

***IFIRA TRUSTEES LTD V FAMILY KALSAKAU* [2006] VUCA 23; *VANUATU COPRA AND COCOA EXPORTERS LTD V MAISON DE VANUATU* [2007] VUCA 24: TWO INSTRUCTIVE CASES FOR MINISTERS OF GOVERNMENT, THEIR POLITICAL ADVISERS, AND PUBLIC SERVANTS**

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**INTRODUCTION**

These two cases, which sprang from unrelated and quite different sets of facts, have one feature in common - they both involved exercise of statutory powers by ministers of the Government of Vanuatu held to be unlawful by the Court of Appeal. They therefore serve as timely reminders to Ministers and their advisers that they must comply with the law. They also serve to show what a great gap often exists between the principles of administrative law and the practice and expectations of politicians and public officials, a gap which it would be in the interests of all to try to bridge.

***IFIRA TRUSTEES LTD V KALSAKAU* [2006] VUCA 23**

**Summary of facts**

In this case, the Family Kalsakau of Ifira Island desired to grant a lease to a hotel chain of about 60 hectares of customary land at Malapoa Point near Port Vila which they claimed they owned. A negotiator's certificate was approved by the then Minister of Lands on 21 March 2005, and about a month later, on 15 April 2005, the Family Kalsakau signed a lease with the custom owners, which provided for payment of VT500 million. The following month, this lease was considered by the State Law Office which recommended it for approval by the Minister of Lands. Before the lease was approved however, the incumbent Minister of Lands was replaced by Mr Barak Sope MP, who was appointed Acting Minister of Lands. He claimed that the ownership of the land was disputed, and on 28 June 2005 he approved a negotiator's certificate in respect of the same land to Ifira Trustees Ltd (ITL). The next day he signed a lease to ITL. Under this lease '[t]here was no premium but only an annual rental of VT1.96 million'.<sup>1</sup>

The Family Kalsakau brought proceedings for judicial review of the actions of the Acting Minister of Lands, and these were upheld by the Supreme Court, and then by the Court of Appeal.

**Grounds for setting aside minister's decision**

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<sup>1</sup> *Ifira Trustees Ltd v Family Kalsakau* [2006] VUCA 23 <http://www.pacilii.org>.

The Court of Appeal held that the ownership of the 60 hectares of land at Malapoa Point was in dispute, and that therefore the minister had power under section 8 of the *Land Reform Act* [Cap 123] to manage the land until ownership was determined, and in particular to grant a lease over it, but the power had not been exercised lawfully and must be set aside. There were two grounds upon which the Court of Appeal held that the decision of the acting minister should be set aside:

*(i) Personal interest of acting minister*

The court held that the acting minister had a direct personal interest which invalidated his actions in granting a negotiator's certificate to the company, and granting a lease to the company:

From the evidence it is clear Mr Barak Sope was himself a signatory to a declaration upon which ITL bases its case. His father, Basea Tapangkai Sope was one of the signatories to a letter dated 18 May 2005 written to the Minister of Lands about the subject matter of the litigation. Cousins of his are trustees of ITL. It is a fundamental precept that **“no man can be a judge of and in his own case”**. Mr Barak Sope issued a negotiator's certificate and a lease to ITL when he had a disqualifying interest and whilst acting as the Minister of Lands. As Mr Tari accepted in the course of the appeal hearing it would be unthinkable, unconscionable and an affront to justice and common sense if there was a Court case in which a judge was one of the parties and the judge sat on the bench and decided that case. There are times when Parliament has vested in the executive arm of government, powers and responsibilities which are as important and as far reaching in their consequence as a decision of a court. Whenever that occurs the member of the executive branch of government who exercises the ministerial power must be independent, objective and disinterested in the outcome of the proceedings. The law requires that people who exercise statutory powers do so from a position in which they have no disqualifying interest and about which a reasonably informed person would not believe that they could be biased. The uncontroverted evidence before the Court can lead only to the conclusion that Mr Sope could not lawfully, properly or validly exercise the powers of a Minister of Lands in this dispute.<sup>2</sup>

