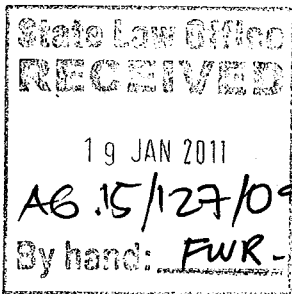


**IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**CIVIL CASE NO 174 of 2009**



**BETWEEN**

**HON. ALFRED CARLOT**  
Claimant

**AND**

**REPUBLIC OF VANUATU**  
Defendant

*Coram: Justice J E Macdonald*

*Hearing: 23 & 24 September, 4, 8, 10, 11, 14 & 15 October 2010*

*Counsel: Mr D Yawha & Mr C Rarumai for the Claimant  
Mr A Jenshel & Ms F Williams for the Defendant*

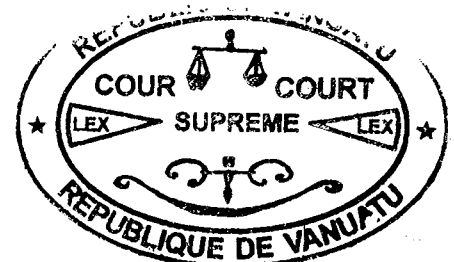
*Judgment: 7 January 2011*

## **JUDGMENT**

### **Background**

1 On 1 July 2005 the Vanuatu Maritime Authority (the VMA) appointed the claimant to the position of assistant to the permanent representative of the VMA at the International Maritime Organisation.

2 The position took effect from 1 August 2005 and was a period of three years.



3 On 15 January 2006 the claimant's position was terminated for alleged gross misconduct, which he denied. His response was to allege that the VMA had breached his employment contract.

4 On 30 March 2006 the Board of the VMA is alleged to have held a meeting at the home of its Vice Chairman, Mr Bongnaim, at which it resolved:

The Board had resolved that the VMA should not reinstate him (Alfred Carlot) but terminate him according to the legal advice of Mr Jack Kilu, VMA Board legal counsel.

The VMA should pay out any of his (Alfred Carlot's) entitlements, or compensate Alfred Carlot for the remaining contract and three months' notice.

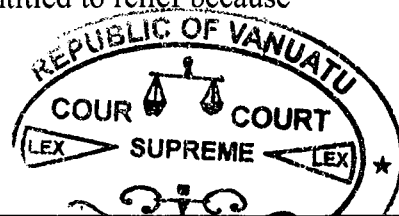
5 Subsequently a deed of settlement between the claimant and the VMA was signed. It is dated 7 April 2005 but it is agreed that the date should be 7 April 2006. Under the deed the claimant was to be paid a sum equivalent to 231,560 Euros.

6 The claimant seeks payment of that sum but the defendant has refused to pay, challenging the validity of the deed.

7 The ultimate issue is whether the deed is legally enforceable.

8 The claimant's position is quite simple. On 30 March 2006 the Board passed a valid resolution to pay out the claimant. The deed that followed was signed voluntarily by the members of the VMA Board. It was duly executed, with the seal of the VMA being affixed by those with legal authority. The defendant is therefore obliged to honour the deed.

9 The defence says that such meeting that took place on 30 March 2006 (which is not admitted) was not a meeting of the VMA and it did not attain a quorum. The meeting was also unauthorised, having been specifically forbidden by the Minister of Infrastructure and Public Utilities in a letter of 28 March 2006. Issues as to the document not meeting the requirements of a deed, of not being approved by the Board, of being *ultra vires* any resolution of the Board, and of being materially altered after it was signed are also raised and particularised in paragraph 6 of the defence. The defence further pleads that the claimant is not entitled to relief because



Mr Bongnaim's signature to the deed was procured by illegal means, or alternatively, means which were contrary to public policy. It also says that Mr Bongnaim's signature was procured as result of the claimant representing that the deed had been checked or approved by the VMA lawyer.

