IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 22/07 CoA/CIVA

BETWEEN: **Ombudsman of the Republic of Vanuatu**
Appellant

AND: **August Letlet**
First Respondent

AND: **Luisa Lagiono Letlet**
Second Respondent

Coram: ***Hon Justice J Hansen***
Hon Justice D Aru
Hon Justice R White
Hon Justice E Goldsbrough

Counsel: *F W Samuel for the Appellant*
M J Hurley for the Respondents

Date of hearing: *14 February 2023*

Date of Decision: *17 February 2023*

REASONS OF THE COURT

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1. On Saturday 5 June 2021 at approximately 5:30 – 6:00am, agents of the Ombudsman executed a search warrant at the home of the present Respondents in the Bellevue area of Port Vila. They did so by entering and searching their home and by seizing various items.

2. The warrant on which the agents relied had purportedly been issued under s.24 of the Ombudsman Act 1998. It was subsequently held invalid for reasons to which we will return.

3. The Respondents then claimed damages for conversion and trespass by reason of the execution of the warrant. They were successful, as the primary judge awarded them damages of VT2 million each, in addition to interest: *Letlet v Ombudsman of the Republic of Vanuatu* [2022] VUSC 173.

4. The Ombudsman now appeals against that judgment.

Relevant statutory provisions

5. Section 22 of the Ombudsman Act provides an escalating means by which the Ombudsman may obtain evidence and information in relation to a matter under investigation. First, the Ombudsman may seek the cooperation of the person in question (s.22(1)). Next, the Ombudsman may, by notice in writing, require a person to appear before him/her and to furnish any information the Ombudsman needs for an enquiry (s.22(2)-(7)). Next, if the person served with the notice fails or refuses to appear before the Ombudsman, or refuses or fails to furnish the required information or evidence, the Ombudsman may apply to the Supreme Court for the person to be summoned to appear before it or to furnish to the Court the required information or evidence (s.23).

6. The final alternative is for the Ombudsman to apply to the Supreme Court for the issue of a search warrant (s.24). The circumstances in which the Supreme Court may do so are circumscribed by s.24:

> "***24. Power to enter premises etc.***
>
> *(1) If the Court is satisfied by information on oath that:*
>
> *(a) a person served with a notice to provide documentary evidence under section 22 has:*
>
> *1. failed or refused to provide the documents; or*
> *2. failed or refused to provide all relevant documents in his or her possession or control; and*
>
> *(b) there are reasonable grounds for suspecting that documents needed for an Ombudsman's enquiry will be destroyed or otherwise become unobtainable unless a search warrant is issued to the Ombudsman;*
>
> *the Court may issue a search warrant to the Ombudsman for premises at which such documents are located or at which it is likely that such documents are located.*
>
> *(2) The Ombudsman or an officer authorized by him or her has at any time the right:*
>
> *a. to enter and inspect any premises for which a warrant has been issued; and*
>
> *b. to call for and examine any document needed for his or her enquiries which is kept on the premises; and*
>
> *c. if necessary, to seize, retain and remove any such document, or take extracts from, or make copies of, any such document.*
>
> *(3) The occupier of the premises for which a warrant has been issued must provide the Ombudsman or person authorized by him or her, as the case may be, with all*

reasonable facilities and assistance for the effective exercise of his or her powers under this section.

(4) A person is guilty of an offence if:

(a) the person obstructs the Ombudsman or his or her officer in the exercise of his or her powers under this section; or

(b) the person fails to provide the Ombudsman or his or her officer with all reasonable facilities and assistance as required by subsection (3).

Penalty: VT 100,000 or imprisonment for 6 months or both.

The invalidity of the warrant

7. The warrant on which the Ombudsman's agents relied on 5 June 2021 was found not to comply with the requirements of s.24 in two respects. First, the warrant had been issued by the Magistrates Court, and not by the Supreme Court which, as indicated, is the only court authorized to issue a search warrant to the Ombudsman. This was the finding in *August v Ombudsman of the Republic of Vanuatu* [2021] VUSC 293.

8. Secondly, the Ombudsman had not followed the process required by s.24 before a warrant can be issued because he had not issued any notice under s.22 to the First Respondent requiring him to produce documents. Accordingly, there had not been any failure or refusal by the First Respondent to provide documentary evidence as required by s.24(1)(a) which was a pre-condition for the issue of a warrant. This was the effect of the decision of this Court in *August v Ombudsman of the Republic of Vanuatu* [2021] VUCA 59 on appeal from the earlier decision in *August v Ombudsman* [2021] VUSC 249. The Court of Appeal left in place the orders granted by Andrée Wiltens J. in *August v Ombudsman of the Republic of Vanuatu* [2021] VUSC 293, viz:

> "***(a) a declaration that the Search Warrant obtained by the Ombudsman was issued in breach of s. 24(1) of the Ombudsman Act and was therefore unlawful;***
>
> ***(b) a declaration that the entry, search and removal of Mr Letlet's documents, chattels and other materials pursuant to the Search Warrant was unlawful;***
>
> ***(c) the Ombudsman is ordered to forthwith return to source all property seized and removed pursuant to the Search Warrant;***
>
> ***(d) the Ombudsman must pay Mr Letlet's costs as agreed or taxed. Once settled the costs are to be paid within 21 days***".

