

BETWEEN: ROBERT JAMES MAKIN
Appellant

AND: THE INDEPENDENT FOUNDATION COMMITTEE INC
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop
Hon. Justice David Chetwynd

Counsel: *Mrs Marie-Noelle Ferrieux Patterson for the Appellant*
Mr Nigel Morrison for the Respondent

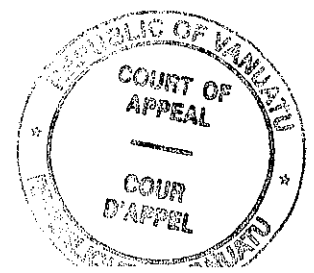
Date of Hearing: *Tuesday 14 July 2015*

Date of Judgment: *Friday 23 July 2015*

JUDGMENT

Introduction

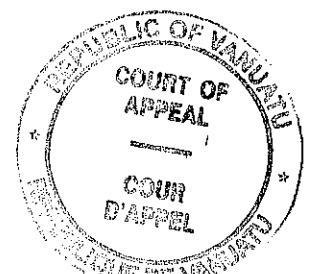
1. Robert Makin, an experienced journalist, was editor of The Independent a newspaper published in Port Vila by the respondent ("the Foundation"), from 13 October 2003 until his resignation with effect from 12 March 2010. On 20 May 2013 he lodged a claim for a severance allowance (Vt 1,283,333), interest and costs.



2. The Foundation denied liability on the basis that between 1 January and 31 December 2006, Mr Makin was, pursuant to a contract dated 7th December 2005, at his own request, “employed” as an independent contractor. Accordingly his period of true employment was interrupted in 2006. Because the Employment Act [Cap. 160] at the relevant time required six years’ continuous service before an employee became entitled to severance, the Foundation contended that Mr Makin’s claim could not succeed.

3. In the Supreme Court judgment issued on 13 August 2014, Justice Sey dismissed Mr Makin’s claim, holding that the contract of 7 December 2005 was genuine and binding. It had been entered into for good reason on both sides. Mr Makin appeals, essentially because he says the day-to-day reality of his work as editor was entirely unchanged throughout the seven years. While the December 2005 contract indicated otherwise, he was in truth an employee in 2006, just as he was before and afterwards. He submits that if the Supreme Court had applied the correct test, focusing on substance rather than form, the only proper conclusion would have been that Mr Makin was continuously employed throughout. He says that he should not be held to the 2005 contract because he was effectively forced to, or at least had no choice but to, sign it, in order to save his job, which was important to him. In addition he submits that the upholding by the Supreme Court of the contract meant that it gave effect to a violation of public policy and of the Employment Act.

4. As the appeal was filed out of time, leave to appeal was required and this was opposed by the Foundation. Because one of the key criteria on such an application is the prospect of the appeal succeeding if the time for appealing is extended, we decided, without opposition from counsel, to proceed to hear the appeal before determining the leave application.

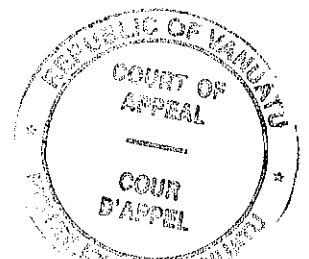


Issue

5. The question for this Court is whether the Supreme Court was correct to find that during 2006 Mr Makin was an independent contractor rather than an employee as he was both before and after 2006. Put another way, and as Mrs Patterson preferred, was the Supreme Court correct to say that he was not in continuous employment throughout the 2003 to 2010 period?

The facts in more detail

6. Before Mr Makin commenced employment it was important for the Foundation, through its chairman Mr Bayer, to ascertain his citizenship/residential status. In an email on 3 August 2003 Mr Makin confirmed to Mr Bayer that he retained Vanuatu citizenship. This was important because it meant the Foundation did not need to make application to the Labour or Immigration Departments or the Vanuatu Investment Promotion Authority (“VIPA”) for Mr Makin to work in Vanuatu despite not being a citizen.
7. As a result, Mr Makin was employed from 13 October 2003 as a Vanuatu citizen under the Employment Act. The Supreme Court was not provided with a copy of Mr Makin’s employment contract for the 2003 to 2005 period but nothing turns on this since there is no dispute between the parties that the terms of his employment were materially the same both before and after 2006.
8. Mr Bayer said that in the latter part of 2005 the Independent was experiencing financial hardship and he wrote to Mr Makin on 5 October 2005 proposing a major restructuring including a reduction in salary and working during alternate weeks. It appears that this