*(ii) Failure by minister to consider all relevant factors*

The other ground upon which the Court of Appeal held that the decisions and actions of the Acting Minister of Lands should be set aside was that the acting minister had not had regard to various relevant factors:

When Parliament grants a power to make decisions, the decision maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision maker must faithfully apply fair and proper processes and procedures. Section 8, for example, is not a licence for a Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that

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<sup>2</sup> Ibid.

dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant. In this case, the Acting Minister within 24 hours of granting a negotiator's certificate reached a decision which on the basis of the evidence was taken without giving any consideration to the alternative claim advanced by the Kalsakau Family, or the financial differential between the two propositions.... There was no evidence that the necessary scrutiny and assessment had been undertaken. What occurred was an unlawful exercise of the power which was available.<sup>3</sup>

### **Additional comment by the Court**

#### *Possible disqualifying personal interest on part of Director of Lands*

The Court of Appeal also drew attention to the possibility of personal interest on the part of the Director of Lands. This had not been the subject of a direct finding by the Supreme Court, but the Court of Appeal made it clear that if it had been established, it would also be a ground for setting aside the registration of the lease:

The next issue which emerged in the Court of Appeal was the uncontradicted evidence ...that the Director of Lands ... had a direct disqualifying interest in this matter. He is a trustee of the ITL, and thus a party in the case. [He] facilitated the issuing and signing of the negotiator certificate and the lease in favour of ITL. There was a suggestion that [he] had failed to declare his personal interest to the normal Minister of Lands when he was dealing with the case. There is no finding on this aspect but again, if established, it would mean there were flaws in the processing of the lease application.<sup>4</sup>

### **Comments**

#### *Personal interest a disqualification for taking administrative or executive action*

There is no doubt that direct personal financial interest in the outcome of a judicial or quasi-judicial decision is regarded by the courts of common law as a disqualification for the decision maker, and a ground for setting the decision aside by judicial review. Until quite recently it was believed that it was only personal interests of a financial kind that had this effect, but in 2000 the House of Lords made it clear that a non-financial personal interest by way of personal association could also serve to invalidate a judicial or quasi-judicial decision.<sup>5</sup>

There has been very little discussion in England or the University of the South Pacific region as to whether personal interest would also invalidate a decision of an administrative or executive nature. The most direct statement has been that of High Court in *R v Environment Secretary, ex parte Kirkstall Valley*<sup>6</sup> where the court said:

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> *R v Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

<sup>6</sup> [1996] 3 All ER 304.

the principle that a person is disqualified from participation in a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome is of general application in public law and is not limited to judicial or quasi-judicial proceedings.<sup>7</sup>

In fact, the High Court held that there was no direct personal interest affecting the decision in question in that case, so that, strictly speaking, the statement was unnecessary for the decision. Nor did the court cite any authority for its proposition.

Accordingly the direct statements by the Court of Appeal in the *Ifira Trustees Ltd v Kalsakau* that an administrative and an executive decision will be invalidated by personal interest on the part of the decision maker is to be welcomed as providing precedent of high authority for the proposition that it is not only judicial and quasi-judicial decisions, but also administrative and executive decisions, that will be invalidated by personal interest on the part of the decision-maker.

#### *Lack of discussion of authority by the Court of Appeal*

It is very noticeable that there is a complete lack of authority cited by the Court of Appeal in this case for the important proposition that it enunciated. The same comment must be made of the next case discussed below. This may be a reflection of the fact that the court library was destroyed by the disastrous fire that engulfed the courthouse in June 2007, but there are other law libraries available to the Court of Appeal, and it would assist with the development of a coherent jurisprudence if the Court of Appeal mentions and discusses other relevant authorities.

One cannot help but be rather uneasy about the way in which the Court of Appeal so glibly applied to executive and administrative action the principles of law that have been developed with regard to judicial and quasi-judicial decisions. All the standards of behaviour of judges sitting in courts surely cannot be expected to be automatically observed by executive and administrative officials of government. This is a point that has been made many times, and was made, with regard to personal interest, strongly by the High Court of England in *Reg v Amber Valley Borough Council, ex parte Jackson*<sup>8</sup> and by the High Court of Australia in *Minister for Immigration v Jia Legeng*.<sup>9</sup> It is a pity that these authorities were not discussed by the Court of Appeal, even if it were only for the purpose of distinguishing them.

