

BETWEEN: **GUY MARCEL BENARD**
Claimant

AND: **THE REPUBLIC OF VANUATU**
Defendant

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr Guy Benard in person*
Mr Frederick Gilu and Mrs Viran Trief, Solicitor General for the Defendant

REASONS FOR JUDGMENT

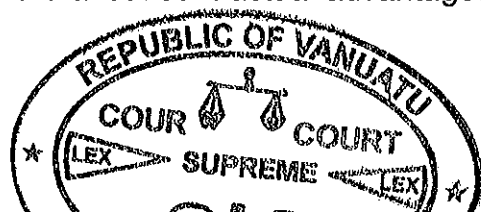
I - INTRODUCTION

By Amended claim filed 18 October 2010, the Claimant, Mr Guy Benard, alleged that he was engaged by the Vanuatu Maritime Authority (V.M.A.) by contractual employment. He alleged that he was firstly engaged by the V.M.A. on the 1st November 2003 and that he was then de facto terminated without notice on the 31st December 2007 by the Vanuatu Maritime Authority (Repeal) Act No.22 of 2007 which repealed the V.M.A. The Claimant contended that he was in continuous employment with the VMA until the intervention of Parliament to repeal the VMA. He said the repeal of VMA terminated his employment contract with the VMA and it amounted to a breach of his employment contract with the VMA.

II - CLAIM AND RELIEF SOUGHT

The Claimant therefore filed the present claim and claimed for the following against the Defendant:

1. Payment of 11.5 days annual leave.
2. Payment of severance allowance for 4.2 years of continuous employment.
3. Payment of the remaining period of his employment period of his employment contract for a specific period.
4. Common law damages for losses of collateral but contractual advantages.



5. Aggravated damages due to excessive resistance and unwarranted use of dominant position.
6. Interest at the rate of 10% per annum.
7. Certificate of employment.
8. Legal expenses.
9. Such orders as this Court may deem fit.

III - DEFENCE

In the defence to the Amended Claim, filed 18 October 2010, it is contended on behalf of the Defendant that the Defendant does not know and does not plead to any evidence of the Claimant's skills or experience. It is contended that that the Claimant's contract was void at all material times because the contract that the Claimant alleged in paragraphs 2 and 5 of the claim was a "Government Contract" within the meaning of the Government Contracts and Tenders Act [CAP.245].

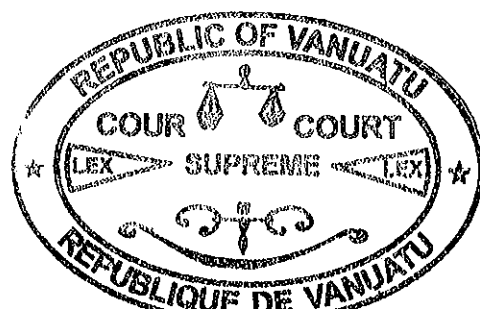
It is contended that such a contract did not comply with any of the requirements of ss. 3(3) 4 or 8 of the Government Contracts and Tenders Act and so the said contract was void pursuant to s.7 of the said Act.

In the alternative, the Defendant says that the said contract with the V.M.A. was frustrated by a total failure of consideration upon Parliament's repeal of the Vanuatu Maritime Act [CAP.253] after 31 December 2007 as the Repeal Act came into force on 1 January 2008.

The Defendant says in further alternative that further performance of the contract after 31 December 2007 was impossible and such obligations as the Defendant might have had after that date were discharged by reason of the statutes.

IV - THE ISSUES

On 29 July 2011, after hearing of objections, most of the evidence adduced by the Claimant was struck out. As a result, some of the items of the prayers for relief have become redundant particularly those in prayers 4, 5 and 7. The Court will pursue items of the prayers for relief sought in 1, 2, 3, 6, 8 and 9.



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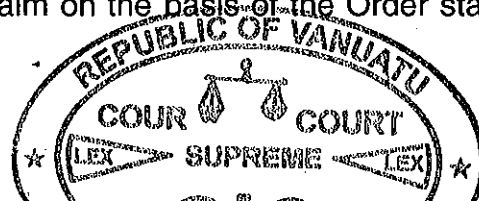
The following are the issues to be determined by the Court:

1. Whether the Claimant had valid contracts or appointments?
2. Whether the Claimant's Contracts or appointments existed after the repeal?
3. Whether the Claimant is entitled to annual leave for the period 1 November 2003 to 30 June 2010 on the basis of his contractual rights or for the period 1 November 2003 to 31 December 2007 as a result of his appointments?
4. Whether the Claimant is entitled to severance allowance for the period 6 November 2003 to 31 May 2004 based on his first contract or as a result of his appointments?
5. Whether the Claimant is entitled to annual leave for the period 1 July 2007 to 31 December 2007 on the basis of his contract or whether his annual leave entitlements result from his appointments?
6. Whether the Claimant is entitled to severance allowance for the second contract commencing 1 July 2007 and ending 30 June 2010 or whether his severance allowance entitlements resulted from his appointments?

V - PROCESS, EVIDENCE AND FACTS

It is noted that the Claimant, Mr Benard, worked for the VMA under a contract of employment with the Commissioner of Maritime Affairs (the Commissioner). The employment of the Claimant came to an end when the VMA went out of existence as a consequence of the coming into force of the Vanuatu Maritime Authority (Repeal) Act (the Repeal Act) on 1 January 2008. He had not been paid for the period September – December 2007. He then commenced proceedings against the Government of the Republic of Vanuatu and the Attorney-General for the payment of his arrears of salary in Civil Case No.199 of 2007 which came on appeal before the Court of Appeal in Civil Appeal Case No.17 of 2009 on a preliminary question of law. The Claimant had settled his arrears of salary claim and the Court issued an order permanently staying the proceeding in CC 199 of 2007 on 30 June 2010.

It is noted that counsel for the Defendant objected for the Court not to allow the Claimant to continue with his present claim on the basis of the Order staying the



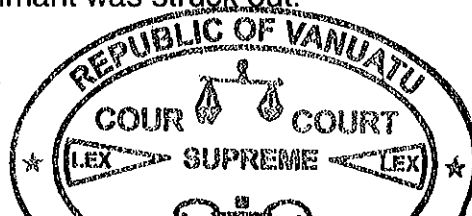
proceedings in Civil Case No.199 of 2007 and also on the basis of res judicata. The Court orally rejected the Defendant's counsel's submissions on those points and directed the management and hearing of the proceedings in the present case as some heads of pleadings relate to other claims, among other matters, for termination of contractual employment before the end of the contract period, severance allowances, damages for breach of the Employment Contract. It is also noted that the Claimant filed an application to amend his claim in CC 199 of 2007 and to include current claim. The Claimant filed his Application with a Draft Amended Statement of Claim. It was objected to by or on behalf of the Attorney-General. The Claimant then withdrew his application to amend his claim in CC 199 of 2007 which would include the present claim. It is also noted and accepted that the Deed of Settlement between the Claimant, Mr Guy Benard, and the Attorney-General acting on behalf of the Government of the Republic of Vanuatu referred to in the Deed as "THE STATE" in proceedings No.199 of 2007 was about the arrears of salaries of the Claimant. This means:

"the unpaid salaries of Benard for the months of September, October, November and December 2007 and the Benard's unpaid annual leave for the period commencing 1/07/2007 ending 31/12/2007" as described in the Deed. [underlined are my own]

The facts of this case are not disputed. The evidence in this case are contained in the sworn statement filed by the respective parties or on their behalf. It is also noted that the Claimant, Mr Guy Benard, appeared in person. Some of the material evidence which are relevant to his case are also annexed as part of his submissions. Since there is no dispute as to substantive facts of this case, the justice of the case requires that these materials will be accepted by the Court as evidence in order to best assist the Court.

The Claimant, Mr Guy Benard filed two (2) sworn statements in support of his claim respectively on 6 October 2010 and 22 March 2011. Mr Frederick Gilu of the State Law Office has filed a sworn statement on behalf of the Defendant on 8 July 2011.

On 29 July 2011, this matter was listed for hearing of objections raised and notified by the Defendant on the content of the sworn statements of the Claimant. Most of the evidence adduced by the Claimant was struck out.



The Claimant's substantial evidence remaining in this case is this:

"On the 6th October 2010, he filed and served his claim for obtaining payment of his entitlements relating to his employment contract with the former Vanuatu Maritime Authority (VMA) commencing the 1st November 2003 and ending the 30th day of June 2010."

