

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

Civil Appeal
Case No. 18/1561 CoA/CIVA

BETWEEN: GEORGE BOAR
Appellant

AND: PUBLIC PROSECUTOR
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Coram: Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd

Counsel: Appellant in person
Mr H. Tabi for the Respondents

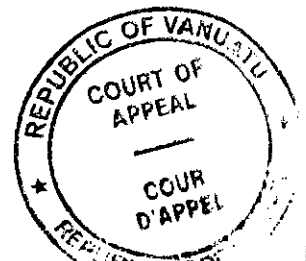
Date of Hearing: 10th July 2018

Date of Decision: 20th July 2018

JUDGMENT

Background

1. The appellant George Boar is a lawyer practicing in Vanuatu. In 2008, he acted for 15 staff of the Vanuatu Government, Department of Co-operative (the clients) in a claim against the Republic of Vanuatu in Supreme Court Civil Case 123 of 2005 (the claim).
2. Judgment was given on the claim on 26th September 2008 in favour of the clients for VT5,964,390 (including costs). The Republic appealed to the Court of Appeal, but its appeal was dismissed on 5th December 2008 with costs.
3. The Republic paid to Mr Boar on behalf of the clients the total sum of VT6,685,660 including the costs of the appeal (the judgment sum). Mr. Boar has paid VT1,500,000 of the judgment sum and costs recovered to a representative of the clients, and it is not clear whether Mr Boar has done so to each of them in the proportion to which they are each separately entitled. There is some uncertainty about whether he has paid any other amounts to them. Mr Boar accepts that he still holds VT964,752 which he has to pay to the clients.



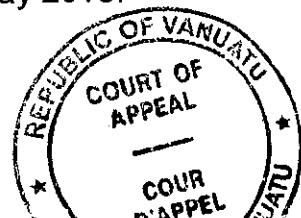
4. It is not at all surprising that the clients over time became upset by Mr Boar's conduct, now some 10 years since the judgment. Nor is it at all surprising that some of the clients should have complained to the police that Mr Boar may have misappropriated most of their judgment sum, as collectively they have received so little of it.

Proceedings in the Magistrate's Court

5. After investigation, the Public Prosecutor filed a draft Charge against Mr Boar for the offence of misappropriation on 27 April 2017 of VT2,335,660 contrary to Section 125(b) of the Penal Code [CAP. 135]. Attached to the draft charge were the Preliminary Inquiry (PI) documents disclosing the proposed lists of prosecution witnesses; proposed exhibits; and a complaint for the purpose of a committal hearing pursuant to Sections 35 and 143 of the Criminal Procedure Code [CAP. 136] (CPC).
6. The draft Charge was amended on 25th September 2017 to substitute the allegation so that it was that between 2009 and 2012 at Port Vila Mr Boar had converted to his own use VT1,865,660 which belong to the clients. Progressively Mr Boar has been provided with updated PI documents.
7. The matter proceeded in the Magistrate's Court as a preliminary investigation. The hearing was conducted on 14th November 2017, including an application by Mr Boar to have the charges against him dismissed.
8. On 28th November 2017, the Chief Magistrate ruled that there was a case to submit to trial, and on 30th November 2017 the Chief Magistrate issued a written committal order. It confirmed that there was a prima facie case disclosed, at that time of course in relation to the then current charge of 25 September 2017.
9. What happened at a Preliminary Inquiry and what needs to be covered and what is not covered was clearly enunciated by this Court in *Moti v Public Prosecutor* [1999] VUCA 5 Criminal Appeal Case 07 of 1999 (23 April 1999).
10. Nothing in this case alters the clear rationale of that previous decision but it does not in any way detract from the fundamental requirement that the Senior Magistrate must be satisfied that there was some evidence which could establish each of the elements or ingredients of the particular count. This requires a basic level of particularity and detail so that the accused person knows what they face and what they must answer.

Proceedings in the Supreme Court

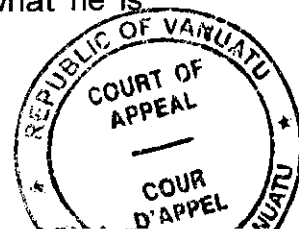
11. Immediately following the committal order, on 1 December 2017 Mr Boar applied for judicial review of that order seeking to have it quashed. The named defendants were the Public Prosecutor and the Republic of Vanuatu, and not the Chief Magistrate whose order was sought to be quashed. That application was amended on 25th January 2018, in some respects and subsequently progressed to a hearing, but the parties did not change.
12. Judgment on that application was given by the Supreme Court on 29th May 2018. Mr Boar's application was dismissed with costs.