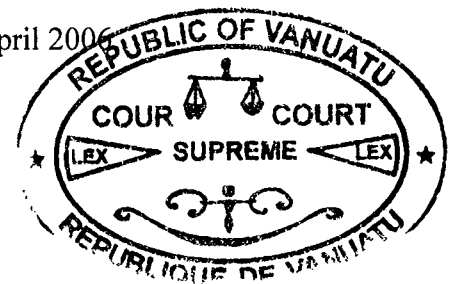
### **Criminal Trial**

10 An intriguing aspect to this case is that in August 2007 (in Criminal Case No.45 of 2006) the claimant was tried in this Court, and ultimately acquitted, on four criminal charges (theft, forgery, using a forged document and corruption and bribery). The charges related to the same events, and included an allegation that the claimant had offered Mr Bongnaim a bribe of VT 1,000,000 to sign the deed.

11 Mr Bongnaim, who gave evidence for the prosecution, had alleged that the claimant had pressured him into signing the deed, which included the offer of a bribe. He eventually signed it at the Ministry of Lands office but only after the claimant assured him that the deed had been drafted by the VMA lawyer, Mr Kilu. When he later found this to be untrue, Mr Bongnaim withdrew his signature. That was on 12 April 2006. He even wondered if the claimant had entered the VMA office and used the VMA seal to stamp the document.

12 Mr Godden was the Acting Secretary of the VMA and was also a prosecution witness in the criminal trial. He said that he was unaware of who drafted the deed but the claimant had the document and got him to sign it. This was on the second floor of the Development Bank office. He referred to the claimant harassing him. Worried about the legality of the document he, like Mr Bongnaim, subsequently withdrew his signature. This was on 13 April 2006. His concern was over where the document came from and who prepared it.

13 The other Board signatory to the deed, Mr Tamuri (he has since died), also gave evidence in the criminal trial. In his case the claimant had approached him and obtained his signature to the deed at the office of the Vanuatu Republican Party. As a result of a discussion with Mr Kilu the following day he decided to withdraw his signature, and he did so by writing to the claimant on 18 April 2006.



14 I mention these matters because Mr Bongnaim and Mr Godden have given evidence in the present case and have specifically disavowed the evidence they gave in the criminal trial. They say it was untrue. They have now changed sides, so to speak, and have given evidence in support of the claimant.

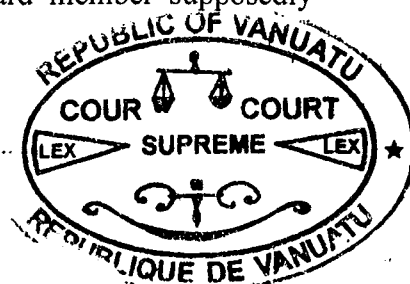
### **Evidence**

15 I see no need to traverse the events leading up to the termination of the claimant's contract or to consider whether that was justified.

16 On 15 January 2006 the termination became effective. The following day the claimant wrote to Mr Benard, who was the Acting Commissioner of Maritime Affairs, requesting three months' pay in lieu of notice. That would amount to 18,600 Euros. On 25 January 2006 Mr Benard replied saying that after legal advice from the VMA solicitor (presumably Mr Kilu) the claimant had no entitlement to such sum. The claimant then consulted Mr Yawha who wrote to Mr Benard on 27 February 2006 seeking 231,560 Euros. This comprised the amount owing under the remaining 30 ½ months of the contract (mistakenly calculated at 6,616 Euros a month), along with three months' notice. Again the position of the VMA was that the claimant had no entitlement, with Mr Benard, in a letter to Mr Yawha of 3 March 2006, expressing his belief that the termination of the claimant's contract was "totally transparent, lawful and justified".

17 In the course of the trial Mr Yawha, counsel for the claimant, has accepted that the original calculation was in error as the monthly salary was only 6,200 Euros. It was also accepted that there could be no entitlement to the three months' notice, given that the contract was sought to be paid out in full. Consequently the claim was amended to the lesser figure of 188,500 Euros.

18 The claimant accepts that the deed was prepared by his solicitor, Mr Yawha. The claimant was the first to sign it and he accepts that he then took the document to three of the Board members to sign. As I understood it there was no attempt to get Mr Virememe to sign the deed, he being the fourth Board member supposedly present at the meeting on 30 March 2006.



19 When Mr Bongnaim signed the deed nobody else was present apart from the claimant. The claimant denied telling Mr Bongnaim that the deed had been prepared with the assistance of the VMA lawyer, Mr Kilu, or another lawyer, Mr Sugden. He denied offering Mr Bongnaim VT 1,000,000 to sign the deed or offering any payment of money. He denied pressuring any of the signatories to sign the deed. He did not know who affixed the seal to the deed.