#### ***VANUATU COPRA AND COCOA EXPORTERS LTD V MAISON DE VANUATU*** **[2007] VUCA 24**

The Vanuatu Commodities Marketing Board (VCMB) was established by the *Vanuatu Commodities Marketing Board Act* [Cap 133]. The Act authorised the VCMB to issue licences to exporters to export prescribed commodities, and by 2006 it had issued a number of licences to exporters to export kava. On 7 October 2006 the VCMB made a contract with a company incorporated under French law, called Maison de Vanuatu, (Maison) allowing for Maison to be the sole exporter of kava

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<sup>7</sup> Ibid, 325.

<sup>8</sup> [1985] 1 WLR 298.

<sup>9</sup> [2001] 205 CLR 507.

from Vanuatu to New Caledonia. The VCMB wrote to existing exporters requesting them to ensure that exports of kava to New Caledonia were consigned only to Maison. Some exporters did not comply, and Maison brought proceedings in the Supreme Court of Vanuatu claiming that the VCMB had not carried out the terms of its contract with Maison, and seeking an order directing the VCMB to carry out the terms of the contract.

The Supreme Court held that the contract was valid and binding on the VCMB, and made an order that the VCMB carry out the terms of the contract. Some of the exporters appealed, and when the case reached the Court of Appeal, that court agreed that the contract was valid and binding on the VCMB, but held that its terms did not provide for VCMB to interfere with the licences of exporters which had been granted and were in existence at the time of the signing of the contract, but only required it to ensure that any licences to be issued in the future would allow exports of kava to New Caledonia to be made only to Maison. Thus the existing exporters were able to continue to export kava to New Caledonia and were not required to consign their cargoes only to Maison

### **Grounds for decision of Court of Appeal**

There were two principal grounds for, or steps in the reasoning of, the decision of the Court of Appeal:

#### *(i) Contract between the VCMB and Maison a valid and binding contract*

It was argued that the contract between the VCMB and Maison was not a valid and binding contract because it had not been approved by the Minister of Trade. Section 6 of the *Vanuatu Commodities Marketing Board Act* [Cap 133] provided that the functions of the VCMB included ‘to secure the most favourable arrangements for the purchase, sale, grading and export or import of prescribed commodities’, and in section 7 authorised the VCMB ‘to do all that is necessary or required to be done in respect of its functions under this Act.’ The Court held that these sections enabled VCMB to make the contract regarding export of kava, which was a prescribed commodity, to New Caledonia through Maison. Reliance was placed upon section 22 of the Act as the basis for an argument that the contract was not valid because it had not been approved by the minister. Section 22 of the Act provided as follows:

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

The court recognised that section 22 of the Act authorised the minister to give general directions to the VCMB, but did not empower the minister to demand that his approval was necessary for every contract that was entered into by the VCMB:

Section 22 contains a power of the kind commonly reserved to a Minister where a governmental function is devolved to a statutory entity. The power entitles the Minister to give directions of a “*general character*” after consultation with the Board. The section contemplates that directions may be

given on matters on government policy and in respect of the performance of any of the functions of the Board as the Minister thinks necessary in the public interest. However, s.22 cannot be construed as imposing a requirement on the Board that the Board obtain ministerial consent to every commercial contract the Board wishes to enter into. To require this would be contrary to the purpose of the Act itself which is to give the day to day performance of the functions set out in s.7 to a Board constituted by people with a cross section of relevant interests.