13. To understand fully the reasons for that decision, it is necessary to note that on 3 August 2017 Mr Boar and two of the clients Joseph Alick and Ben Joseph executed a Deed of Settlement (the Deed) agreeing that Mr Boar still owed the clients VT964,751 as the balance of the judgment sum and costs previously recovered, after payment of his charged legal fees. He said that he continued to hold that sum in trust for the clients, and was prepared to pay to them, subject to identifying precisely which clients were to receive what amount of money. The Deed provided certain of the grounds for the judicial review application.
14. It is also necessary to note that Mr Boar's conduct has also been the subject of complaints to the Law Council under the Legal Practitioners Act [CAP. 119].
15. Mr Boar said that, by reason of the Deed and the Law Council complaint, it was an abuse of process of the Court for the concurrent prosecution of a criminal offence to be maintained against him. He specifically said in his amended application that the Deed had made "*redundant*" the continued prosecution of him and had excluded the Court from presiding over any charge of misappropriation. His amended application also asserted that the prosecution against him was oppressive, having regard to the lapse of time and having regard to the difficulty he asserted that he had experienced in identifying which of the clients was entitled to which amounts of money from the balance of VT964,751 now available.
16. All those claims were rejected by the primary judge.

The Appeal and Determination

17. This is an appeal from that judgment. We note that the proposed criminal charge was further amended on 1st December 2017 so the allegation was then that between 2009 and 2017 Mr Boar converted between VT964,751 and VT2,007,895 representing "*the judgment sum less charges*" and being money to which the clients were entitled. The lower figure is the amount specified in the Deed. The higher figure is the amount calculated on the basis of the PI statements of the clients.
18. It is apparent from the PI documents, particularly as disclosed in the appeal book, that Mr Boar's position simply is that he collected or received the sum of VT6,685,660, that he has paid to a representative of the clients VT1,500,000, and that he has applied the balance apart from the VT964,751 held by him on behalf of the clients to this costs. He asserts in his submissions that it was agreed between him and the clients that he would deduct his legal fees from the payments he had received, and would then pay the balance to the clients. His submissions suggests that, in addition to the VT1,500,000 payment referred to above, he has made other payments to certain of the clients. The Deed (and some other documents) suggest that he also paid VT170,000 and then VT817,751 in December 2012 and VT300,000 on 10 May 2017.
19. That is a matter which, from the point of view of the Public Prosecutor, should be clarified before the charge can proceed to a fair hearing. Any person facing a criminal allegation is entitled to have clarity and particularity as to what he is facing.



20. There are other documents, including Mr Boar's accounts and correspondence in the PI documents which suggest that, after payment of the fees, there was simply not enough money for him to have made those payments. If that is so, it may suggest he has intermingled his personal funds and trust monies, and simply applies his personal funds as necessary to meet the trust liabilities he has.
21. Whereas the Deed asserts that his total legal costs to be paid by the clients are VT3,090,909, it also refers to the Republic having paid VT1,500,000 for party-party costs as well. His correspondence and his accounts total VT4,291,909. Those documents are in the PI papers and in his appeal book.
22. The position appears to be:

"RECEIPTS AND PAYMENTS

Received	VT6,685,660
<i>Fees paid</i>	
<i>Invoice 79/08</i>	475,000
<i>Invoice 08/09</i>	1,250,000
<i>Invoice consolidated 03/03/08</i>	<u>2,566,909</u>
<i>Total</i>	4,291,909
<i>Available funds</i>	2,394,751
<i>Less paid to clients</i>	1,500,000
<i>Less funds specified under Deed</i>	<u>964,751</u>
<i>Total</i>	2,464,751
<i>Difference (Shortfall)</i>	(71,000)"

23. That is based particularly on Mr Boar's own consolidated invoice obviously prepared sometime after 3 March 2008, the date it bears. He accepted its accuracy in the course of the hearing. There is a shortfall of VT71,000 to reach a balance.
24. Even on that analysis, Mr Boar has "overspent" the amount received. There is no room for the additional payments asserted in the Deed. In any event, the Deed takes into account as part of the receipts from the Republic the amount paid for costs, but then does not allow for that (applied by Mr Boar for costs) when working out the "surplus" held by him as specified in the Deed.
25. As we have discussed, it appears that even putting aside the asserted payments to the clients as set out in the Deed (and elsewhere) other than the VT1,500,000, Mr Boar has "overspent" the moneys held in trust for the clients.
26. But it is not clear, especially as the later version of the charges appears to accept some legal fees were properly taken from those monies, how much Mr Boar is said to have converted to his own use and when and how that is said to have been done is unclear. If he kept a separate trust account, which recorded payments in and out on behalf of the clients and which properly balanced, the delay in paying them would not show he had used their funds for his own purposes. It is probable that such a clear record does not exist, on the basis it is



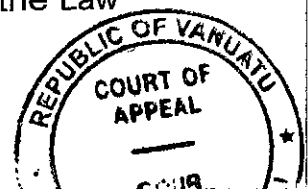
not in the PI documents and has not been presented to the Public Prosecutor. However that may be incorrect.