20 As an aside, I sensed that the claimant viewed his acquittal on the criminal charges as being determinative of this civil claim and that success was something of a formality. However, a higher standard of proof was in operation in the criminal trial, his acquittal was not a finding that he was innocent, and on my reading of the judgment it seems to have been a close-run thing. To illustrate the point I note that at paragraph 59 of his judgment Tuohy J said this in relation to the bribery charge:

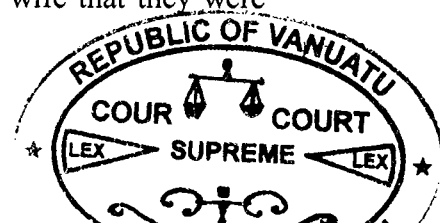
So while I think that Mr Bongnaim probably told the Court the truth about the offer of a bribe to sign the deed, without any corroboration of his evidence I am not sufficiently sure of it to be satisfied of guilt beyond reasonable doubt.

21 Mr Bongnaim referred to the Board meeting on 30 March 2006. He acknowledged that the Board had received letters from the First Political Advisor and the Minister of Infrastructure and Public Utilities directing that the Board should not hold any meetings. The letter from the Minister, which was dated 28 March 2006, contained the following sentence:

I wish to advise that there are to be no Board meetings held until such time as the Court has determined whether the terminations and appointments made were in order.

22 While acknowledging receipt of that letter Mr Bongnaim said that they had obtained legal advice to the effect that the Board had the right to hold meetings if it wished. The Minister therefore had no power to stop the Board holding a meeting. Only a Court order could prevent that.

23 Mr Emelee who was the Chairman of the Board was overseas at the time but Mr Bongnaim said that he managed to inform him through his wife that they were



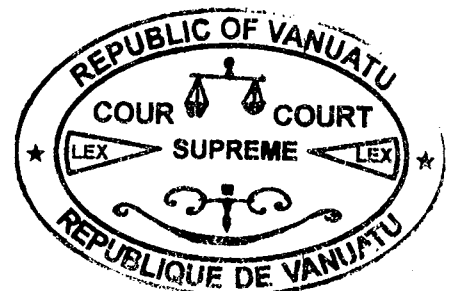
holding a Board meeting. The minutes of the meeting are of course interesting in that they indicate that Mr Emelee was present "by telephone". While that would suggest that he was participating in the meeting by telephone, that was not the case.

24 In the criminal trial Mr Bongnaim had said that there had been no meeting at all. He now says that this was untrue and the reason he gave evidence for the prosecution was because he had been pressured by Mr Benard and Mr Emelee to give false evidence. In re-examination it emerged that such pressure was in the form of Mr Benard and Mr Emelee coming to his house several times and asking him to withdraw his signature. If not, the threat was that he would go to jail for five years. He claimed that he had not told anybody about this before.

25 Mr Bongnaim accepted that in the course of the meeting of 30 March 2006 they did not discuss the amount to be paid to the claimant. As to the urgency in holding the meeting he said it was "because Alfred was here and we wanted to save the VMA money". He conceded that they did not seek legal advice and there was no attempt to verify the correctness of the figures contained in the deed. In fact the Board never met to discuss the deed. The three members who signed the deed did so individually on separate occasions, with it being brought to them by the claimant. Mr Bongnaim appeared to concede that the claimant had led him to believe that the VMA solicitor had approved the deed.

26 Mr Godden referred to the meeting at Mr Bongnaim's home on 30 March 2006 and said that all members of the Board were present, except for Mr Emelee "who was informed by phone". To confirm that the meeting took place Mr Godden was eventually able to produce the meeting's attendance register (the *feuille de presence*) that had been signed by each Board member. That included Mr Emelee, although the words "present by telephone" are handwritten under the signature that appears in the column beside his name.

27 Mr Godden gave the same reason as Mr Bongnaim for giving false evidence in the criminal trial. He denied being pressured by the claimant to sign the deed.

