7 October 2006. The Appellant has failed to show that the



agreement is invalid, but has succeeded on issues concerning the effect of clause 4.

It seems that the litigation has arisen, at least in part, because of the failure of VCMB and Maison to sufficiently consult with the existing licence holders in October 2006, and to include them in negotiations leading to the agreement. We think VCMB and Maison must bear some responsibility for the litigation.

We consider justice will be done if no order for costs is made for or against any party to this appeal.

The formal orders of the Court therefore will be:-

- (a) Paragraph 2 of the Order of the trial judge made on 29<sup>th</sup> March 2007 is set aside.
- (b) The appeal is otherwise dismissed.
- (c) No order as to costs for or against any party to the appeal.

**DATED at PORT-VILA this 30<sup>th</sup> day of November 2007**

**BY THE COURT**

  
.....  
**VINCENT LUNABEK C.J. REPUBLIC OF VANUATU** **BRUCE ROBERTSON J**

  
.....  
**JOHN VON DOUSSA J**   
.....  
**OLIVER A. SAKSAK J**

  
.....  
**CHRISTOPHER TUOHY J**