27. There is reason to doubt the Deed accurately reflects the amount Mr Boar holds or should hold on behalf of his clients. The act or acts of conversion, and the dates should be made clearer. The amount or amounts converted should be clear.
28. There are a number of issues which the Public Prosecutor will need to be clear about, so as to focus on what is to be proved.
 - (1) After receipt of the judgment sum and costs, did Mr Boar maintain a trust account on behalf of the clients, or did he simply pay them into his personal account or accounts, so that (for example) the amount said to be available of VT964,751 under the Deed is to come from a personal account;
 - (2) If he intermingled the clients' monies with his own, did he make use of their monies for his personal use until he made payments to them;
 - (3) If some allowance is to be made for his fees,
 - (i) Is it accepted that his fees as charged are proper; or
 - (ii) Is he confined to recovering VT1,500,000 for fees because that was the sum specified by him as recovered from the Republic for fees?
or
 - (iii) Is he confined because of instructions given by the clients by letter of 18 December 2009 to pay all the sum received above VT1,500,000 into a specified trust account (see: Appeal Book p. 497) or because of other communications between him and the clients.
29. The source of the additional payments he has made (or claims he has made), and the details of the account or accounts he has operated, will no doubt provide further lines of inquiry. It may be that to pay the amount recovered into his personal account, intending to pay the clients back in due course, is itself a conversion unless his records clearly maintained the payment as isolated from his personal account.
30. We observe that there is no forensic accounting analysis of the invoices or accounts of Mr Boar in his practice.
31. In those circumstances, if the matter is to proceed, obviously the Public Prosecutor will endeavor to reconcile or explore those matters with a view to determining what clearly can be proved including which, if any, of the clients' acknowledged receipt of the payments which Mr Boar asserts, or on the other hand, whether his records show the amounts of fees deducted as indicated in invoices simply involved a notional transfer in his personal accounts. Obviously that is a matter requiring some expertise, probably from a forensic accountant.
32. The present particulars of the offence charged do not contain sufficient particularity about the conduct alleged. We have indicated why that is so. It is



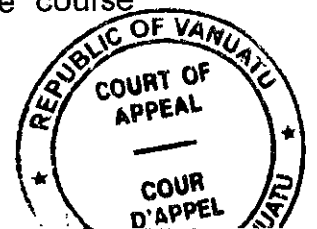
clear that that is, and has always been, a requirement of the criminal justice system so that the accused person can have a fair trial. See for example, R v Quintner (1934) 25 Cr App Rep 32.

33. It is not necessary to recite specifically the material in the Appeal Book and in the PI documents to support those figures. They appear more than once.
34. The Public Prosecutor has properly submitted that this application for judicial review by Mr Boar is not an appropriate procedure and might itself be seen as an abuse of process, particularly as the appropriate procedure to review any decision of the Magistrate's Court is specified relevantly in Section 30 of the Judicial Services and Courts Act [CAP. 270]. The Public Prosecutor, in his submissions, accepts that that provision would provide Mr Boar with an avenue to challenge the Magistrate's decision to commit him for trial. Moreover, as the Public Prosecutor submitted, in the event of an application for judicial review, it was necessary to name the Chief Magistrate as a party: see Rule 17.4 of the Civil Procedure Rules.
35. We see merit in both of those contentions. An inappropriate procedure was adopted by Mr Boar. However, as discussed below, we do have concerns about the committal order based upon the PI information as it then stood, and the more so with the apparent acceptance by the Public Prosecutor of Mr Boar's entitlement to charge fees (in the charge of 1 December 2017) from the payments received from the Republic and with no apparent indication of an assertion that the amount charged for those fees and the amount deducted from the monies held by Mr Boar for those fees was either excessive or unauthorized in the particular circumstances. There is certainly no particularity of the alleged offence which, in our view, enables Mr Boar properly to understand the nature of the case against him.
36. It would be regrettable if this application were to be dismissed on a technical ground, leaving an unsatisfactory information to be addressed before a judge at trial in circumstances where the judge would almost certainly dismiss the charge because of the inadequacy of the particularity provided to Mr Boar so that the charge against him could not fairly proceed in its present terms.
37. In other aspects, we consider that some matters raised on the appeal by Mr Boar have no merit.
38. The Deed of Settlement may or may not be part of the evidence in the hearing of any prosecution. It may become part of the evidence either by the Public Prosecutor tendering it or by Mr Boar choosing to rely on it. It is only a piece of evidence. It cannot, and it does not, prevent the proper prosecution of a charge against Mr Boar. It cannot apply retrospectively.
39. The fact that there is a complaint against Mr Boar under the Legal Practitioners Act made to the Law Council in relation to his conduct, (full particulars of which were not included in the appeal book) does not expose Mr Boar to "*double jeopardy*" in a way which entitles him to prevent the present prosecution (if it were otherwise in proper form) from proceeding. They are separate procedures, directed to different ends. There is no inconsistency in them being conducted together. It may be that, in fairness to Mr Boar, the present inquiry by the Law