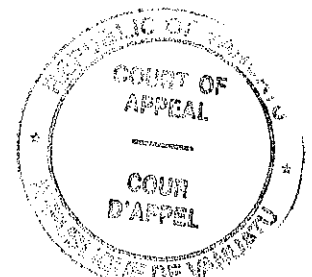


restructuring was not implemented or at least not fully but that there was a failure to pay everything due to Mr Makin so that the Foundation accrued a debt to him.

9. Mr Bayer says that around this time he became aware that Mr Makin had applied for and been granted Australian citizenship. At the time dual citizenship was not allowed in Vanuatu and there was discussion about the holding of two citizenships. Mr Makin told him that he would renounce his Vanuatu citizenship. Mr Bayer understood that, consistent with this, Mr Makin would be seeking approval from VIPA in order to remain in Vanuatu as an investor and to work for the Foundation as a contractor. This led to the signing of the critical contract on 7 December 2005, the terms of which are set out in full here:-

**“THE INDEPENDENT FOUNDATION
CONTRACT SERVICE AGREEMENT”**

1. **Principal:** *The Independent Foundation (“the Independent”) of Box 1555, Port Vila.*
2. **Contractor:** *Bob Makin (“Contractor”) of Box 1262, Port Vila.*
3. *This Agreement is NOT subject to the Provisions of the Employment Act [Cap. 160] as both parties agree that the relationship between the parties is not that of Employer and Employee.*
4. **Service begins:** *1 January 2006*
5. **Type service provided:** *Editing, writing and directing (“the Services”)*
6. **Position Title:** *Editor*
7. **Responsibilities:** *Writing editorials, subbing articles, directing staff.*
8. **Contact person responsible:** *The Acting Committee Chairman of the Independent*
9. **Contract Period:** *This Agreement is for an indefinite period. Either party may terminate at any time with 30 days notice.*
10. **Payment Terms:** *Payment shall be at the rate of two hundred thousand Vatu (Vt 200,000) per month.
An advance of up to Vt 100,000 will be paid to the Contractor on the 15th of each month, or the last business day prior to the 16th, if the 15th is not a business day.*
11. **Office Hours:** *Whilst the official office hours are 7.30 am to 5.00 pm from Monday to Friday and access to the office is always possible during those hours, the Contractor is not required to be in attendance during those hours, or any particular hours.*
12. **Use of Independent’s facilities and equipment:** *The Contractor may use the office facilities, including computer facilities and phone but there is no requirement to use these facilities.*



13. **Variation:** *The terms and conditions of this Contract Agreement shall remain unaltered unless varied in writing by both parties.*
14. **Confidentiality:** *The Independent takes its confidentiality obligations very seriously. The Contractor will be required to sign a Secrecy Declaration covering all aspects of the Independent's operations. In the event that it is discovered that the Contractor has been found responsible for the unauthorized disclosure of any information about either the Independent's operations or those of its clients or sources, this Agreement will be liable to immediate termination without notice. The Independent reserves all its rights and remedies in the event of any suspected breach of confidentiality.*
15. **Out of pocket costs:** *Justified costs approved in writing by the Independent, in respect of work done for the Independent, will be paid for or reimbursed to the Contractor by the Independent.*
16. **Restraint of trade:** *The Contractor, not being an employee, is unrestricted in his activities and the Independent has not authority to direct the activities of the Contractor, but the Contractor agrees he will not, without the written consent of the Independent, accept any work or retainer from another newspaper or publisher in Vanuatu whilst this contract continues in force.*
17. **Business License:** *Not being an employee, the Contractor is responsible for her own Business License.*
18. **Validity:** *If any term of condition is breached or unenforceable, it shall not effect the other clauses.*
19. **Applicable Law:** *The law of Vanuatu shall apply to this agreement.*
20. **Notices:** *Any notice to be given by one party hereto to the other party hereto shall be deemed delivered upon personal delivery to the offices of the Independent or to the Contractor as the case may be, or shall be deemed to have been given 3 working days after posting to the relevant party at the address first hereinbefore given.*

Agreed

Agreed

The Independent

Contractor _____
Bob Makin

Per _____
Thomas M. Bayer
Acting Committee Chairman

Date: 7 December 2005

Date: 7 December 2005"



10. Consistent with what Mr Bayer says was agreed with Mr Makin was the letter Mr Makin wrote to the Labour Commissioner on 14 December 2005. The content of this letter was as follows:-

"I am aware that we have not replied yet to a letter you sent concerning the editor's position at The Independent.

