

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
*(Civil Jurisdiction)*

**Civil Case No. 15 of 2012**

**BETWEEN: MAISON DU VANUATU**  
*Claimant*

**AND: REPUBLIC OF VANUATU**  
*Defendant*

**Hearing:** *17 October, 2013*

**Before:** *Justice Robert Spear*

**Counsel:** *Ronald Warsal for the Claimant*  
*Kent Tari (SLO) for the Defendant*

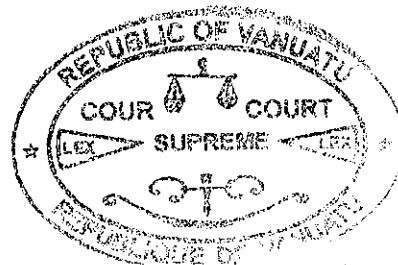
**Judgment:** *12 December 2013*

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**JUDGMENT**

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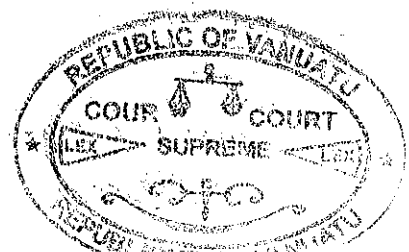
1. On 30 April 2011, a deed of "*release and settlement*" was entered into by the parties requiring the State to pay Maison du Vanuatu (MdV) Vt15 million by 30 April 2011. The Republic did not make that payment and this claim seek judgment accordingly.
2. The State asserts that the deed is voidable because of a material and significant misrepresentation made to it by MdV as to the Republic's liability.
3. The pleadings are contained in an amended claim dated 2 May 2012, an amended defence dated 29 January 2013 as supplemented by a memorandum from State Counsel providing further and beter particulars of defence.



4. Four sworn statements have been filed as part of the evidence:-
  - a) Georgy Calo of 14 September 2012 for MdV.
  - b) Georgy Calo of 28 September 2012 for MdV.
  - c) Sato Kilman of 8 October 2012 for the State.
  - d) Alain Terrien of 8 March 2013 for MdV.

### **Background**

5. On 7 October 2006, MdV and the State (by the Vanuatu Commodities Marketing Board – VCMB) entered into a contract whereby the State appointed MdV as its sole exporter of kava from Vanuatu to New Caledonia. MdV alleged that the State breached that contract and sought damages of Vt 1,084,337,500. The contract provided that if the contract was terminated by breach then the party in breach would be liable in damages but to a limit of Vt 15,000,000.
6. That case came on for hearing before Macdonald J on October 2010. In a reserved decision delivered on 22 October 2010, Macdonald J found that MdV had not proven a breach of contract on the part of the State. Furthermore, his Lordship held that even if a breach had been proven, the damages would be limited to Vt 15,000,000 in accordance with provision capping any damages.
7. It appears from the decision that the claim failed principally because of a lack of evidence as to breach. Be that as it may, the decision must be accepted as a conclusive determination between the parties that the State had not breached the supply contract.
8. Following delivery of that decision, matters then became somewhat complicated.
9. Mr Warsal commenced acting for MdV after the delivery of the Supreme Court decision was delivered on 22 October 2010. It appears that Mr Warsal wrote to the Attorney General on 24 January 2010 stating “as per the judgment (MdV) is entitled to Vt 15,000,000 and costs”. A demand for payment was made on behalf of MdV in the sum of Vt 18,000,000 being Vt 15 million for damages and Vt 3 million for costs. The Attorney General responded by a letter dated 27 January 2011 pointing out, quite



correctly, that the judgment was indeed in favour of the State and not MdV and that the State owed MdV nothing by that judgment.

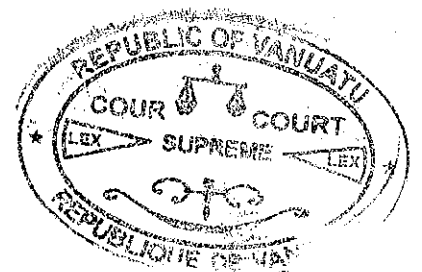
10. MdV then arranged a meeting between its representatives and the Prime Minister of the time. Following that meeting, the Prime Minister wrote to the Attorney General stating,

*“Maison du Vanuatu (MdV) has agreed to settle this claim once and for all with VCMB.*

*MdV has agreed to accept Vt 15,000,000 being judgment debt as specified in Justice J. McDonald’s judgment dated 22 October 2010: plus Vt 3,000,000 for legal costs as ordered as well.....*

*As Minister responsible for VCMB affairs, I see no reason why instructions for settlement to occur be prolonged. As such I request your legal opinions so that the Ministry of Finance and Economic Management (MFEM) can organize payments and so doing close off this ongoing legal issue”.*