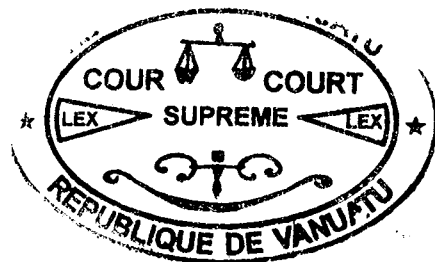


28 Although he was the Acting Secretary Mr Godden denied being aware that the Minister had given an instruction not to hold any meetings. Yet that is at odds with the minutes, which mention the letter from the Minister on the second page, and Mr Godden had signed the minutes. He conceded that they did not take the deed to the VMA lawyer or in any other way attempt to check or verify that the figures contained in the deed were correct. He was unable to remember why the Board did not wait until Mr Emelee returned from overseas before holding the meeting, even though he was aware that he was returning "in a few days".

29 Mr Benard in evidence said that he spoke to Mr Godden about the deed and asked him why he had signed it. Mr Godden seemed very embarrassed but did not answer. Mr Benard also spoke with Mr Bongnaim about the deed. He too seemed very embarrassed and said that he would withdraw his signature. However, Mr Benard denies that he ever threatened or pressured them into withdrawing their signatures. He said that he had absolutely no reason to make any threats. He never told them that they would go to jail for five years, explaining that it was not within his power to do that, and it was not his way. Having said that, Mr Benard was very suspicious as it was, after all, a very large amount of money to take from the VMA. He also acknowledged that he was very upset at the Board for allowing such a large amount of money to be paid out.

30 Mr Malvirlani was the administrator of the VMA in 2005 and 2006 and he described the three stamps used by the Board. He kept the VMA stamp, which was used for administrative purposes. The Board stamp would be used for the deed. The Directors' stamp would be used for the minutes. For his part he did not put the stamp on the deed or the minutes of 30 March.

31 Mr Virememe was a member of the VMA Board in 2005 and 2006. He did not recall attending a meeting at Mr Bongnaim's home on 30 March 2006. He said that he never attended a meeting at his home. He also did not remember attending a meeting at which the claimant's entitlements were considered. He said that the claimant approached him to give evidence but that did not occur. Obviously his evidence would not have assisted the claimant.



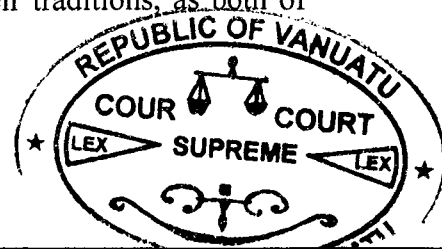
32 In a curious development in the course of the trial Mr Virememe turned up at Court quite spontaneously, and without alerting counsel, in the week after he had given evidence. The reason for this was that he wanted to reveal that Mr Godden had approached him after he had given evidence, and he had attempted to persuade him to change his evidence. Mr Virememe had hoped that the Court would still be sitting, and that he would have the opportunity to disclose what had happened.

33 Despite an objection from Mr Yawha I ruled that Mr Virememe could be recalled as the evidence was relevant to issues of credibility. This was subject, of course, to Mr Yawha having time to make his own enquiries before cross-examining Mr Virememe. He was also at liberty to recall Mr Godden.

34 Mr Virememe said that on the previous Thursday he was shocked to be approached by Mr Godden, who told him they would meet the next day at his home around 3 o'clock and drink kava. Mr Godden gave him the bus fare. The two met as arranged the following day, which would have been on 1 October 2010. Mr Godden gave Mr Virememe a piece of paper and said that there was a meeting at Mr Bongnaim's home. He also suggested that if they talked in the same language during the case then the Honourable MP (being the claimant) would sponsor the VMA Board's case. This was taken to be an indication that the claimant would help them financially. When Mr Virememe said that he did not want to tell lies, and that he had already sworn an oath, Mr Godden responded by saying that he had to co-operate, otherwise he would expose him in Court. He showed him the *feuille de presence* containing his signature. Mr Godden wanted him to come to Court and apologise. He also wanted him to go to the claimant's lawyer and prepare another statement. The purpose was to speak in the same language.