This post is part of a re-structuring at the newspaper which will see more use of consultants hired to carry out particular tasks for a limited time.

My own tenure of the editor's position as an employee of the Independent Foundation ceases today.

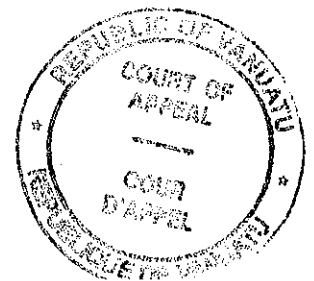
A letter has gone to the Vanuatu Investment Promotion Authority and should enable decisions to be taken for the resumption of publication of the paper in 2006 after the Christmas recess."

11. In a handwritten note at the bottom of a copy of that letter, apparently addressed to Mr Bayer, Mr Makin noted:-

"Alliance Realty property valuation of Vt 22 million submitted to VIPA today."

The Foundation says this indicates that Mr Makin was taking the appropriate steps, as agreed with Mr Bayer, to obtain VIPA approval.

12. Mr Bayer says that in late 2006 Mr Makin advised him that he had decided not to retain his Australian citizenship. He had apparently found out that in fact his Vanuatu citizenship had never been revoked in spite of his application. After further discussion, given these changed circumstances, Mr Makin was again employed as a Vanuatu citizen by the Foundation in accordance with the Employment Act. His written contract dated 5 January 2007 was produced in evidence. That governed the relationship between the parties until

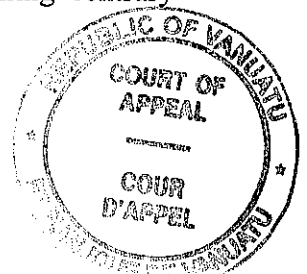


Mr Makin resigned with effect from 12 March 2010. Its terms are not disputed and need not be reproduced here.

13. Mr Bayer said, and this is not disputed, that in 2005 the requisite period of continuous employment which was required to give rise to a severance entitlement was 10 years and that neither of the parties had any idea then that in 2009 the law would change to only require six years of continuous service.

The Supreme Court Judgment

14. Justice Sey noted the key submission made by Mr Makin that at the time he signed the December 2005 contract he thought he was simply obtaining continuation of his job as an employee and that the reality was, irrespective of the terms of that contract, that he was not operating an independent business on his own account. Rather, he was continuing to work as an employee for the Foundation, and no one else, and for its benefit. Justice Sey noted Mrs Patterson's submission that the Court ought to look at "the substance not the label" and that Mr Makin's status could not be determined solely on the basis of the parties' own declaration as to their intention. Mrs Patterson further submitted that in reality the contract was an employment agreement disguised as a contract for service and this amounted to "*sham contracting*".
15. Justice Sey concluded however that the words which the parties had used in their December 2005 agreement were genuine and, having considered relevant case authorities, that there was no sham involved because there was no disparity between the ostensible and real intentions of the parties. She also upheld the submission made by Mr Morrison that the agreement had been signed by Mr Makin and, in the absence of compelling contrary

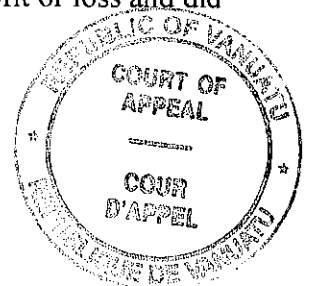


evidence, should be binding on him. She noted there was no plea of *non est factum* which she observed was not surprising given that Mr Makin's first language is English and he is well- educated. She accepted Mr Morrison's submission that these were two independent, intelligent parties who had not been coerced into signing the agreement. Justice Sey also noted that the proposed change in status was corroborated by other documents, including those generated by Mr Makin himself. She found that the fact that the Foundation did not pay, and therefore Mr Makin did not receive, VNPF contributions during 2006 was further corroboration that the December 2005 contract reflected their genuine intentions.