It is a fact that the Claimant attached the details of his employment relations with the Commissioner of the Vanuatu Maritime Authority and copies of his employment contracts with the Commissioner of the Vanuatu Maritime Authority in an "Annexure D" to the Claimant's Response to Defendant submissions filed 6 September 2011. The said Annexure D shows the following:

- A letter of 24 September 2003 by John Less Napuati then Assistant Administrator of the VMA, stipulates that Mr Guy Benard is appointed under section 39 of the Vanuatu Maritime Authority Act [CAP.253].
- A letter of 6 November 2003 by John Less Napuati then Acting Commissioner of Maritime Affairs, stipulates that Mr Guy Benard is appointed under section 38(1) of the Vanuatu Maritime Authority Act as Advisor and surveyor for a temporary period of four months under the following conditions:
 1. You report directly to the Commissioner of Maritime Affairs in the discharge of your obligations; and
 2. Your Acting employment will commence from the date of this letter for the next four months; and
 3. Your salary will be stated in a contract to be signed with the Authority.
 4. Your appointment is effective as from the date of this letter."
- An Instrument of Appointment was issued by Mr Less John Napuati on 6 November 2003, appointing Mr Guy Benard as a VMA Licensing Officer under section 2 of the Shipping Act [CAP.53].
- By an agreement dated 10 November 2003 between the Vanuatu Maritime Authority (VMA) and Mr Guy Benard, he was contracted as Technical



Advisor and Surveyor for a temporary basis of 4 months. Under this agreement, Mr Benard's duty is:

- To train the Commissioner and VMA staff in the maritime technical matters.
- To advise the Commissioner, staff and VMA services users.
- To survey vessels and all maritime works for which the VMA is responsible.

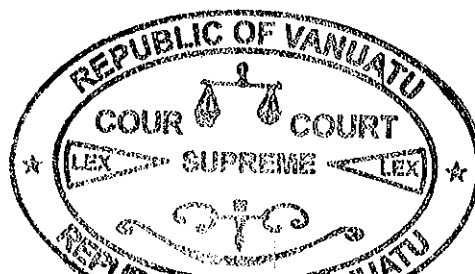
He was paid a monthly salary of VT500,000. The VMA is to support expenses for professional purposes (travel, communications, vehicles, etc...). VMA is to be responsible for Labour and Immigration formalities concerning the Employee. The law of reference for this contract is VMA Act No.29 of 1998 and Employment Act [CAP.160].

- In summary, the Claimant was contractually engaged by the VMA for a period of 4 months.
- On 22nd January 2004, Mr Ephraim Mathias, then Commissioner of Labour and Director of Employment Services wrote to Mr John Less Napuati, Commissioner of Maritime Affairs about - Re. Temporary Work Permit of Mr Guy Benard, informing on following:

"We have granted approval for Mr Guy Benard to be exempted from work permit requirements for a period of four (4) months: with due effect as of February 2004.

Mr Guy Benard shall engage with the matter of TOKYO MOU project only under the Vanuatu Maritime Authority. Should you intend to employ Mr Guy Benard on a permanent basis, we advise you submit a fresh application in due course."

By a letter of 26 January 2004, the Commissioner, Mr John Less Napuati extended Mr Guy Benard's appointment as Advisor and Surveyor for a period of 4 months starting 7th March 2004 and ending on 6th July 2004.



- On 1st April 2004, Mr John Less Napuati, the Commissioner of Vanuatu Maritime Authority and Mr Guy Benard signed a Standard Agreement of employment. Mr Guy Benard is employed by VMA to the position of Technical Advisor of the Commissioner of Maritime Affairs and Surveyor. The Preamble of this agreement recites:

"PREAMBLE

Whereas the Parties have entered into an agreement on the 6th November 2003 (the "Previous Agreement");

Whereas the Commissioner is fully satisfied of the duties performed by the Employee;

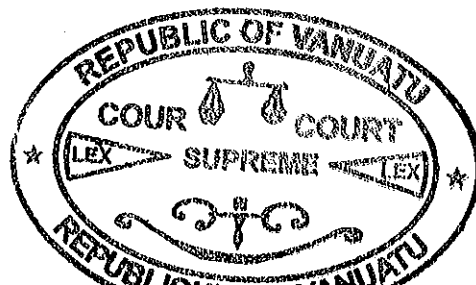
Whereas the Commissioner wishes to extend the duration of the Previous Agreement and include specific modalities. The Parties agreed to enter into a new agreement (the "Service Agreement");

Whereas the Parties are duly authorised and have the capacity to enter into and perform this Service Agreement;

The Preamble hereto shall form an integral part hereof;

This Service Agreement and any annexure referred to herein constitute the entire Service Agreement between the Parties relating thereto..."

- This Service Agreement is for a specific period of three years commencing on 1st June 2004.
- The Agreement provides for the remuneration of the employee at VT7,200,000 payable in equal monthly instalments in arrears in Vatu, Annual Leave, Sick Leave. It confined the Employee with the office hours of the VMA for his working hours to his position. It provides also for Employee's housing, motor vehicle and injury and accident provisions. It is stated that the Commissioner of Maritime Affairs signed the Service Agreement for the Vanuatu Maritime Authority under section 38 of the VMA Act 29 of 1998 (as amended). In summary, the employee was appointed and contracted to fulfil the duties he was assigned in Schedule 1 of the Agreement.



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- The Standard Agreement SCHEDULE 1 spells out the Duties of the Employee as follows:

“VANUATU MARITIME AUTHORITY

**STANDARD AGREEMENT
SCHEDULE I**

DUTIES OF THE EMPLOYEE

TECHNICAL ADVISOR

Advising and assisting with the duties of the Commissioner of Maritime Affairs and in particular dealing with the following matters.

- International convention for the safety of life at sea (I-974)
- International convention on load lines (1966)
- International convention on civil liability for oil pollution damage (1969)
- International convention for the prevention of pollution of the sea by oil (1951)
- Regulations for the prevention of pollution by oil
- International conferences for safety (PSC, ISPS)

Other international conventions which the state of Vanuatu is signatory

Maritime regulations	Maritime Act CAP 131
	VMA Act No29 of 198
	Shipping Act CAP 53
	Fisheries Act CAP 158

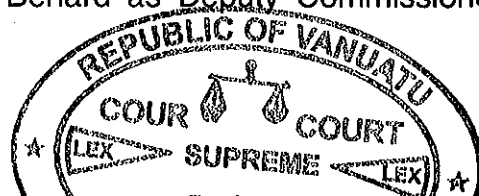
SURVEYOR

Training the VMA staff

- Safety of vessels
- Search and rescue
- Pollution response
- Environmental nuisance
- Shipping regulations
- Prevention of accident and casualties
- Legal matters
- Maritime tribunal”

- On 4 February 2005 Mr John Less Napuati, then Commissioner of Maritime Affairs wrote a letter to Captain Guy Benard informing him that the Board of Directors of the VMA has confirmed his employment with the Commissioner’s office as advisor and surveyor and the Minister of Internal Affairs has also approved his work permit.

- On 10 March 2005, Mr John Less Napuati, the then Commissioner of Maritime Affairs appointed Mr Guy Benard as Deputy Commissioner of



Maritime Affairs under Part 6, s.19 of the VMA Act and s.3 of the Maritime (Amendment) Act [CAP.131] and delegated to him the power and duties of a Deputy Commissioner under the Act to be exercised in foreign ports.

- On 18 April 2005, the Commissioner of Maritime Affairs issued an Instrument with the written consent and endorsement of the Chairman of the VMA Board by delegating the Commissioner's powers to Mr Guy Benard, the employee of the Authority as Deputy Commissioner, Technical Advisor and Surveyor. The Instrument was issued by the then Commissioner under ss.13 and 38 of the VMA Act and s.3 of the Maritime(Amendment) Act [CAP.131].
- On 22nd July 2005, the Authority, the Commissioner of Maritime Affairs and the Employee effected Amendment No.1 to the Standard Agreement Between VMA and Capt. Guy Benard dated 1st April 2003. The Parties agree that:
 1. VT30,000 allowance to be paid to Guy Benard to compensate for the use of his private vehicle.
 2. The Employee's salary (VT7,200,000) remains the same for the period (June 2005 to June 2006).
 3. Period of reference for severance allowance is the whole period of employment of Capt. Guy Benard commencing from 1st November 2003 and ending in June 2007.
- By letter dated 30th May 2006, the then Minister of Infrastructure & Public Utilities as Minister responsible for Vanuatu Maritime Authority replies to a letter of the Commissioner dated 27 March 2006 about Mr Guy Benard's salary increase of 10% recommended an increase of the salary to be effective only as from June 2006.
- On 31st May 2006, the Commissioner of Maritime Affairs and Capt. Guy Benard (Deputy Commissioner, Technical Advisor and Surveyor) effected Amendment No.2 to Standard Agreement (Employment Contract) Between the Vanuatu Maritime Authority and Captain Guy Benard. They agree that the whole remuneration of Capt Guy Benard is increased of ten per cent (10%) per month.



- On the evidence so far before the Court, the Claimant commences employment with the Vanuatu Maritime Authority (VMA) since 6 November 2003 to 30 June 2007 as reflected by the Claimants' appointments and related contractual employments which also include the employment contract signed by the then Commissioner and the Claimant as an employee under s.38 of the VMA Act for 3 years commencing 1 June 2004 and ended on 30 June 2007.
- During the period of the Claimant's engagement with the VMA commencing 6 November 2003 to 30 June 2007, it is a fact that the Claimant was appointed and contracted as a technical advisor to advise and assist with the duties of the Commissioner under the VMA Act and also in respect to the duties of the Commissioner provided under other Acts. The Claimant as a surveyor was also appointed to train the Commissioner, the VMA staff on areas of duties listed in the Schedule 1 of the standard agreement and he was paid a monthly salary.
- The sworn statement of the Claimant filed on 6 October 2010 contains the Claimant's last contract dated 11 April 2007 in its Annexure GB1. This Employment Contract was signed by the Commissioner and the Employee with other witnesses on 11 April 2007. It was made by the Commissioner under section 38 of the VMA Act. The Employee is appointed and employed as a Deputy Commissioner, Technical Advisor and Surveyor of the Vanuatu Maritime Authority. This last Employment contract shall become effective as of the date of 1st July 2007 and shall continue in full force and effect until the date of its termination of the date of 30th June 2010. It has following specific terms:

"Effective date: 01/07/2007

Duration of Employment: 3 years

Date of Termination: 30/06/2010"

- It provides also for annual vacation, sick leave, housing, vehicle, medical expenses, compassionate leave, severance allowance and remuneration.
- SCHEDULE 1 of this Employment Contract provides for the Duties and Responsibilities of the Employee.