That is not to say that in a specific case that the Minister may not by direction in advance of a transaction require that the Minister must be involved in consultation or even that the Minister must ultimately give consent to a transaction. However that need arises because of directions given to that effect, not by force only of the general words of s.22. In this case no directions were given that required prior approval to transactions implementing the general program endorsed by the Government, and in so far as directions of a general character had been given in relation to that program, the evidence shows that the directions were followed.<sup>10</sup>

*(ii) Terms of contract did not restrict existing licence holders from exporting to New Caledonia*

The contract entered into between the VCMB and Maison on 7 October 2006 contained the following clauses:

### **3. AGREEMENT**

Both parties agree as follows:

1. VCMB or through its licensee continue to export the prescribed commodity known as kava to New Caledonia;
2. The export of this prescribed commodity will be solely to a company known as Maison du Vanuatu which is fully incorporated under the French company law;
3. In return of VCMB accepting Maison du Vanuatu as sole importer and distributor of Vanuatu kava, Maison du Vanuatu will immediately and within seven day of this Agreement coming into force freely allocate or give 15% of its share to VCMB...

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

Both parties agree to the following terms and conditions:

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

1. It will abide by the terms and conditions of this Agreement.

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<sup>10</sup> *Vanuatu Copra and Cocoa Exporters Ltd v Maison de Vanuatu* [2007] VUCA 24  
<http://www.pacii.org>.

2. For New Caledonia kava market, VCMB will specify clearly in each licence to be issued to any holder in Vanuatu the sole right to export kava to Maison du Vanuatu and no any other destination in New Caledonia.

3. While a current license (sic) is valid the holder shall not export kava to any other destination in New Caledonia.

4. VCMB may cancel any licence holder who does not abide by the terms of this Agreement.

5. VCMB agrees to export kava to New Caledonia only through Maison du Vanuatu as the sole importer and distributor provided that 15% of its share are freely allocated or given to VCMB and an advance payment of VT5,000,000 be made available to VCMB within seven days from the date this Agreement is signed to assist its financial position.<sup>11</sup>

It is obvious that there is a certain ambiguity about the meaning of these clauses, especially in relation to existing licence holders. The meaning which the Court of Appeal held should be adopted was that these clauses applied only to future licence holders, not licence holders existing at the date when the contract was entered into on 7 October 2006:

Clause 4 (A) (2) ...speaks only to the future. It imposes an obligation on VCMB in relation to future licences. It says nothing about existing licences. Clause 4(a) (3) by its terms speaks of current licences....

However it will be noted first that the agreement is between only VCMB and Maison. Clause 4(A)(3) cannot have any contractual effect on licence holders who are not parties to the contract... Other export licence holders... do not fail to “abide by the terms of this Agreement” if they continue to operate under their current licences....

There are reasons for this conclusion besides the background context in which the Agreement was made. As a matter of law, it could not be open to VCMB to arbitrarily alter or cancel the terms of existing licences held by third parties....[A]n administrative decision making body like VCMB must extend natural justice to licence holders before taking action which adversely affects their vested interests. In the present context, VCMB could not act lawfully to add a restrictive condition to an existing licence, or to suspend or cancel a licence without giving the licence holder an opportunity to be heard. Moreover, the VCMB could only alter, suspend or cancel a licence if there was a lawful reason for doing so. Licences, like the export licences... constitute valuable property. The Constitution of the Republic of Vanuatu, Article 5, obliges the Government, including agencies of the Government, like the VCMB, to act in accordance with constitutional fundamental rights.

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<sup>11</sup> Ibid.

Article 5(1)(j) of the Constitution protests people in Vanuatu against government action which would constitute an unjust deprivation of property.

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

For the above reasons we consider the Agreement should be construed to mean that VCMB and Maison intended that existing licence holders would continue to enjoy their current export licence rights to export kava to importers of their choice in new Caledonia.... However the Agreement requires that new export licences issued to third parties after 7<sup>th</sup> October 2006 will contain a condition that the New Caledonia importer must be Maison.<sup>12</sup>