16. Her Ladyship concluded that the December 2005 contract represented as Mr Morrison had submitted a "*win win*" situation which suited both parties at that time. By entering into the contract as an independent contractor, Mr Makin preserved his job and his income, while the Foundation avoided the cost of employing an expatriate.

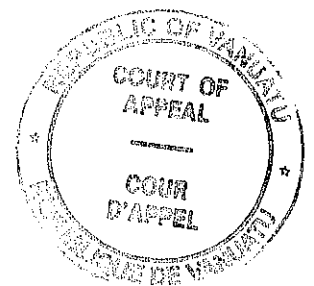
The submissions on appeal

17. Mrs Patterson emphasised the absence of any change in the day-to-day work carried out by Mr Makin in 2006 from that which he carried out before and after 2006. She said that on the application of the relevant common law test for determination of the status of an "*employee*" all the factors pointed to Mr Makin being an employee. She noted that Mr Makin was an integral part of the Foundation's business and that he did not work for anyone else. He worked permanently and on a full-time basis for the Foundation. What he did, and when he did it, were entirely within the Foundation's control. He was not able to subcontract the work or hire staff himself nor did he provide any tools, equipment or other office facilities. Mr Makin worked under the control and direction of Mr Bayer and was required to report regularly to him. Mr Makin did not bear any risk of profit or loss and did



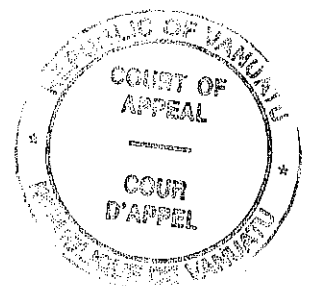
not invoice for his work but rather was remunerated on a monthly basis regardless of completion of tasks or projects. She submitted with reference to authority, *PP v. Lowen* [2003] VUSC 31, that the failure by the respondent to pay VNPF contributions did not in itself indicate the true status Mr Makin held.

18. Mrs Patterson submitted that the only factor pointing towards an independent factor relationship was the December 2005 contract but this should not be held to be determinative or indeed genuine. She also submitted that if the 2003-2005 employment had genuinely come to an end, then that should have been recorded and changes made to the working relationship. Nothing of that kind occurred.
19. We will refer to several of Mrs Patterson's other arguments in the ensuing discussion.
20. Mr Morrison supported the reasoning of the Supreme Court and emphasised that the December 2005 contract had not come about solely to benefit the Foundation but rather it was also to Mr Makin's benefit. Mr Bayer had properly being concerned about Mr Makin's citizenship status before their relationship began in 2003 and what led to the 2005 contract was primarily caused by a change in that area. The 2005 contract was entered into so that Mr Makin could continue in his position as editor despite the financial difficulties of the Foundation and the Foundation could continue to have him in that role at a reduced cost and avoiding the costs which would otherwise have applied to an employed non-citizen of Vanuatu. He emphasised there was no ulterior motive on the part of the Foundation and that nobody thought about severance consequences because at that time the 10-year rule was in place and Mr Makin had only been employed for just over two years.