The Employee was appointed under section 38 of the VMA Act, section 2 of Shipping Act (as amended) and section 3 of the Maritime (Amendment) Act and contracted as:

1. TECHNICAL ADVISOR

- Advising and assisting with the duties of the Commissioner of Maritime Affairs. The list of the particular matters for the Employee's advice and assistance to the Commissioner are set out in the Schedule 1.
- Apart from the advising and assisting with the duties of the Commissioner, the Claimant was also contracted to:
- Advising the Government of the Republic of Vanuatu on matters covering subsections (n) to (v) of section 6 of the VMA Act. The areas covered by subsections (n) to (v) of s.6 are listed below:

"(n) to provide training schemes, whether by itself or with the co-operation of such other persons or bodies as the Authority thinks fit, for its employees or for other persons concerned with maritime affairs;

(o) to advise the Minister on maritime transport policy;

(p) to undertake such research as is necessary to enable the Authority to perform any of its functions;

(q) to act internationally as the national authority, or representative, of Vanuatu in respect of matters relating to the supervision and regulation of the maritime transport industry;

(r) to provide advice and assistance to the government in relation to matters affecting the maritime transport industry, including:

(i) to prepare and submit reports to the government and other persons or bodies engaged in the marine transport industry in or from within Vanuatu; and

(ii) to make recommendations on the regulation of the maritime transport industry and on legislation relating to the industry;

(s) to assist and advise the government on matters relating to any Act or regulation directly or indirectly relevant to the maritime transport industry;

(t) such other functions as are conferred on it by this Act or any other Act;

(u) such other functions as the Minister may prescribe by notice in the Gazette;

(v) to do anything else that is incidental or conducive to the performance of any of the preceding functions."



- Relationship between the VMA and other Government entities such as NDMO – Fisheries – PMW – etc...
- The employees shall be on duty on a 24h/7h basis to deal with any casualties at sea, salvage operations and any event that might require his knowledge and intervention. He shall also be the permanent contact point on a 24h/7h basis with the MRCC Noumea and any other MRCC requiring the assistance of Vanuatu.

2. SURVEYOR

Training VMA staff on daily basis on matters or areas listed therein in schedule 1.

3. DEPUTY COMMISSIONER OF MARITIME AFFAIRS AND LICENSING OFFICER

- SCHEDULE 2 of the Second Employment Contract stipulates the following remuneration package for the Employee:

Monthly remuneration of the Employee in consideration of the performance of his duty as Technical Advisor of the VMA and the Government -VT400,000

Monthly remuneration of the employee for performing his duty as Surveyor, PSC Officer and Licensing Officer - VT294,000

Monthly housing Allowance - VT120,000

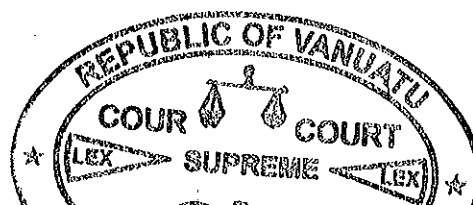
Monthly contractual remuneration of the Employee at 1/07/2007 -VT814,000

VI - THE LAW

The Claimant advances his claim in the present proceedings under the provisions of section 11 of the Interpretation Act [CAP.132]. Section 11 of the Act provides:

“11. Effect of repeal

- (1) *Where any Act of Parliament repeals any Act, the repeal shall not —*
- revive anything not in force or existing at the time at which the repeal takes effect; or*
 - affect the previous operation of the enactment so repealed or anything duly done or suffered under it; or*
 - affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
 - affect any penalty, forfeiture or punishment incurred in respect of*



- any offence committed against any enactment so repealed;*
- (e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.*
- (2) *Upon the expiry of an Act of Parliament this section shall apply as if the Act had been repealed.*
- (3) *Where an Act of Parliament that has been amended by another Act is repealed the repeal shall include all the provisions in the other Act that amended the repealed Act.*

Subsections 1(a), (b), (c) and (e) of section 11 are the relevant subsections for the present proceeding.

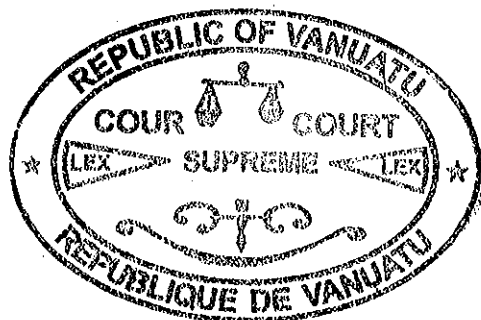
The applicable laws for consideration are:

- The Vanuatu Maritime Authority Act [CAP.253] in force before its repeal by the Vanuatu Maritime Authority (Repeal) Act No.22 of 2007; and
- Section 3 of the Maritime Act [CAP.131] in force before the legislative change brought in under s.2 of the VMA (Repeal) Act No.22 of 2007.
- Section 2(1) of Shipping Act [CAP.53] in force before its repeal by the Shipping (Amendment) Act No.13 of 2008.
- The relevant provisions of the Employment Act [CAP.160] (if any).
- The contracts of employment (if any)
- The relevant provisions of the Government Contracts and Tenders Act [CAP.245] (if any).

VII - APPLICATION OF THE LAW

I propose to consider the relevant and applicable laws and apply them by dealing with the issues raised or questions posed for Court determination which I now do.

ISSUE 1: Whether the Claimant had valid contracts or appointments?



I understand this issue relates to the appointment of the Claimant by the then Commissioner of Maritime Authority with corresponding employment contractual arrangements.

Section 38 of the VMA Act [CAP.253] is headed "APPOINTMENT OF STAFF" and provides:

- "(1) The Commissioner may appoint such employees, including employees on secondment from other organisations, as he or she thinks necessary for the efficient performance of the Authority's functions.*
- (2) The Commissioner may terminate or suspend the employment of any of the Authority's employees.*

...."

Section 3 of the Maritime (Amendment) Act [CAP.131] is headed "Deputy Commissioner of Maritime Affairs" and provides:

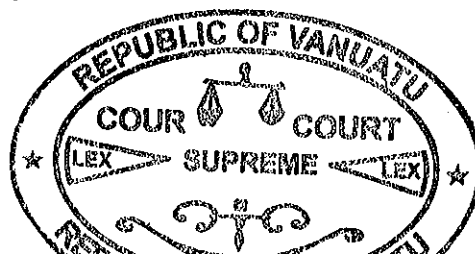
- "(1) The Commissioner may from time to time appoint Deputy Commissioners of Maritime Affairs.*
- (2) The Commissioner may delegate to the Deputy Commissioner any of his powers and duties under the Act to be exercised in foreign ports."*

Section 2 of the Shipping Act [CAP.53] is headed "Principal Licensing Officer and Other Licensing Officers" and provides:

- "(1) The Principal Licensing Officer must be the Commissioner of Maritime Affairs appointed under section 12 of the Vanuatu Maritime Authority Act [CAP.253]. The Principal Licensing Officer may grant licences and certificates under the provisions of this Act and may appoint other licensing officers to grant such licences and certificates.*
- (2) Subject to the provisions of this Act licensing officers shall exercise their powers, and shall discharge their duties subject to any general instructions which the Principal Licensing Officer may issue."*

On the facts, the then Commissioner of Maritime Authority appointed the Claimant, Mr Bernard, as an employee of the Vanuatu Maritime Authority under section 38 of the VMA Act [CAP.253]. He has also appointed the Claimant as a VMA Licensing Officer under s.2 of the Shipping Act [CAP.53] and he has finally appointed the Claimant as a Deputy Commissioner of Maritime Affairs under section 3 of the Maritime (Amendment) Act [CAP.131].

The Commissioner agreed and signed with the Claimant the terms and conditions of the Claimant's contractual arrangements in almost all of the claimant's contractual arrangements.



Submissions of parties on issue 1

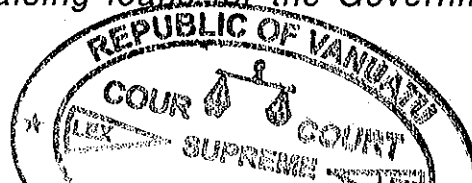
The Claimant says and submits that he was contracted under s.38 of the VMA Act as an employee of VMA and his contracts of employment with the Commissioner are “**contracts of services**” but they are not “**contracts for services**” under section 39 of the VMA Act. The Claimant further says that the successive employment agreements signed between the Commissioner and himself (the Claimant) show that the Claimant was appointed to exercise various duties and responsibilities under the VMA Act and also under other Acts mentioned in Schedule 1 of the VMA Act, such as a Deputy Commissioner as per section 3 of the Maritime (Amendment) Act [CAP.131] and a licensing officer as per section 2 of the Shipping Act [CAP.53]. He submitted that such functions were performed for the day to day operations of the VMA under the control and the instructions of the Commissioner who had power to appoint and to terminate the employees who were appointed under the VMA Act and other Acts.