35 Despite that, Mr Virememe remained adamant that he never attended a meeting at Mr Bongnaim's house.

36 Mr Godden was recalled and gave evidence about the meeting with Mr Virememe. Initially he seemed to suggest that he saw Mr Virememe by chance as he was going down to Pango but later conceded that was not the case. When they met the following day Mr Godden referred to following their traditions, as both of





them were from the island of Pentecost. Mr Godden said that he wanted to tell Mr Virememe that in the Court of Law there is no forgiveness, but in their law there is forgiveness and the exchange of gifts symbolises forgiveness. He claims that Mr Virememe said that he was sorry but it was a long time ago and he forgot. This was a reference to the meeting on 30 March 2006. Mr Godden gave him a copy of the *feuille de presence* and Mr Godden says that Mr Virememe accepted that it was his signature, and that he had proved to him that there was a meeting. Mr Godden denied asking Mr Virememe to change his story or to go to the claimant's lawyer to make a new statement.

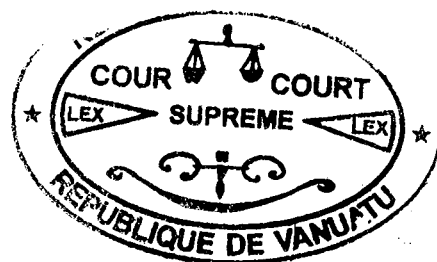
37 Mr Emelee was the VMA chairman in 2006. He became aware of the 30 March 2006 Board meeting upon his return from overseas. That was a surprise as he thought that the Board had agreed that there would be no meetings. He was given a copy of the deed of settlement.

38 Mr Napuati was the Commissioner of Maritime Affairs. He had no idea how the minutes of the 30 March meeting came to be stamped, but the correct stamp to use would have been the Directors' stamp. He also commented that the minutes were not in the usual format.

39 In the course of their evidence both Mr Bongnaim and Mr Godden referred to advice given by Mr Kilu. In fact paragraph 5(b) of the Amended Supreme Court Claim specifically refers to the fact that based on advice received from legal counsel for the VMA, Mr Jack Kilu, the Board decided to terminate the contract and pay out the entitlements. I simply note that Mr Kilu did not give evidence and so any comments or advice attributed to him must be regarded as hearsay.

### Issues

40 As previously indicated, the ultimate issue is whether the deed is legally enforceable. In light of the pleadings, however, there are other questions to answer along the way, including the following:



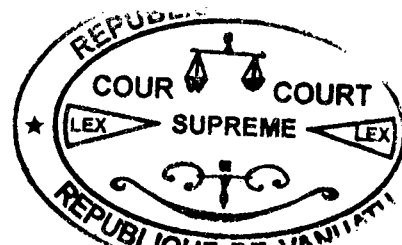
- a) Did a meeting of the Board take place at the home of Mr Bongnaim on 30 March 2006, and was Mr Virmeme present? If the answer is in the negative then the claim would fail as the meeting would not have attained a quorum, and the subsequent signing of the deed would be *ultra vires*.
- b) If the answer is in the affirmative then was the resolution passed sufficient to authorise the signing of the deed, which included an obligation to pay 231,650 Euros to the claimant?
- c) In signing the deed were Mr Godden or Mr Bongnaim influenced by false representations, duress, or inducements from the claimant?
- d) Was it sufficient that only three members of the Board affixed the VMA seal, and did they affix the seal in any event?
- e) Did the deed merely record a sham transaction?

#### ***Meeting of 30 March 2006***

41 Mr Bongnaim and Mr Godden say that there was a meeting and it was held at the home of Mr Bongnaim. To support that they can point to the Board minutes, which record who was present, and the *feuille de presence*, which contains their signatures.

42 On the other hand, Mr Virmeme says that he never attended any Board meeting at the home of Mr Bongnaim, and he has no recall of ever attending a meeting where the claimant's entitlements were discussed. He never signed the minutes or the deed. The only signatures on the minutes are those of Mr Bongnaim and Mr Godden.

43 The issue then is largely one of credibility. At the criminal trial Mr Bongnaim and Mr Godden said that there was no meeting and they gave accounts which, in all material respects, were completely different to their testimony in the present case. Both effectively admit committing perjury at the criminal trial but now say that they have told the truth. The immediate difficulties for them are obvious, and much



depends on the reasons for the change in their testimony. They blame pressure and threats from Mr Benard and Mr Emelee.