11. At about the same time, Mr Warsal replied to the Attorney General by letter of 4 February 2011 contending again, and again incorrectly, that the judgment of 22 October 2010 had awarded Vt 15,000,000 to MdV as damages for breach of contract.
12. It appears, from letters written by the Prime Minister at that time, that the Prime Minister instructed the Minister of Finance and Economic Management to settle this matter. On 13 April 2011, the Minister of Finance entered into the deed of release and settlement with MdV.
13. Issue was taken by the State that the Minister did not have the authority to bind the State to this settlement. This point was advanced on the basis that the responsibility for the VCMB was transferred to the Prime Minister’s Office on 14 January 2011. However, it would be a curious state of affairs indeed if a settlement deed of this general nature could be avoided by the State simply on the basis that the Minister of Finance and Economic Management did not have the actual authority to enter into it on behalf of the State.
14. It is unnecessary to deal with the law relating to ostensible authority as it is beyond question that an entity such as the MdV, and its dealings with the State, could be expected to rely on its dealings with the Minister of Finance and Economic Management as being within the Minister’s authority unless it had been put on notice or was otherwise



aware that the Minister did not have the requisite authority to bind the State in respect of a "contract debt" .

15. MdV then sought leave to appeal out of time against Macdonald J's decision of 22 October 2010. In a considered ruling given on 28 April 2011, leave to appeal out of time was refused particularly on the grounds that the appointment sought to be advanced on appeal had no prospect of success.

16. The Minister of Finance then wrote to the State Law Office on 28 August 2012 in the following terms,

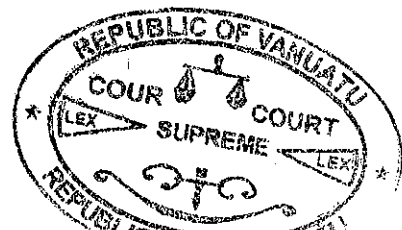
*"As you are aware, I signed the deed of release and settlement dated April 2011, in accordance with the instructions of the Prime Minister who is head of the Government. As such the State Law Office as the Government's legal advisor is obliged to act upon client's instructions and therefore you are hereby instructed to settle these legal proceedings with Maison du Vanuatu at the next convened Court hearing".*

17. That letter was followed by a further letter by the Minister of Finance to the State Law Office of 29 August 2012 which is in these terms:-

*"I refer to the letter dated 29 August 2012 of Mr Warsal seeking an immediate payment of Vt 18,000,000 as per judgment  
A copy of that letter is enclosed ease of reference. You are hereby advised that payment in respect to this matter is to be settled in full by Friday 31 August 2012".*

18. The Prime Minister then wrote to the Attorney General on 13 September 2012 advising that he had been misled by representatives of MdV in to a believe that the judgment delivered by Macdonald J on 22 October 2010 had created a judgment debt to MdV of Vt 15,000,000 and legal costs. The Prime Minister acknowledged in this letter of 13 September 2012 that he had subsequently being persuaded that the judgment was not in favour of MdV and that, in particular, the State was not in breach of the contract. The Prime Minister concluded his letter in these terms:-

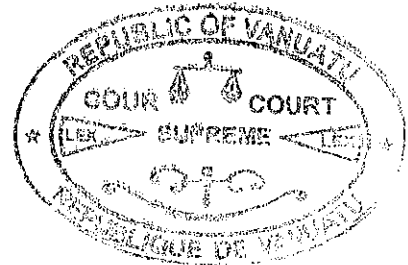
*"By this letter, as head of the Executive and Minister responsible for the VCMB, I hereby instruct you (the Attorney General) that the Government's position with regards to this*



*matter is that the Government will stand by the decision of the Court as issued on 22 October 2010 in Civil Case No. 130 of 2009 and that the Minister of Finance and Economic Management will withdraw his signature from the deed of release executed between himself and Georgy Calo as representative of Maison du Vanuatu dated 13 April 2011 as having been executed without any proper authorization.*

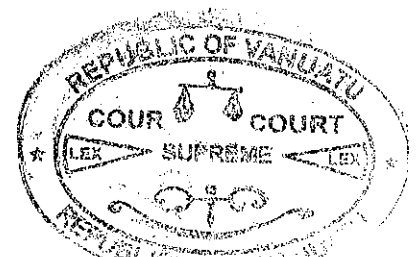
*I have never given my approval appearing under cover of the Minister of Finance's. Said letter of 3 February 2011 with respect of any settlement of this matter and hereby for the avoidance of doubt refute any such references."*

19. And so the battle lines were drawn. MdV asserted that they had a legally enforceable and binding contract with the State requiring the State to pay it Vt 15,000,000. In response, the State contended that it had been induced to enter into the settlement deed principally through the false representation by MDV as to the judgment of the Supreme Court.
20. As if the dealings between the parties in this matter have not, by that time, already reached farcical proportions, at a pre-trial conference before me on 27 August 2012, State counsel (not Mr Tari) informed the Court that both the Prime Minister and the Minister of Finance and Economic Development had now decided that the deed of settlement was to be honoured by the State. Then at a further conference on 31 August 2012, State counsel proffered the explanation that payment had not been made as the Director General of Finance had declared that the Department did not have sufficient funds to meet that payment.
21. Mr Warsal for MdV then applied for summary judgment. However, in another about turn, the State indicated that this application was opposed.
22. Prior to hearing the summary judgment application, the sworn statement of the Prime Minister (Sato Kilman) was filed by the State contending that the deed of settlement and release had been entered into by the State on the basis of a complete misunderstanding as to the judgment of Macdonald J arising from the false representation made to the Prime Minister at that meeting in early February 2011. The summary judgment application was then withdrawn and this matter was placed on track for trial.