It is contended on behalf of the Defendant that the Claimant’s contracts are void as they were made contrary to the Government contracts and Tenders Act [CAP.245]. It is contended for the Defendant that the Claimant’s contracts were for services, and are Government contracts within the Act, as defined in the Act [CAP.245].

Section 2A of the Government contracts and Tenders Act defines the Government contracts as follows:

“2A. Government Contracts defined

- (1) *Subject to subsections (3) and (4), each of the following is a Government Contract:*
 - (a) *a contract or arrangement for the supply of goods or services or the execution of public works in consideration of payment out of public moneys;*
 - (b) *a contract or arrangement for the disposal of an asset of the Government;*
 - (c) *a concession or franchise granted by the Government.*
- (2) *Any subcontract made in relation to any contract or arrangement mentioned in subsection (1)(a) or (1)(b) is also a Government Contract.*
- (3) *The consideration in relation to any contract, arrangement, franchise or concession must exceed VT 5,000,000.*
- (4) *A contract or arrangement for raising loans for the Government*



is not a Government Contract."

It is also argued that the said contracts are paid out of public money of which the Claimant in this current proceeding is seeking payment there from.

It is further contended for the Defendant that the said contracts did not comply with the following requirements of the Governments Contracts and Tenders Act.

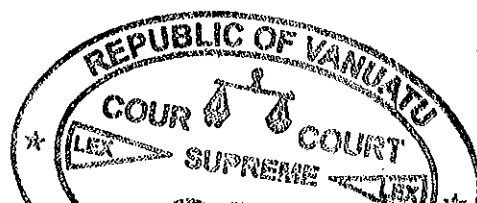
Subsection 3(3) of the Act provides:

"Prior to entering into a Government Contract a minister must first:

- (a) ensure the contract is consistent with Government policy;*
- (b) ensure the contract is fiscally responsible, prudent, cost effective, and is a necessary obligation for Government to assume;*
- (c) consult with the Director-General and satisfy himself on reasonable grounds that the Government has or is likely to have the financial ability and resources to meet all of the obligations under the contract including future obligations;*
- (d) consult with and obtain the advice of the Attorney General or a legal practitioner approved by the Attorney General in writing, on the legal aspects, implications, and appropriateness of entering into the contract;*
- (e) ensure that no conflict of interest exists between a minister or the Council and the other party;*
- (f) use a competitive and transparent process when deciding who to award the contract to including where applicable, a tender process as may be prescribed by this or any other Act or regulation;*
- (g) make a written submission to Council which must include a copy of the proposed contract, the process followed, and comments on the proposed contract by, and under the signatures of, the Director-General and the Attorney General or the legal practitioner. The Attorney General must certify that the procedures in accordance with this or any other applicable Act have been followed;*
- (h) obtain a Council minute approving the Contract.*

Section 4 of the Act

- (1) Every Government Contract entered into under section 3 must be in the name of the Government of the Republic of Vanuatu represented by the responsible minister, and every document required to be signed evidencing the terms of the contract may be executed by, the responsible minister on behalf of the*



Government.

- (2) *The terms of a Government Contract may be varied or discharged in the same way*

or Section 8 of the Act

When entering into a Government Contract or a contract for the contracting out of a Government service or the purchasing of goods or services, a minister, or director-general of a ministry, or any other person authorized to do so, must comply with the quotation or tendering process in accordance with this Act or with any regulations made under this or any other Act."

It is therefore submitted for the Defendant that given the above circumstances, the Claimant's contracts are void pursuant to section 7 of the Act.

It is also contended that even though the Claimant alleges that his contracts of employment are "of service" and are within the vicinity of section 38 of the Vanuatu Maritime Authority Act [CAP.253] the terms and conditions applied to these contracts are those taken from section 39 of that same Act. The Defendant says this can be identified from the evidence adduced by the Claimant and summarized in the Defendant's further submissions in paragraph 2.2.

It is therefore submitted for the Defendant that the contract cannot be defined as a contract of service but a contract for service according to condition 3 as provided in the case of **Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance** (1968) 2 QB 497 at p.515.

Finally it is submitted for the Defendant that given the conclusion of the decision of the Court of Appeal in **CAC No.17 of 2009** that VMA was a Government Agency as defined in the PFEM Act and thus the Government is liable for the debts of the VMA, the then Commissioner in entering into contracts of employment is doing so as a representative of the Government. Accordingly, any contract for service that exceeds VT5,000,000 must adhere to the requirements of the Government Contracts and Tenders Act [CAP.245] and since the contracts are made otherwise, they are unlawful.

Court considerations on issue 1

I now discuss the above submissions relating to the first issue.



When I consider the above respective submissions the question that comes to my mind is whether the Government Contracts and Tenders Act [CAP.245] applies to employment contracts entered into by the Commissioner and if so, in what circumstance?

The provisions of s.38 of the VMA Act are set out earlier. Section 38 gives the Commissioner of Maritime Affairs the power to employ and dismiss or suspend an employee of the Vanuatu Maritime Authority (VMA). **Parenté Judgment (Parenté v. Vanuatu Maritime Authority** [2004] VUSC 41; CC 101 of 2004) upheld the right of the Commissioner to hire and fire the staff of the Authority. In **Takau case, [Takau v. Vanuatu Maritime Authority** [2006] VUSC 83, CC 212 of 2004 (15 December 2006)], Tuohy J dealt also with similar point and reached the same conclusion when he held:

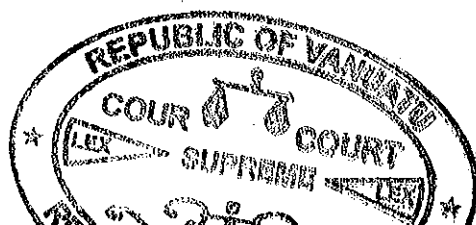
"I am of the view that the legislative intension [under s.38] was to confer on the Commissioner alone the power to hire and fire staff. There is nothing unusual or strange about that. It accords with a widely held management theory that employment of staff should properly be the function of the executive of an organisation and not of the board of Directors." (p.14)

Section 38 can be contrasted with s.39 of the same Act.

Section 39 of the VMA Act is headed "CONSULTANTS, SPECIALISTS, ETC" provides as follows:

- "(1) The Authority may appoint consultants, specialists or advisory committees to advise on the exercise of functions or powers of Authority.*
- (2) The Authority may:*
- (a) pay to such persons or members of committees such remuneration by way of fees, salary or allowances, and such travelling allowances and expenses, as the Authority thinks fit; and*
 - (b) contribute towards the remuneration, travelling allowances and expenses of any such persons or members of committees, whose employers provides services for the Authority."*

In **Takau case**, Tuohy J after contrasting s.38 with s.39, held:



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“Sections 38 and 39 are specific provisions relating to the employment of staff and the engagement of consultants... However, s.38 amounts to a specific delegation to the Commissioner of the power to appoint staff and to terminate their employment, albeit that the employment contracts of staff are with the Authority itself. This can be contrasted with s.39 which does not contain any such specific delegation to the Commissioner.”

I respectfully agree with Tuohy J in **Takau** Judgment that section 39 does not contain any such specific delegation to the Commissioner. This means that the Commissioner has no power to appoint consultants, specialists or advisors as such appointments are given by statute specifically to the VMA and the Commissioner cannot dismiss or suspend consultants, specialists or advisors appointed by the VMA under s.39 of the VMA Act as they are not employees of the VMA appointed by the Commissioner under s.38 or appointed by the Authority under s.7. of the VMA Act. Consultants, specialists or advisors appointed under s.39 are independent contractors who “...provide **services for**” the Authority as intended and referred to at the ending part of s.39(2)(b) dealing with their remuneration, travelling allowances and expenses for their engagements.

The next question is: can the Commissioner appoint an employee as a consultant, specialist or advisor under section 38 of the VMA Act to be his advisor or “to advise on the exercise of functions or powers of the Authority”? I will answer this question by exploring the functions and powers of the Authority under the VMA Act and the process of their delegation to VMA officers or employees.

The functions and powers of the Authority are set out under sections 6 and 7 of the VMA Act.