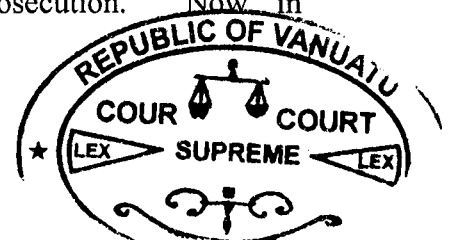
44 In that regard I can accept that Mr Benard might well have put pressure on them to withdraw their signatures, given that he was upset at the Board's decision to authorise such a huge payment to the claimant. However, having seen and heard Mr Benard, I think it is most unlikely that he would have threatened them in the manner alleged. As he said, he was not a prosecutor or a policeman and he could not make those things happen. The same applies to Mr Emelee.

45 As Mr Benard suggests, it is difficult to see the connection between the failure to withdraw the signatures and going to jail for five years. There seems to be a step or two missing. In the circumstances I do not accept the assertions that they gave false evidence at the criminal trial because of threats from Mr Benard and Mr Emelee.

46 Leaving aside the possibility that their evidence at the criminal trial was true, what are the other possible reasons for Mr Bongnaim and Mr Godden to change their testimony? The defence suggests that the claimant has put pressure on them, along with the promise of some monetary payment. I accept that is entirely possible but it has been denied and there is no actual evidence to support it. I need to be careful not to speculate.

47 Even so, the fact that Mr Godden had initiated the meeting with Mr Virememe is perhaps revealing because it indicates that he had a vested interest in the outcome of the case, and undoubtedly one that was favourable to the claimant. Why else would he want Mr Virememe to see the *feuille de presence* and accept that he was wrong about whether the meeting had taken place?

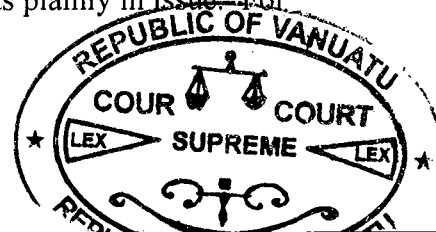
48 As to credibility I did not find Mr Bongnaim to be particularly credible or reliable, even allowing for the fact that I would have expected him to do his utmost to overcome his status as a self-confessed perjurer. At times his story changed. At the criminal trial he apparently said that he been pressured by the Vanuatu Republican Party not to give evidence for the prosecution. Now in



cross-examination he said for the first time that the pressure came from Mr Benard and Mr Emelee and that he had not told the claimant or Mr Yawha of this. He then said that he told the claimant that he had received pressure. That was a change of story. At times he was evasive. An example was in relation to the Minister's letter not to hold meetings. Rather than explaining why they held a meeting in the first place, his response centred on the Minister not having the power to stop them. There were occasions where there were long and unexplained pauses before he answered a question.

49 I saw Mr Godden as an uncomfortable witness. He was frequently evasive under cross-examination. An early example was over the minutes of the 30 March meeting. He was reluctant to admit that he was aware of the Minister's directive, yet it was plainly recorded in the minutes, and he was the acting secretary. His account seemed to change fairly rapidly in relation to whether or not the Board had checked the figures or the claimant's contract in the course of the meeting. When asked about the reason for urgently holding the meeting, and not awaiting Mr Emelee's return, there was such a delay in replying that it was as if he was playing for time. His responses in relation to the minutes and the notation that Mr Emelee was present "by telephone" were tortuous. He was evasive and he refused to answer. He seemed to suggest that he met Mr Virememe by chance on what must have been 30 September 2010, but eventually conceded that was not the case. Often he knew that a 'yes' or 'no' answer was required or expected, but refused to respond in that manner. When under pressure he would sometimes revert to Bislama or claim that he did not understand the question. The impression I had was that he was giving himself more time to come up with an answer.

50 As to whether Mr Virememe was present at the meeting on 30 March 2006, ordinarily the *feuille de presence*, which appears to contain his signature, would provide compelling evidence that he was. However, I am not satisfied that it is necessarily safe to accept the document at face value, especially as it records that Mr Emelee was "present by telephone". That was plainly false. There is the further curious aspect that the document only surfaced for the first time near the end of the trial. It would obviously have been important evidence in the criminal trial, as the question of whether there was a meeting on 30 March 2006 was plainly in issue. For



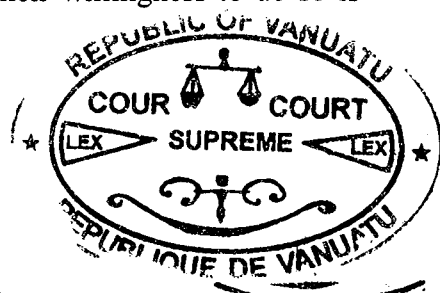
Mr Godden to now say that the police or the prosecutor had never asked for the document seemed a rather lame response.