Discussion and Decision

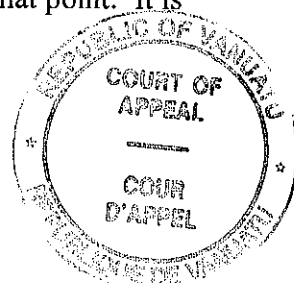
21. In answering the question as to the true status of Mr Makin during 2006 and whether his employment prior to that changed, the starting point must be the contract of 7 December 2005. Whenever the parties to a relationship choose to record the aspects of their arrangement in writing, it is self-evidently the best evidence of their intention. Unless there is a proper basis to do otherwise, it must be treated as a genuine arms-length agreement reflecting the giving of consideration by each side to bind their bargain.
22. The agreement is succinct and to the point. It expressly says, with the word *NOT* emphasized in paragraph 3, that the agreement is not subject to the provisions of the Employment Act and that the relationship between the parties is not that of employer and employee. This was expressly agreed by Mr Makin who is an experienced journalist and an articulate and intelligent man. He did not plead in a Reply in the Supreme Court *non est factum* (literally, not his deed) or that he was coerced to enter the agreement.
23. There is no doubt that, in terms of the work Mr Makin did for the Foundation, there was no material change from that which he did before or after 2006. However, as between these two parties, there is equally no doubt whatsoever that they deliberately set about changing their *legal* relationship under which that work would be carried out. Whether it was, or was not, a misrepresentation of the true nature of their relationship to third parties, as between them there was no mistake. There is no reason why each party should not be held to the terms of the written agreement they solemnly signed.
24. In our view that is enough to dispose of the appeal but in deference to the submissions made we make the following further observations.



Whenever there is a debate raised as to the intention with which the parties entered into a written agreement, contemporaneous conduct and documentation is usually of considerable interest and may be pivotal. It is not unusual to find that the complexion which a party seeks to place on a historical contract is at odds with the way that party conducted themselves at that time. This case provides a clear example. In writing his letter of 14 December 2005, to the Labour Commissioner, Mr Makin acted entirely consistently with the plain meaning of the 7 December 2005 contract because he expressly confirmed that his own tenure of the editor's position *as an employee* of the Independent ceased from the date of the letter. While Mr Makin said in cross-examination in the court below that this letter had been written at Mr Bayer's request, the reality is that it is a short and simple letter which he signed and to which he added a handwritten note consistent with its contents. There can be no serious suggestion that Mr Makin did not know exactly what he was doing in signing that letter and in signing the contract the previous week.

25. The contemporaneous conduct of Mr Makin in December 2005 is in our view inconsistent with the revisionist argument he now seeks to advance many years later at a time when it has become apparent that continuous service for six years matters.

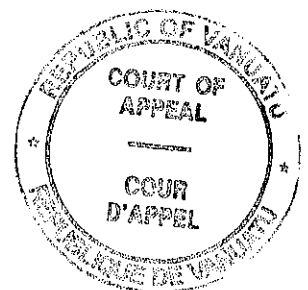
26. We are also satisfied that there were good reasons for Mr Makin to sign the December 2005 contract. As Mrs Patterson accepted in her submissions, he did not want the paper to close and had an emotional and personal involvement in its continuation. Because of the apparent financial difficulties of the Foundation, he was in a situation where he had little if any choice but to save the Independent the cost of employing an expatriate by agreeing to work in the same way, but in a different legal capacity, as he had done until that point. It is



not correct however to say this meant that he signed the contract itself under duress. He clearly had a choice not to sign it but for good reasons elected to do so. It allowed him to continue as editor and the further change in circumstances later in 2006 allowed him to be re-employed from 2007 for as it turned out, a further five years.

27. We are satisfied that had it not been for the citizenship issue, which is a factor relating to Mr Makin not the Foundation, there would have been no need for the 2005 contract to have been signed. It was not the Foundation who generated the problem but a combination of Mr Makin's decision to apply for Australian citizenship and the effect of the law in Vanuatu at that time. A problem had arisen and a solution needed to be found. There was clearly agreement between the parties at that time to the solution manifested by the 7 December contract. It was cost-effective for the Foundation but also beneficial to Mr Makin to allow the Independent and his position as editor to continue. This was nothing more than commercial commonsense in a situation which both parties would have preferred not to have been in, but had to face.

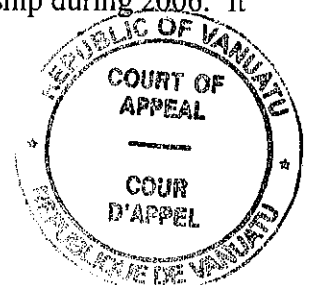
28. The integrity and genuineness of the Foundation in this process was questioned by Mrs Patterson particularly because the alleged restructuring did not occur. She implied, although not able to point to evidence, that this may have been some kind of ruse to get rid of Mr Makin. In our view that contention is not supported by the evidence. It is clear that the Foundation was concerned about the citizenship issue before Mr Makin ever began employment and, importantly, once the position was clarified in late 2006 it was quite happy to re-engage Mr Makin as an employee from 1 January 2007 at considerable further cost to itself compared to those incurred in 2006.