Section 6 is headed “Functions of the Authority” and provides:

“6. Functions of the Authority

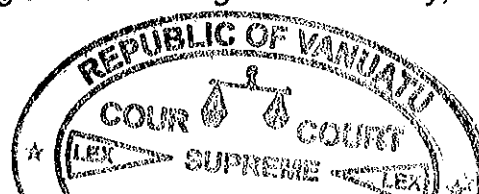
In furtherance of its principal objectives, the Authority has the following functions:

- (a) *to be responsible for:*
 - (i) *the general administration of the Acts specified in the Schedule and any regulations and rules made under those Acts; and*
 - (ii) *the collection of fees, charges and other revenue payable under those Acts, regulations or rules;*

in accordance with the provisions of those Acts, regulations and rules;



- (b) to ensure compliance with the law in respect of the registration, licensing, operation and crewing of vessels;
- (c) to ensure that the teaching and training of seafarers by the Vanuatu Maritime College
- (d) to promote compliance with safety standards in the maritime transport industry;
- (e) to promote regular reviews of, and improvements and developments in, the maritime transport industry;
- (f) to promote compliance with marine pollution prevention standards in the maritime transport industry;
- (g) to promote Vanuatu's preparedness for, and ability to respond to, occurrences resulting in the pollution of the marine environment;
- (h) to ensure the provision of appropriate distress and safety radio communication systems and navigational aids for shipping;
- (i) to ensure compliance with occupational health and safety standards for seafarers;
- (j) to promote safety in the maritime transport industry by providing information and advice on maritime safety;
- (k) to ensure the investigation of accidents, mishaps and incidents, and the reporting of those investigations as obliged under any convention, memorandum of understanding or other agreement to which Vanuatu is a party;
- (l) to maintain and preserve records and documents relating to the Authority's functions;
- (m) to produce, publish and distribute, whether for payment or otherwise, in paper, electronic or magnetic form such reports, papers or other information as may be conducive to the carrying out of the Authority's functions;
- (n) to provide training schemes, whether by itself or with the co-operation of such other persons or bodies as the Authority thinks fit, for its employees or for other persons concerned with maritime affairs;
- (o) to advise the Minister on maritime transport policy;
- (p) to undertake such research as is necessary to enable the Authority to perform any of its functions;
- (q) to act internationally as the national authority, or representative, of Vanuatu in respect of matters relating to the supervision and regulation of the maritime transport industry;
- (r) to provide advice and assistance to the government in relation to matters affecting the maritime transport industry, including:
 - (i) to prepare and submit reports to the government and other persons or bodies engaged in the marine transport industry in or from within Vanuatu; and
 - (ii) to make recommendations on the regulation of the maritime transport industry and on legislation relating to the industry;



- (s) to assist and advise the government on matters relating to any Act or regulation directly or indirectly relevant to the maritime transport industry;
- (t) such other functions as are conferred on it by this Act or any other Act;
- (u) such other functions as the Minister may prescribe by notice in the Gazette;
- (v) to do anything else that is incidental or conducive to the performance of any of the preceding functions."

Section 7 is headed "Powers of the Authority" and provides:

"7. Powers of the Authority

- (1) In addition to any other powers conferred on it by this Act, the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- 2) Without limiting subsection (1), the powers include the following:
 - (a) to enter into contracts;
 - (b) to acquire, hold and dispose of real and personal property;
 - (c) to engage persons to perform services for the Authority;
 - (d) to do anything incidental to any of the powers specified in this subsection or otherwise conferred on the Authority."

In light of the above considerations, I am of the view that the Commissioner cannot appoint an employee under s.38 of the VMA Act to be his "advisor" or "to advise on the exercise of functions or powers of the Authority".

The only way for the Commissioner to do that is through the process of the delegation of the Authority's functions and powers by the Authority under s.17 so as to give the effect intended under s.20 of the VMA Act.

Section 17 is headed "Delegation of Authority's functions or powers to employees of Authority". It provides:

"17. Delegation of Authority's functions or powers to employees of Authority

- (1) The Authority may delegate to the Commissioner or any employee of the Authority all or any of its functions or powers under this Act.
- (2) The Commissioner or an employee of the Authority to whom a function or power has been delegated must not delegate the function or power to another person without first obtaining the written consent of the Authority.
- (3) A delegation may be made to:
 - (a) a specified employee of the Authority; or
 - (b) employees of a specified class; or



- (c) *to the holder or holders for the time being of a specified office or specified class of offices of the Authority.*
- (4) *The Commissioner or an employee of the Authority purporting to act under a delegation must, when reasonably requested to do so, produce evidence of his or her authority to act."*

Section 20 of VMA Act is headed "Effect of delegation" and provides:

"20. Effect of delegation

Where a section of this Act confers power on a person or the Authority (in this section called the "delegator") to delegate a function or power:

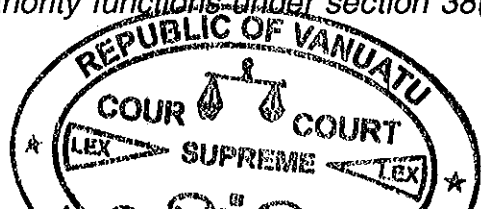
- (a) *the delegation must be made by instrument in writing; and*
- (b) *the delegation may be made either generally or as otherwise provided by the instrument of delegation; and*
- (c) *a function or power so delegated, when performed or exercised by the delegate, is for the purposes of this Act, taken to have been performed or exercised by the delegator; and*
- (d) *a delegation of a function or power by the delegator does not prevent the performance or exercise of the function or power by the delegator; and*
- (e) *subject to any general or special directions given or conditions imposed by the delegator, the delegate may exercise a function or power so delegated in the same manner and with the same effect as if it had been conferred on the delegate by this Apt and not by delegation; and*
- (f) *in the absence of proof to the contrary, the delegate is presumed to be acting in accordance with the terms of the delegation when the delegate purportedly acts pursuant to the delegation; and*
- (g) *the delegation may be given for a specified period; but is revocable at will by the delegator."*

The facts of the present case show that, among other contractual arrangements, the last contractual agreement executed between the Commissioner and the Claimant on 11 April 2007 for a period of 3 years effective as of 1 July 2007 and to be ended 30 June 2010, was made within s.38 of the VMA Act.

Clause 3 of the said employment contract confirms this:

"3.APPOINTMENT

- *Whereas the Commissioner of Maritime Affairs may appoint such Employees including Employees on secondment as he thinks necessary for the efficient performance of the Authority functions under section 38(1)*



of the VMA Act No.29 of 1988 (typing error (1998)?) Hereunder referred to as "THE VMA ACT".

- *Whereas the parties are duly authorised and have capacity to enter and perform this Employment Contract,*
- *Whereas the VMA wishes to employ the Employee to perform duties and responsibilities as prescribed in the Schedule 1 of the Employment Contract,*
- *The Employer hereby employs the Employee and the Employee hereby accepts the employment to perform the functions of the Deputy Commissioner, Technical Advisor and Surveyor of the Vanuatu Maritime Authority."*

Clause 4 of the said contractual agreement partly reads:

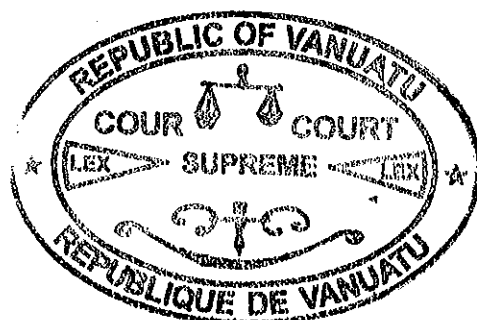
"4. UNDERTAKING

... The employer acknowledge the fact that the Employee in the exercise of his duties/employment is an officer seconded to the Government to perform the functions of the Authority as enacted by section 6 of the VMA Act and other Acts such as Maritime Act [CAP.131], the Search and Rescue Act [CAP.88], the Shipping Act [CAP.53] and the Maritime Conventions Act [CAP.155]."

Schedule 1 of the said Agreement set out the duties and Responsibilities of the Employee as summarised below:

1. TECHNICAL ADVISOR

- Advising and assisting with the duties of the Commissioner of Maritime Affairs in particular dealing with the following matters (as listed therein).
- Advising the Government of the Republic of Vanuatu as per section 6 subsections (n) to (v) of the VMA Act.
- Relationship between the VMA and other Government entities such as NDMO – Fisheries – PMW – etc...



- The employees shall be on duty on a 24h/7h basis to deal with any casualties at sea, salvage operations and any event that might require his knowledge and intervention. He shall also be the permanent contact point on a 24h/7h basis with the MRCC Noumea and any other MRCC requiring the assistance of Vanuatu.

2. SURVEYOR

- Training VMA staff on daily basis.
 - Safety of vessel
 - Search and rescue
 - Pollution response
 - Environmental nuisance
 - Shipping regulations
 - Prevention of accident and casualties
 - Legal matters
 - Maritime Tribunal
 - Salvage
 - Port State Control/MOU Tokyo.

The term "TECHNICAL ADVISOR" and "SURVEYOR" and the matters of advice and skills and responsibilities referred to under those terms are within the terms and conditions of s.39 of the VMA Act. The matters covered include "advice" to the Government of the Republic of Vanuatu "on the functions of the Authority under s.6 paragraphs (n) to (v)". There is no evidence of a written instrument of delegation of the functions or powers of the Authority by the Authority to the Commissioner in the sense of s.17(1) and s.20(a) of the Act. In the absence of a written instrument of delegation, the contract of employment dated and executed on 11 April 2007 between the Commissioner and the Claimant would be vitiated and so unlawful.