### *Consideration*

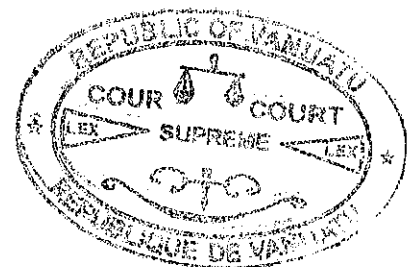
23. The case for MdV is that it has a valid and binding contract (by the deed of settlement and release) with the State requiring the State to pay it Vt 15,000,000. On the face of the document, that clearly appears to be so. However, the State contends that it has avoided the deed by reason of the misunderstanding arising from the false representation to it made to the Prime Minister by the representative of MDV.
24. It is for the State to prove on the balance of probabilities that this deed of settlement and release was voidable and has legitimately been avoided otherwise it is clear that there is a binding and enforceable contract requiring the State to pay MdV Vt 15,000,000.
25. Mr Tari argued that the deed had been avoided. In this respect he relied upon the following passage from Halsbury's laws of England,
26. "A party to a deed is not stopped from proving that it is void because he was induced by machinations of some other person to execute it under a mistake of a fundamental nature (not due to his own carelessness) as to the substance of the transaction expressed to be effected hereby, or because he and the other parties executed the deed under mutual mistake or fact. A person may aver, in opposition to his own deed, that he was induced to execute it by fraud, misrepresentation, duress, or undue influence and proof that for that reason it is avoidable.
27. Mr Tari argues that the deed was into by a mistake on the part of the Minister of Finance who had been misled by the instructions of the Prime Minister as to the judgment of 22 October 2011. Futhermore, that the Prime Minister's instructions were contaminated by the same mistake as to the effect of the judgment.
28. This raises the question as to why neither the Prime Minister nor the Minister of Finance, or their respective advisers, took the time to read the judgment which is in admirably clear and unequivocal terms. No-one who even had a cursory glance at the last few paragraphs of the judgment could have been left in any doubt that the judgment was in favour of the State and not MdV. Of course, that raises the additional question as to how it came about that Mr Warsal for MdV contended otherwise in his demands on the State.



29. It is long been understood that the remedy of rescission is available to contracting party if he or she is being induced to enter the contract by an actionable misrepresentation<sup>1</sup>. In this case, the representation is the statement made by MdV to the Prime Minister on or about 4 February 2011 that judgment had been entered in favour of MDV requiring the State to pay MDV Vt 15,000,000. It is not contested that such a representation was made to the Prime Minister by Georgy Calo on behalf of MDV which indeed followed the demand made by Mr Warsal in his letter to the Attorney General of the previous month.
30. The State argues that the Prime Minister's belief, based on the misrepresentation made to him, was simply carried over to the Minister of Finance with the direction from the Prime Minister that the debt be settled in those stated terms. The Minister of Finance appears to contend, and there is no objection taken to this, that he entered into the deed of settlement and release by reason of the direction of the Prime Minister and so it is safe to accept that the Minister of Finance was laboring under the same misunderstanding as the Prime Minister at the relevant time.
31. MdV appears to have believed that the judgment was in its favour. That would account for its incorrect representation to the Prime Minister in early February 2011. It is in conformity with the demand made by Mr Warsal in his letter to the Attorney General of 24 January 2010 "*as per the judgment (MdV) is entitled to Vt 15,000,000 and costs*". If so, that would mean that the deed was entered into by both parties labouring under a common or mutual mistake which would render the contract (the deed) voidable. However, even if that was not the honestly held view of MdV at the time they met the Prime Minister, it certainly appears that it was the Prime Minister's honest belief based upon the representation made to him by Georgy Calo for MdV which resulted in the Minister of Finance entering into that deed of settlement and release. I consider that such a mis representation entitle the State to avoid the contract.
32. It has not been argued for MdV that the deed was ratified in some way by the acknowledgments of State Counsel at the conferences before me that the deed would be

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<sup>1</sup> Cheshire and Fifoot's law of Contract (8<sup>th</sup> Australian edition) at para 11.8



honoured. That has not been pleaded, it is not the subject of any evidence, and it has not (as mentioned) been argued before me. I have not given further consideration to it.

33. I accordingly find that the deed of settlement and release has been avoided by the State.

34. This claim fails and judgment is accordingly entered for the State.

35. In all the circumstances, however, I am not disposed towards awarding costs to the State given that this untidy situation should never have arisen in the first place if the Prime Minister and the Minister of Finance had listened to the advice from the Attorney General rather than the representations on the part of MdV.

**BY THE COURT**