51 The matter also needs to be considered in conjunction with the minutes of the meeting. In that regard I have reservations about the authenticity of the minutes. I say that because the surname of Mr Bongnaim is incorrectly spelt as Bongnem, and the Christian names of two other members, Mr Emelee and Mr Virememe, have also been misspelt. It really is difficult to understand how that could possibly happen if the minutes were typed by VMA staff and it raises a real doubt as to who prepared them.

52 As for Mr Virememe he presented as an honest and truthful witness, even though he was vague on some aspects. His credibility was greatly enhanced by his spontaneous act of turning up at the Court to tell of his contact from Mr Godden. He never signed the minutes. He remained firm that he never attended a meeting at the home of Mr Bongnaim, and nor did he ever attend a meeting where the claimant's entitlements were discussed. He appears to have resisted overtures from the claimant to give evidence. In all this he appears to have nothing to gain by giving evidence as he has.

53 In the end I am prepared to accept that there was a meeting of sorts on 30 March 2006. But on balance, and despite the *feuille de presence*, which appears to contain Mr Virememe's signature (and I do not know how or when that occurred), I do not accept that he was in attendance. I believe his evidence in that regard.

54 It follows that there was no quorum for the meeting. That in turn explains why the minutes are framed in such a way as to suggest that Mr Emelee was in attendance, as that would have provided a quorum. I can think of no other reason for the inclusion of words beside Mr Emelee's name, both in the minutes and in the *feuille de presence*, indicating his presence by telephone. The fact that such false impression was created in the first place supports my conclusion that Mr Virememe was not at the meeting. Mr Bongnaim, with complicity on the part of Mr Godden, was responsible for creating the false impression, and their willingness to do so is another reflection on their credibility.



### *The Payment Authorised*

55 The Board had resolved to “pay out any of his (Alfred Carlot’s) entitlements or compensate Alfred Carlot for the remaining contract and three months’ notice”. Agreeing to pay is one thing, but I am quite sure that there was no discussion and no resolution as to what sum was to be paid.

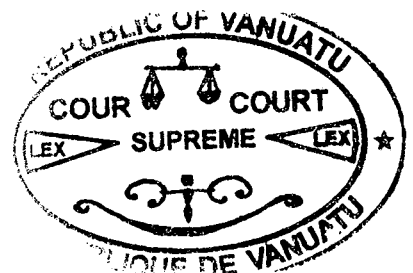
56 Had the Board met to discuss the deed, and if it had a copy of the claimant’s contract, then it should have been readily apparent that the amount claimed was based on an incorrect monthly figure. There was also plainly no justification for paying for a notice period. It is also difficult to see how the Board could possibly consider that payment of the entire contract sum would have been appropriate.

57 It needs to be borne in mind too that what the claimant initially sought was three months’ pay in lieu of notice, which would amount to 18,600 Euros; a far cry from the figure specified in the deed of 231,560 Euros.

58 As it stood the resolution of 30 March 2006 was specific in respect of an agreement to pay three months’ notice. Beyond that it was entirely vague and gave no hint as to the sum being authorised to be paid to the claimant.

59 To have any meaning at all the resolution should have specified the sum for which payment was being authorised. That was especially so given the size of the payment. And, as mentioned before, as the Board never even met to discuss the deed it is difficult to see how payment of the sum specified in the deed was ever properly authorised, and, in my view, it clearly went well beyond that which could ever have reasonably been contemplated by the Board when it passed the resolution.

60 I further note that the resolution did not specifically authorise the Board to sign any deed.



### *Duress or Inducements*

61 As Mr Bongnaim and Mr Godden have disavowed the testimony given at the criminal trial, and have now denied that any pressure was exerted upon them by the claimant to sign the deed, there is insufficient evidence from which I could conclude that there was any duress.

62 I reach a similar conclusion in respect of any inducements that might have been offered. There has been no evidence of this.