However, it is noted that, there is a letter dated 4 February 2005 written by John Less Napuati, then Commissioner of Maritime Affairs to the Claimant informing the Claimant that the Board of Directors of the VMA has confirmed his employment with the Commissioner's office as "adviser" and "surveyor" and the Minister of Internal Affairs has also approved his work permit. This letter of 4 February 2005 indicates that there is in existence an authorisation by the Board of Directors of VMA for the Claimant to be appointed by the Commissioner as a Technical Advisor and Surveyor with the Commissioner's office. Whether or not there is a proper delegation of the functions or powers of the Authority by the



Authority to the Commissioner, that should not be a matter of concern for the Claimant as the **House of Lords** in **Morris v. Kanssen** [1946] AC 459 confirming the Rule in **Turquand's case** in **Royal British Bank v. Turquand** (1955) E & B 248: 119 ER 474 put it:

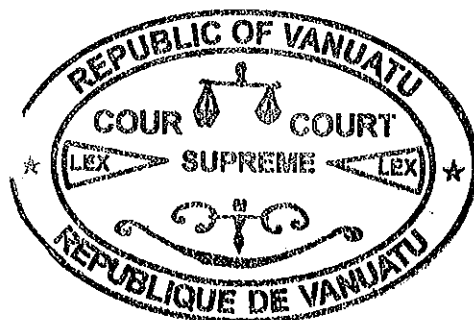
"But persons contracting with a Company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular."

In the present case, the letter of 4 February 2005 is taken to mean a delegation made generally under s.20(a) and (b) and has the effect and meaning given under s.20 (c), (d), (e) and (f) of the VMA Act [CAP.253]. Subsection (f) is the relevant subsection of section 20 in the circumstance of this case.

In light of the above considerations, the contract of employment between the Commissioner and the Claimant (Employee) dated 11 April 2007 must be understood to be signed by the then Commissioner under s.39 of the VMA Act [CAP.253]. Section "38" in the said contract must be read section "39" of the VMA Act [CAP.253]. Such a contract is not a contract "of service" but a contract "for service" of advice and/or consultancy of the Claimant to the Commissioner, the VMA and the Government of the Republic.

There is support for this view under s.39(2)(b) of the VMA Act as noted earlier (at page 19) but also in the case law. The case of **Takau v. Vanuatu Maritime Authority** [2006] VUSC 83, CC 212 of 2004, is the first case in which s.38 and s.39 are contrasted and are given specific meaning as intended by Parliament. In the (English) case of **Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance** (1968) 2 QB 497 at page 515, the Court had to consider the contentions whether a contract was not a contract of service but an independent contract and on appeal, the Court of Appeal provided the following definition of a contract of service which I accept and follow in the present case:

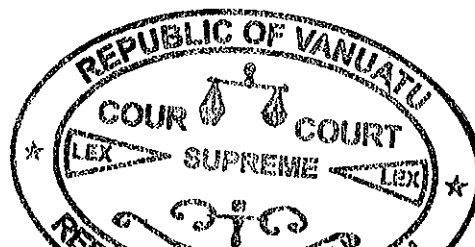
"That a contract of service existed if:



- (a) *the servant agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his master, and*
- (b) *the servant agreed expressly or impliedly that, in performance of the service he would be subject to the control of the other party sufficiently to make him the master, and*
- (c) *the other provisions of the contract were consistent with its being a contract of service."*

Applying the above definition in the context of the present case, there is no difficulty with the first aspect of the definition. In respect to the second aspect, it would be difficult for a master to exercise sufficient control and direction over the sources and confidentiality of the material information used in the advice given; in the knowledge and required skills and the skilled used in the employee's advice because the adviser is supposed to be an expert or specialist in his or her different fields of professional life. In a sense, the employee-adviser has higher or superior skills and knowledge in the professional fields of his or her advice. In this case, there was a real risk that the then Commissioner of the VMA would not have the professional capacity and competence to exercise sufficient control and direction over the Employee's advice in light of the terms of the Agreement of service executed on 11 April 2007 (effective 1 July 2007). I find and accept that the claimant's contract of 11 April 2007 was a contract "for service". If any other challenge arises it will be for the future consideration. As to the third aspect of the definition, the potential difficulty (as elucidated in the second aspect of the definition), indicates that it is really the third aspect of the definition of the contract of service that is problematic for the position advanced by the Claimant in his claim as the terms of the Claimant's contract of 11 April 2007 are not consistent with the said contract being contract a "of service" but a contract "for service".

As a contract "for service" of advice and/or consultancy of the Claimant to the Commissioner, VMA and the Government of the Republic, the "Employment Contract" signed between the Commissioner and the Claimant on 11 April 2007 is a Government contract within the Government Contracts and Tenders Act [CAP.245] and so its terms and conditions must comply with the provisions of the Government Contracts and Tenders Act.



Mr Benard's submissions relying on the case of **Parenté (Parenté v. Vanuatu Maritime Authority** [2004] VUSC 41; CC 101 of 2004) cannot assist him with the contractual agreement he signed with the Commissioner on 11 April 2007. The terms and conditions of the contractual agreement of Mr Laurent Parenté were very different from Mr Bernard's in respect to his Agreement of Service with the Commissioner signed on 11 April 2007.

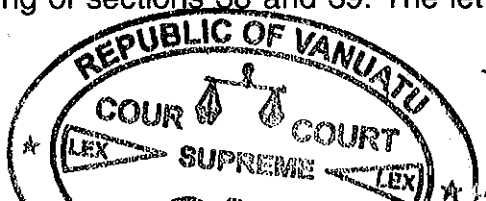
The facts and the submissions which are accepted reveal that the terms and conditions of such an "Agreement of Service" are made contrary to the provisions of the Government Contracts and Tenders Act. The said contract of 11 April 2007 is void pursuant to s.7 of the Government Contracts and Tenders Act.

This conclusion can also be reached based on the conclusion of the **Court of Appeal** in **Benard v. Government of the Republic of Vanuatu** [2009] VUCA 42; CAC No.17 of 2009 which held that VMA was a Government Agency as defined in the PFEM Act and the Government is liable for the debts of the VMA. It follows that the then Commissioner in entering into the contract of employment dated 11 April 2007, the Commissioner did so as a representative of the Government. The "Agreement of Service" dated 11 April 2007 as a contract "for service" exceeds VT5,000,000 which is contrary to the requirements of the Government Contracts and Tenders Act. The said contract of 11 April 2011 is unlawful and so void.

Further, in addition to the contract of 11 April 2007 which was declared unlawful and so void, and based on the above same findings and conclusions, the following appointments of the Claimant as "TECHNICAL ADVISOR" and "SURVEYOR" made under s.38 of the VMA Act and the corresponding contracts of employment made by the Commissioner and the Claimant within s.38 of the Act are also unlawful and void:

1. Letter of Appointment of 6 November 2003

The letter of 6 November 2003 by then Commissioner (Acting) appointing the Claimant under s.38 of the VMA Act as Advisor and Surveyor for a temporary period of four months is unlawful. This appointment is supposed to be made under s.39 but not under s.38 of the VMA Act. There is no other evidence of delegation of the Authority's functions or powers to Commissioner to make such appointment of a Technical Advisor and surveyor within the specific meaning of sections 38 and 39. The letter of 4



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February 2005 does not assist. It was made after the appointment letter was made on 6 November 2003.

2. Letter of extension of Appointment of 26 January 2004

The Commissioner's letter of 26 January 2004, extending the Claimant's appointment as Advisor and Surveyor for a period of 4 months starting 7th March 2004 under s.38 of the Act, is also void because it should be made under s.39. There is no evidence of a delegation of the Authority's functions or powers to Commissioner to do the extension of Appointment as Advisor and Surveyor. The letter of 4 February 2005 does not assist as it was made after the extension letter.

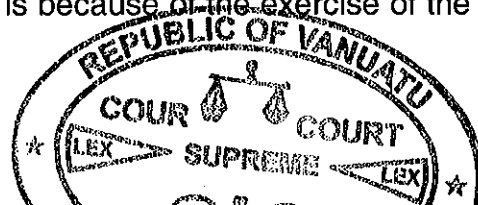
3. Appointment and Contract of Employment dated 1 April 2004

The appointment of the Claimant as Technical Advisor and Surveyor under s.38 of the VMA and the corresponding contract of employment between the Commissioner and the Claimant dated 1st April 2004 commencing 1st June 2004 for a period of 3 years made within s.38 of the VMA Act are unlawful and so void. There is no evidence of a delegation of the functions and powers of the Authority by the Authority to the Commissioner to proceed with such an appointment under s.38 of the Act. The terms of the contractual agreement of 1 April 2004 covered matters within the terms and conditions of s.39 of the VMA Act. The letter of 4 February 2005 does not help as it was made after the executing date and the commencement date of the contract of 1 April 2004. The terms of the contract of 1 April 2004 are made contrary to the provisions of the Government Contracts and Tenders Act.

HOWEVER, contrary to the above considerations, I set out below the appointments of the Claimant made by the then Commissioner and one contractual agreement made between the VMA and the Claimant which are valid and lawful:

1. Appointment of the Claimant as a VMA Employee under s.38 of the VMA Act

I consider and accept that the then Commissioner appointed the Claimant as an Employee of the VMA. The Commissioner has the power to do that under section 38 of the VMA Act. It is because of the exercise of the power



under s.38 of the Act that the Claimant was engaged by the VMA as an Employee until the Parliament by enactment repealed the VMA Act on 31 December 2007 by the Vanuatu Maritime Authority (Repeal) Act No.22 of 2007.