Council might have to be deferred pending the hearing and determination of any proper criminal prosecution but that is a matter for him, and for the Law Council if he applied to defer its inquiry on proper grounds.

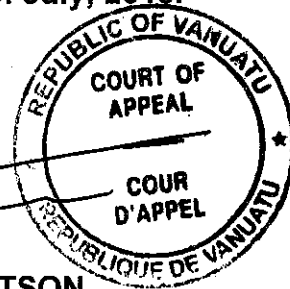
40. Mr. Boar's explanation for his non-payment of amounts owing to the clients (or the amounts which he accepts that he owes to the clients) is not a reason to preclude a proper prosecution from continuing. It may be part of his defence to explain what has occurred in the past, and that may emerge in the course of the evidence of the public prosecution through cross-examination. However, it is only evidence. Its particular relevance is not a matter upon which we have to make a determination.
41. Nor does the fact of the acceptance by the Public Prosecutor that Mr. Boar is entitled to deduct some fees mean the prosecution is not a proper one. It may be an issue as to whether Mr. Boar was entitled to charge the fees which he has charged, particularly in the absence of a fee agreement with the clients. That is not presently an issue particularized in the charge. Nor is the amount of his fees as asserted by the Public Prosecutor particularized in the charge. If it becomes an issue, it may be an appropriate step for Mr Boar to seek taxation of his costs but he has not done so. It may be that, in the absence of a costs agreement, it was necessary for him to tax his costs before recovering any costs. It is not clear at the present time. However, that is not an answer to the charge simply to say: *"if there is a complaint about my costs, they can be taxed"*.
42. Finally, if (as Mr Boar says) there has been an invitation by the Public Prosecutor to Mr. Boar that he should plead guilty to the charge to the extent of the amount specified in the Deed, VT964,751, that does not in any sense mean, the charge is improper and/or should not proceed.
43. The appeal should be dismissed.
44. However we have explained above that, in our views:
 - (1) The Senior Magistrate should not have been satisfied that there was a prima facie case which could satisfy all the elements of the offence, simply because the details of the offence were not clear enough; and
 - (2) The charge as expressed before the Senior Magistrate and as subsequently amended does not adequately furnish the accused person, that is Mr Boar, with notice as to the charge he has to meet.
45. During the appeal, counsel for the Public Prosecutor could not indicate to the Court with any precision what were factual matters the Public Prosecutor would seek to prove, having regard to what is said at [27] – [28] above. They are matters the Senior Magistrate would need to have understood to be satisfied that a prima facie case existed in relation to them.
46. In this matter, the onus now lies on the Public Prosecutor either to amend the charge so that Mr Boar has proper particulars of the charge alleged against him, or to withdraw the charge. In that event, he may lay a further charge against Mr Boar, properly particularized, and the Senior Magistrate will in due course consider if a prima facie case has been made out on the PI material.



47. Obviously the above does not preclude the Public Prosecutor from laying alternate charges, properly particularized. Nor does it prevent the Court from applying section 109 or section 126 of the Criminal Procedure Code.
48. Nor is it intended to encourage appeals from the decisions by the Senior Magistrate to commit persons for trial when satisfied that a prima facie case is made out. Such appeals should be rare, provided the charge enables the accused person to understand the case against him and generally, any uncertainty can be addressed by amendment of the charge in any event.
49. In the circumstances, there should be no order as to the costs of the appeal.

DATED at Port Vila, this 20th day of July, 2018.

BY THE COURT



Hon. Justice Bruce ROBERTSON