29. In summary, while Mr Makin's day-to-day work did not change throughout the 2003 to 2010 period, his citizenship status did (at his own instigation) and that gave rise to a problem which needed to be resolved. It was resolved in a way which allowed him to continue as editor despite revoking (or at least attempting to) his Vanuatu citizenship. At the same time, the reduced cost of having Mr Makin as editor under the 2005 contract benefited the Foundation. But the primary driver for the 2005 contract was the position of Mr Makin and his own choice to surrender his Vanuatu citizenship. Had he remained a Vanuatu citizen throughout and not sought to relinquish his Vanuatu citizenship there would have been no need to change the employment contract under which he had been working since October 2003.

30. Mrs Patterson submitted that the effect of the Supreme Court judgment was to uphold contractual provisions which violated public and statutory policy. We accept that the contract was entered into to address the cost ramifications of Mr Makin's citizenship in relationship to the applicable law of Vanuatu. What we are asked to decide is what, *as between these particular parties*, was their genuine relationship? That was solemnly set out with good reasons on both sides in the contract of 7 December 2005. It was a genuine contract as between the parties and that is the end of the matter so far as this claim is concerned.

31. There is also no clash with the Employment Act since the 2005 contract did not amount to a contracting out of that Act which is proscribed by section 6. The parties to an employment-like relationship may of course enter into a relationship where a former employee becomes an independent contractor without that amounting to infringement of section 6. Mrs Patterson's argument begs the question of the true nature of the relationship during 2006. It

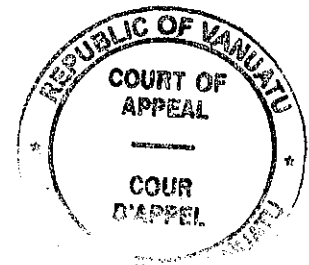


is clear that that relationship was not one of employer and employee and that both parties intended and understood that that would be the case when they signed the contract.

32. Mrs Patterson made submissions about the contract not having been entered into willingly by Mr Makin on a free and equal basis. We note that there was no pleading of this contention which ought to have been included in a reply to the defence, which expressly stated that *at his request* Mr Makin was employed as an independent contractor from 1 January 2006. So not only was the Foundation alleging free choice but that the 7 December contract was arranged at Mr Makin's instigation. Under rule 4.6 of the Civil Procedure Rules, if a claimant wishes to allege further relevant facts after the defence has been filed and served he is obliged to file and serve a reply. In the circumstances here, if Mr Makin considered the contract was entered into under duress or on some basis providing a *non est factum* defence, then that had to be pleaded with appropriate particulars so that it was an issue properly before the Court. He did not do so. In any event, being given Hobson's choice, or at least being in a dilemma, does not mean that choosing an unpalatable option amounts to signing under duress.

Conclusion

33. We are satisfied that the clear and succinct written contract of 7 December 2005 was genuinely entered into by each party with each seeing a benefit in doing so. No good reason has been shown why Mr Makin should not be held to his bargain which was made primarily because of his own citizenship choices.
34. We are prepared to grant leave to appeal because there was a relatively short delay in seeking leave to appeal out of time, an explanation for at least the early part of that period,

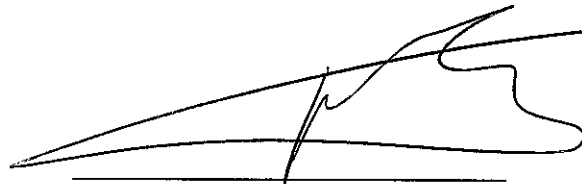


an arguable point and no prejudice to the respondent. However, having heard the appeal itself we are satisfied that it must be, and is, dismissed with standard costs awarded to the Foundation, to be taxed if they cannot be agreed.

35. We thank counsel for the clarity of their submissions.

DATED at Port Vila this 23rd day of July 2015

BY THE COURT

A handwritten signature in black ink, consisting of several fluid, overlapping strokes, positioned above a horizontal line.

Hon. Chief Justice Vincent LUNABEK