It is noted also that it was through appointment as an Employee of the VMA under s.38 that the then Commissioner issues instruments to delegate some of the Commissioners' powers to the claimant as reflected in the letter of 4 February 2005 referred to earlier.

2. Instrument of Appointment as a VMA Licensing Officer

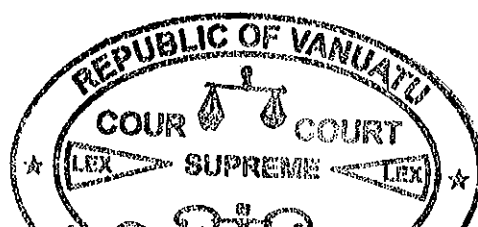
On 6 November 2003, the Commissioner issued an instrument appointing Mr Benard as a VMA Licensing Officer under s.2 of the Shipping Act [CAP.53]. The Commissioner has the power to so appoint. There is no issue in its exercise here. The instrument of appointment has not been revoked until the repeal of the VMA Act and s.2(1) of the Shipping Act [CAP.53].

3. Agreement dated 10 November 2003

The agreement dated 10 November 2003 between the Vanuatu Maritime Authority (VMA) and the Claimant was valid as it was made by the VMA and signed by its Chairman (but not the Commissioner) and the Claimant was appointed Technical Advisor and Surveyor for a period of 4 months which was due in February 2004.

It was obvious that this agreement must be made by the Authority appointing the Claimant as Technical Advisor and Surveyor for the reason that, it was under this agreement that the Claimant as a Technical Advisor trained the Commissioner and VMA staff in the Maritime technical matters and advised the Commissioner and VMA users and finally to survey vessels and all maritime works for which the VMA is responsible. This contract must have been made under s.39 of the VMA Act. It was a **contract for service** of advice and consultancy of the Claimant to the VMA.

4. Appointment of the Claimant as Deputy Commissioner of Maritime Affairs



The appointment of the Claimant, Mr Benard, as a Deputy Commissioner of Maritime Affairs under s.3 of the Maritime (Amendment) Act [CAP.131], by the Commissioner on 10 March 2005 was validly made. There is no question of the existence of the power of the Commissioner to so appoint. There is no issue as to how it was exercised. This appointment was not revoked until the repeal of the VMA (Repeal) Act No.22 of 2007.

In the present case, I consider that the Claimant's appointments as a VMA employee and a Licensing Officer and a Deputy Commissioner of the Maritime Affairs can be viewed in light of section 9 of the Employment Act [CAP.160] which provides that a contract of employment may be made in any form whether written or oral.

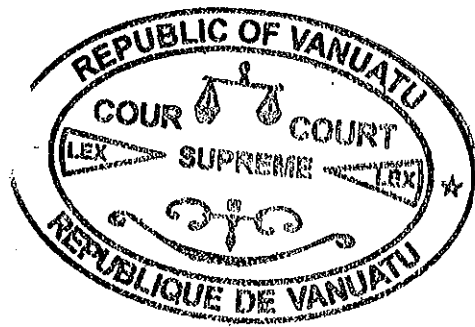
I consider also that there have been contracts made through the appointments and their acceptance by Mr Benard, evidenced by the subsequent performance of works and corresponding payments. The Claimant, Mr Benard, must have had the right given by the Employment Act in respect of contracts of employment for unspecified period. Further considerations shall be made when considering issues 4 and 6 in respect to severance allowance entitlements.

I now move on to consider the second issue.

ISSUE 2: Whether the Claimant's contracts or appointments existed after the repeal of the Vanuatu Maritime Authority Act [CAP.253] on 31 December 2007?

When considering this issue, it is understood to be the position that the Claimant's appointments under section 38 as "TECHNICAL ADVISOR" and "SURVEYOR" are void because of the lack of the powers of the then Commissioner to appoint Consultants and Specialists or Advisers under s.38 of the VMA Act and any corresponding contracts made under s.38 of the VMA Act are illegal at the formation of such contracts and so they are void. They are not relevant for consideration in any respect anymore.

HOWEVER, the Claimant's following appointments are valid and relevant to be considered here:



1. The Claimant's appointment as an employee of the VMA since November 2003; and
2. The Claimant's appointment by the Commissioner as VMA Licensing Officer under s.2(1) of the Shipping Act [CAP.53] dated 6 November 2003; and
3. The Claimant's appointment by the Commissioner as a Deputy Commissioner of Maritime Affairs under section 3 of the Maritime (Amendment) Act [CAP.131] dated 10 March 2005 and other delegations of responsibilities of the Commissioner to the Claimant by the then Commissioner.

I consider that the above three (3) appointments are for unspecified period. The appointment of the Claimant as a VMA Licensing Officer under section 2(1) of the Shipping Act [CAP.53] existed when it was made on 6 November 2003 until subsection (1) of section 2 of the Shipping Act was repealed by the Shipping (Amendment) Act No.12 of 2008 which became effective on 4 August 2008.

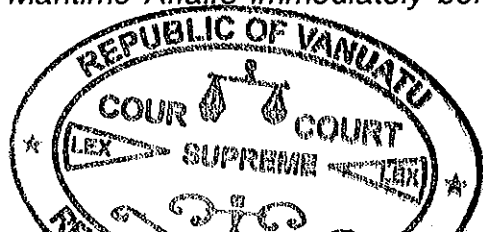
Equally, the appointments of the Claimant as an Employee of the VMA under s.38 of the VMA Act and as a Deputy Commissioner of Maritime Affairs under section 3 of the Maritime Act [CAP.131] existed when they made until the repeal of the VMA Act [CAP.253] by the VMA (Repeal) Act No.22 of 2007 and the legislative change brought in under section 2 of the said VMA (Repeal) Act which was effective as of 1 January 2008.

It is noted that although these appointments referred to above are made under different statutes, they are made for the functions, powers and responsibilities of the Vanuatu Maritime Authority and for the purposes for which the Vanuatu Maritime Authority was established by the VMA Act [CAP.253].

This is re-emphasised by section 2 of the Vanuatu Maritime Authority (Repeal) Act No.22 of 2007, which provides:

"2. Allocation of functions and powers and responsibilities

Any function, power or responsibility under any Act, other than the Vanuatu Maritime Authority Act [CAP.253], that was exercisable by the Vanuatu Maritime Authority or the Commissioner Vanuatu Maritime Affairs immediately before the



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commencement of this section shall be exercisable on and after that commencement by such other person or persons as the Prime Minister may appoint in writing."

In such a circumstance, the Claimant's appointments as an Employee of the VMA and as a Vanuatu Maritime Authority Licensing Officer and as a Deputy Commissioner of Maritime Affairs were frustrated by a total failure of consideration upon Parliament's repeal of the Vanuatu Maritime Authority (Repeal) Act No.22 of 2007 (section 4) and the subsequent legislative changes made.

Given the repeal of the VMA Act [CAP.253] which fundamentally affected those appointments and the consequential legislative changes, further employment performance which resulted from the respective appointments after 31 December 2007 were impossible and such obligations as the Defendant may have had after that date were discharged. Equally, further performance of any valid contract (if any) would become impossible by statute.

The Defence submissions on this issue reflect the correct legal position when they submit:

"At common law frustration does not rescind the contract ab initio: it brings the contract to an end forthwith, without more and automatically, in the sense that it releases both parties from any further performance of the contract, while leaving undisturbed any legal rights already accrued or payment already made in accordance with its terms. In other words, the maxim adopted by the common law is that 'the loss lies where it falls'." [See following authorities which are referred to by counsel of the Defendant:

- **Philips v. Alhambra Palace Company** [1901] 1 KB 59
- **Stubbs v. Holywell RY** (1867) LR 2 Ex 311
- **Graves v. Cohen** (1930 46 TL 121)]

I now move on to consider the third and fifth issues. They shall be dealt with together.

ISSUES 3 & 5: Whether the Claimant is entitled to annual leave for the period 1 November 2003 to 30 June 2010 or whether the



Claimant is entitled to annual leave for the period 1 July 2007 to 31 December 2007 as a result of his appointments?

The Claimant says that he was in continuous employment with the Vanuatu Maritime Authority (VMA) from 1 November 2003 until his contract was de facto terminated on 31 December 2007. The Claimant says he is entitled to annual leave for the period of his contractual engagement.

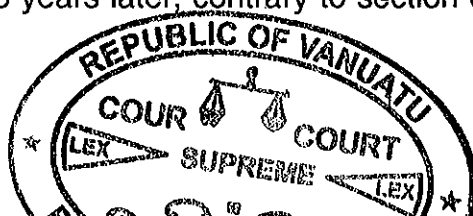
In light of the earlier findings and conclusions, the Claimant's contracts of 1 April 2004 and 11 April 2007 are declared unlawful and therefore void. The Claimant is not entitled to claim any rights based on those contracts.