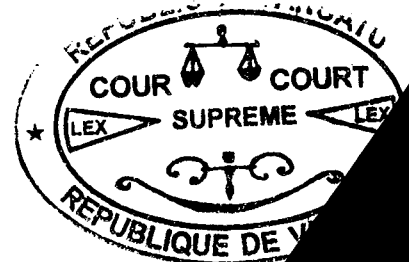
### *Affixing of Seal*

63 It remains unclear as to who might have affixed the VMA seal to the deed. It was certainly not by any of the signatories to the deed, Mr Godden, Mr Bongnaim, or Mr Tamuri. Given the venues at which each signed the deed, none of them would have had the VMA seal. Mr Malvirlani said that he did not affix the seal either. By a process of elimination the suspicion must fall on the claimant, or some other person who might have stamped the document at his direction. That is precisely what Mr Bongnaim had suggested at the criminal trial but the claimant says that he does not know who affixed the seal.

64 This uncertainty opens the way for Mr Jenshel's submission that the affixing of the seal would amount to a subsequent and material alteration. In my view that submission is now irresistible.

65 I suspect that the defence submission that it was necessary for more than three members to affix the seal is also well-founded, especially having regard to the fact that four members are needed for a quorum at a meeting. Although the legislation appears to be silent on the point it is difficult to imagine that fewer than that number would be required to affix the seal.

66 Viewed overall I cannot be satisfied that the deed was properly executed.



### *Was it a sham?*

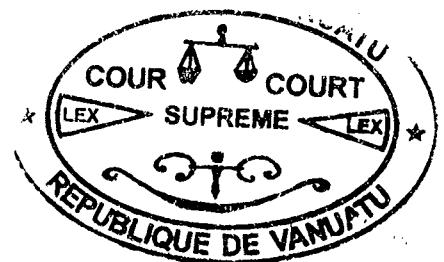
67 Neither Mr Bongnaim nor Mr Godden could explain why the directive from the Minister was ignored, or why there was any urgency in holding the meeting. No adequate explanation was ever provided as to why they could not wait until Mr Emelee returned from overseas. The fact that they sought legal advice on whether they were entitled to hold a meeting, despite the Minister's directive, indicated they were under pressure to hold a meeting. Presumably this came from the claimant and is entirely consistent with what happened afterwards in relation to the signing of the deed. I found it quite irregular, if not extraordinary, that the claimant would be physically taking the deed to each member of the Board to sign, and remarkable that each signed it immediately. Equally extraordinary is the fact that the Board never met to discuss the deed before it was signed.

68 Again it seemed quite irregular that the deed was not sent to the Board for execution through conventional channels, that is, from Mr Yawha to the VMA or its solicitor (presumably Mr Kilu). In fact I would have expected the VMA solicitor to have prepared the deed. As it is, there is no evidence that the VMA solicitor was even aware of the deed before it was signed. And, the fact that the signing of the deed represented a complete departure from the earlier responses to the claimant's claim is yet another matter that remains unexplained.

69 In my view the greater the number of matters that remain unexplained or are patently irregular, the greater the likelihood that it might be viewed as a sham. Indeed, considering all the circumstances in combination I am satisfied that that is precisely what it is. This was a sham transaction designed to obtain a substantial and unwarranted payout to the claimant.

### **Conclusions**

70 I am not satisfied that any meeting held on 30 March 2006 attained a quorum. The deed is therefore *ultra vires* and of no effect.





71 Even if I am wrong, and there was a quorum, I am not satisfied that the resolution that was passed properly authorised the signing of a deed which guaranteed payment to the claimant of 231,560 Euros. The *ultra vires* argument would again succeed.

72 There is insufficient evidence to conclude that Mr Bongnaim or Mr Godden were under duress or were offered inducements by the claimant to sign the deed.

73 I am not satisfied that the deed was properly executed, either because there were insufficient Board members who affixed the seal, or because it is completely unknown as to when or by whom the seal was affixed. If it was the latter it amounted to a material alteration.


74 The deed recorded a sham transaction and is void *ab initio*.

#### **Result**

75 The claim by the claimant is dismissed. Costs are awarded to the defendant on the standard basis.

**Dated at Dunedin, New Zealand, this 7<sup>th</sup> day of January 2011**

**BY THE COURT**

  
.....  
J E Macdonald

**JUDGE**