## **Comments**

### *Minister's powers*

It is obvious that the Minister of Trade considered that he had much greater powers of control over the making of the contract between the VCMB and Maison than the Court of Appeal held that the Act allowed him. The minutes of a meeting of the VCMB, 14 -16 October 2006, which were quoted in the course of the judgment of the court, showed that the Minister of Trade was insisting through his first political adviser that the Minister must be consulted about the terms of the agreement, and that the agreement would not come into effect until the Minister had signed it. The VCMB eventually passed a resolution that the agreement, which had already been signed by the Board about a week before 'be approved in principle awaiting the Minister of Trade's approval.'<sup>13</sup> The court judgment also records that in December 2006 the Minister wrote a letter stating that he had 'never approved the Agreement... [and] cannot allow the VCMB to be part of this deal as it was without my approval.'<sup>14</sup> All of this was not authorised by the *Vanuatu Commodities Marketing Act* [Cap 133], and constituted unlawful assertions of power by the Minister of Trade.

### *Uncertainty about meaning of terms of the contract*

It cannot be denied that the terms of the contract between the VCMB and Maison were extremely unclear. Some clauses seem to envisage that Maison will be the sole exporter and distributor of kava, whilst others seem to contemplate that only future licence holders will be affected. The Court of Appeal adopted an interpretation of the terms which was consistent with the law, and was fair to existing licence holders. But it may be doubted whether it was what either the VCMB or Maison actually intended. Certainly Maison argued throughout that the VCMB was in breach of the agreement in not stopping existing licence holders from exporting to New Caledonia without going through Maison. The VCMB also apparently at first argued that the agreement was valid and binding, although later it argued that the contract was invalid because it had not been approved by the Minister of Trade.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

*Responsibility for drafting contract*

The judgment of the Court of Appeal does not indicate who were the persons responsible for drafting this contract, which clearly was of extreme importance to both the VCMB and Maison. The ambiguity and uncertainty of its terms would suggest that it was drafted by a person without legal training. If that is so, it raises the question of whether statutory bodies should be required to have their contracts approved by the State Law Office or by a private lawyer.

## **CONCLUSION**

One cannot read the facts of these two cases which came before the Court of Appeal, and the judgments that were delivered by the Court of Appeal, without being struck by the enormous gap, in fact a yawning chasm, that existed between the law and the practice, between the principles of judicial review and the actions of the politicians and public officials. One can have some sympathy for the ministers and public officials. The courts have made such strides over the last 50 years in the development of principles of judicial review, and the extent to which they will imply restrictions into the words of legislation which are not expressly stated, that they have far outpaced the knowledge or anticipations of ordinary lay persons who have no knowledge of administrative law. For a person without legal training it must seem very difficult to understand that the words of legislation that provide discretionary powers for ministers and public officials do not really mean what they appear to say, but are instead shrouded with restrictions that are not expressed in the legislation, but are imposed by the courts on the basis of implications and inferences known only to judges and lawyers. However, that is not to suggest that the principles of judicial review and the jurisprudence that have developed with regard to the interpretation of legislative provisions that empower the taking of actions and decisions by ministers are inappropriate or unsuitable. On the contrary, they are principles that are essential to the concepts of good governance, transparency and accountability which are considered to be so important as features of modern state governance. Rather, it suggests that a great deal needs to be done to bring those who have to administer, apply and implement these statutory provisions up to an appropriate level of awareness and appreciation of the limits that are implicit, but not explicit, in those legislative provisions.

One method for closing the gap between the law and the practice of politicians would be to have induction programs and follow-up programs to ensure that ministers, their political advisers, and public servants are made aware of the limits within which the courts will hold that statutory powers must be exercised. Another method might be the provision of written material, such a brochures or pamphlets which could be distributed for reading by ministers, their political advisers, and public servants.

But what is taught in such programs is easily forgotten, and it may be that the stage has been reached when the basic principles of common law should be expressly provided in legislation. This could be done either by having a general Act, entitled the Ministerial Powers Act, or Statutory Powers Act, which applied to all legislation granting discretionary powers to ministers and public officials, or by inserting in each Act that granted discretionary powers to ministers or public officials a general section that stated the principles upon which all discretionary powers conferred by that Act

must be exercised. In this way it could be made explicitly clear to ministers and public officials what limits are imposed by the courts upon the exercise of statutory powers, and upon what principles, and within what limits, those powers should be exercised.