However, as noted earlier, the Claimant was appointed by the then Commissioner as a VMA Employee since November 2003 and subsequently as a VMA Licensing Officer and as a Deputy Commissioner of the Maritime Affairs. Those appointments were made for unspecified period until the Repeal of the Vanuatu Maritime Authority Act on 31 December 2007. In this regard, the Claimant was in continuous employment with the Defendant for 12 months or more. He shall be entitled to annual leave for the period of his employment from November 2003 to 31 December 2007.

It is accepted that the Claimant had settled his arrears of salary claim and annual leave entitlements covering the period 1 July 2007 to 31 December 2007 in Civil Case No.199 of 2007 on 30 June 2010 and the Supreme Court issued an Order permanently staying the proceeding in CC No.199 of 2007. The Claimant is not entitled to annual leave based on his 11 April 2007 contract. Any leave entitlements covering the said period (1 July 2007 – 31 December 2007) should be understood to be based on the Claimant's appointments under s.38 as a VMA Employee and appointments made under s.2 of the Shipping Act [CAP.53] and s.3 of the Maritime (Amendment) Act [CAP.131].

The Claimant would be entitled to the balance of his annual leave for the period 6 November 2003 to December 2007. But he would not be entitled to annual leave which is not yet due.

In the present case, it is submitted on behalf of the Defendant that the claim for annual leave entitlement was only made when the Claimant filed his claim in this proceedings on 6 October 2010, some 3 years later, contrary to section 33 of the



Employment Act [CAP.160]. Accordingly, it is submitted the Claimant is time barred to make his claim for annual leave.

Section 33 of the Employment Act reads:

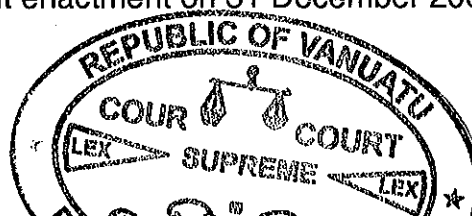
“After leaving the service of his employer any employee may avail himself of his annual leave and travel, if any, within 6 months counting from the date on which he ceased to work for the Employer”

After the Claimant’s appointments were frustrated by the repeal of the VMA Act on 31 December 2007, no other steps were undertaken and the employment of the Claimant ceased on that date. The Claimant had 6 months to avail himself of his annual leave. From the evidence before the Court, the Claimant failed to show that immediately after his appointments were terminated, he attempted to avail himself with the balance of his annual leave entitlements. I accept the Defence submissions that the Claimant is therefore time barred to make his claim for annual leave on the basis of section 33 of the Employment Act [CAP.160]. The Claimant’s claim for the balance of his annual leave is refused.

I now consider issues 4 and 6 together.

ISSUES 4 & 6: Whether the Claimant is entitled to severance allowance for his first and second contracts or severance allowance as a result of his appointments?

From the evidence the Claimant’s first contract was the standard agreement signed by the then Commissioner of the VMA and the Claimant on 1 April 2004 and the Claimant’s second contract was the standard agreement signed between the then Commissioner and the Claimant on 11 April 2007 which became effective on 1 July 2007. It is noted that the Claimant’s first and second contracts referred to above are found to be unlawful from their formation and so declared void. As a result, the Claimant is not entitled to any severance allowance claim based on the said contracts. However, as noted earlier the Claimant was in continuous employment with the Defendant for 12 months or more. The Claimant was appointed as an Employee, a VMA Licensing Officer and a Deputy Commissioner of the Maritime Affairs. Those appointments were made for unspecified period. The Claimant was engaged by the Defendant from November 2003 until the Repeal of the VMA Act by Parliament enactment on 31 December 2007.



The Claimant is entitled to severance allowance under the provisions of the Employment Act [CAP.160] because he has met the requirements of section 54(1) in that he has been in the continuous employment of the VMA for a period of 12 months or more and so the Defendant shall pay his severance allowance under section 56 of the Employment Act.

As noted earlier the date of commencement of work is in early November 2003. The Claimant said he was appointed as an Employee of the VMA since 1 November 2003. The evidence of appointment as a Licensing Officer showed 6 November 2003. I consider the length of dispute between the parties, the time and costs involved. I decide to give a practical and simple solution to this aspect. I decide and accept that the commencement date of work is 1 November 2003.

However, what is not clear is the amount of the monthly salary corresponding to his appointments as a VMA Employee and as a Licensing Officer of the VMA and a Deputy Commissioner of the Maritime Affairs. I decide also to give a practical solution to this aspect. On the evidence SCHEDULE 2 of the Claimant's second Employment Contract of 11 April 2007 stipulates the following remuneration package for the Employee (Claimant):

- Monthly remuneration of the Employee in consideration of the performance of his duty as Technical Advisor of the VMA and the Government – VT400,000
- **Monthly remuneration of the Employee in consideration of the performance of his duty as Surveyor, PSC Officer and Licensing Officer- VT 294,000**
- Monthly Housing Allowance - VT120,000
- Monthly Contractual remuneration of the Employee at 1/07/2007-VT814,000

I consider that although the contract of 11 April 2007 which was effective as of 1 July 2007 was declared void, the above schedule provides a material basis as to what amount of monthly remuneration the Claimant as a VMA Employee was paid for the performance of his duty as a licensing Officer including as a Deputy Commissioner of Maritime Affairs. That amount is VT294,000 as evidenced above.

I decide to use that figure as the Claimant's monthly remuneration for the purpose of calculating his severance allowance under section 56. I also consider and



decide that for practical purpose the starting date for calculation will be 1 November 2003 instead of 6 November 2003 and the termination date is 31 December 2007. This period represents a period of 4 years and 2 months. I use the method of calculation in section 56 and I arrive at the amount of Vatu 1,225,000 for severance allowance.

I finally consider the Claimant's claim for interest at the rate of 10% per annum and legal expenses (costs). In this case, the Claimant is successful on his claim for severance allowance. He would be entitled to interest at the rate of 5% instead of 10% in line with the Court of Appeal guideline judgments on this point.

The Claimant's claim for legal expenses is refused. The Claimant is unrepresented and so cannot be awarded costs but he may recover his disbursements. (See Civil Procedure Rules – Rule 15(4)). On the balance of all the case, I decide that each party to bear their own costs in the current proceeding.

In conclusion, the Court issued the following Orders:

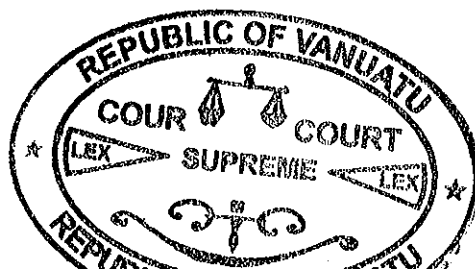
ORDERS

1. The Claimant's claim for annual leave is refused as the Claimant is time barred by s.33 of the Employment Act [CAP.160].
2. The Claimant is entitled to severance allowance for 4 years and 2 months of continuous employment calculated as follows:

$$294.000 \times 4 = 1,176,000 + (294,000 : 12 \times 2 = 49,000) = 1,225,000 \text{ Vatu}$$

3. The Claimant's claim for payment of the remaining period of his employment period of his contract for a specific period is refused as the contract of 11 April 2007 which became effective on 1 July 2007 for a period of 3 years was unlawful at its formation so it is void.

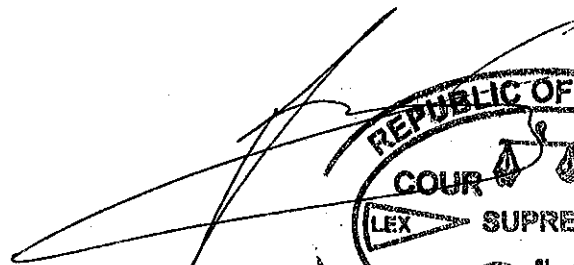
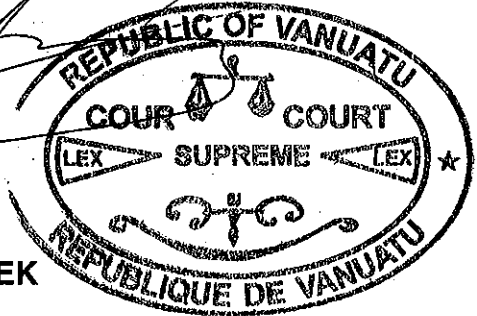
Equally, the appointments of the Claimant which are separate and different from his contractual arrangements are for unspecified period and such appointments are frustrated by the Repeal of the Vanuatu Maritime Authority Act and subsequent legislative changes.



4. The Claimant's claim for common law damages for losses of collateral but contractual advantages fails as there is no evidence in support.
5. The Claimant's claim for aggravated damages due to excessive resistance and unwarranted use of dominant position fails as there is no evidence in support.
6. The Claimant is awarded interest on the Judgment sum of VT 1,225,000 at the rate of 5% per annum from the date of the filing of the claim 18 October 2010 until the date of payment.
7. The Claimant's claim for costs (legal expenses) is refused. Each party to pay their own costs.
8. It is directed that the amount of the Judgment of VT1,225,000 plus interest of 5% must be paid by the Defendant to the Claimant by 3.00pm on 30 March 2012.

DATED at Port-Vila this 10th day of February 2012

BY THE COURT

**Vincent LUNABEK
Chief Justice**