The appeal to this Court

9. The Ombudsman appeals, on multiple grounds, against the award of damages. Several of the grounds overlap. We note that the Ombudsman does not appeal against the amount of damages awarded.

10. We will address these grounds under the headings below.

Was the Search Warrant void from the beginning? – *Grounds (1)(a) – (c))*

11. The primary Judge found that the lack of authority for the issue of the warrant meant that it was "*void from the beginning*", with the consequence that none of the actions of the Ombudsman's agents at the Respondents' home was lawfully authorized, at [28]. This meant that their actions constituted trespass and conversion, entitling the Respondents to damages.

12. The Ombudsman contended that the Judge should have found only that the warrant was voidable, and that, until it was declared invalid or unlawful by the Supreme Court, it had legal effect, with the consequence that it had been legally effective at the time of its execution. He submitted, accordingly, that the entry and seizure had been lawful.

13. In support of this submission, the Ombudsman sought to invoke the principle that persons must comply with the orders of a court of competent jurisdiction even if they think that those orders are void or irregular. They cannot determine for themselves the validity or lawfulness of the court's order. If they consider the order to be void or irregular, their remedy is to apply to the court in question to have the order discharged.

14. The principle to which the Ombudsman referred is well established, but it is important to have regard to its precise scope. In *Isaacs v Robertson* [1985] AC 97 at 101, the Privy Council referred to "*the short and well established ground that an order made by a court of unlimited jurisdiction ... must be obeyed unless and until it has been set aside by the court*". Their Lordships also endorsed a passage in the judgment of Romer J in *Hadkinson v Hadkinson* [1952] P 285 at 288 – 290: "*it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.*"

15. As is apparent, the principle is stated in *Isaacs v Robertson* with respect to the orders of courts of "*unlimited*" jurisdiction and in *Hadkinson* with respect to the orders of courts of "*competent*" jurisdiction. Plainly, the Magistrates Court of Vanuatu is not a court of unlimited jurisdiction. Nor is it a court which is competent to issue search warrants to the Ombudsman under s.24 of the Ombudsman Act. This means that the principle on which the Ombudsman relies can have no application presently. As counsel for the Respondents submitted, the respondents would have been

entitled, had they been sufficiently informed about the defects in the warrant, to resist the officers' entry onto their premises. They would not have committed any offence or contempt of Court had they done so.

16. The Ombudsman's submission faces another difficulty. A search warrant issued under s. 24 of the Ombudsman Act cannot, on any view, be an order of the Court with which the Ombudsman and his agents must comply. Instead, the issue of the warrant gives the Ombudsman and his authorized officers only the "*right*", in respect of the premises for which the warrant has been issued, to enter and inspect the premises, to call for documents, and to seize documents. It is entirely a matter for the Ombudsman and his agents, once they have obtained a warrant, to decide whether to execute it. Accordingly, the question of compliance by the Ombudsman's officers with an obligation imposed by s.24 should not arise.

17. During the course of the appeal hearing, Mrs Samuel for the Ombudsman sought to overcome this difficulty by reference to the terms of the warrant actually issued by the Magistrate. After the recitals, the Magistrate said "*I now make the following Orders*". There then followed a series of orders that the Ombudsman and members of the Vanuatu Police Force enter, search, seize, retrieve and confiscate (or some combination of these actions) documents and records from 12 separate premises (including the appellants' own home). Counsel submitted that the warrant expressed in these terms did require the Ombudsman's officers and agents to take the action they did on 5 June 2021.

18. We do not accept that submission. The warrant should be understood as being in conformity with the terms of s. 24 of the Ombudsman Act, i.e., as though it provided that the investigators and Police "*may enter*" the identified premises. With respect to counsel, it is not realistic to suppose that the warrant was *compelling* the officers to enter the premises of the Ministry of Finance, the office of the Chair of the Public Service Commission, Digicel Vanuatu, Telecom Vanuatu Ltd, the Bank of the South Pacific, National Bank of Vanuatu, ANZ Bank of Vanuatu, the Reserve Bank of Vanuatu, the Head Office of the National Provident Fund and the Office of the OGCIO, and to take the actions set out above.

19. We also note that, had we accepted the submissions of counsel, it would have been yet another basis on which the search warrant was unlawful and would have had to be taken into account in the assessment of whether the Ombudsman and his officers and agents had acted without good faith, negligently or in bad faith for the purposes of the immunity claimed by the Ombudsman under s. 41 of the Ombudsman Act.

20. For these reasons, the principle invoked by the Ombudsman does not assist him presently.

21. This conclusion makes it unnecessary, strictly speaking, to address the Appellants' submission (Ground 1(b)) concerning the primary Judge's distinguishing of the decisions in *Iapatu v Republic* [2022] VUCA 13; *Ayamiseba* CAC35/2012; and *Re de Robillard* [1997] VUCA 1. We indicate,

however, that the Ombudsman is correct in his submission that the Judge was mistaken in thinking that he had relied on the decision in *Ayamiseba* CAC35/2012 when it was in fact *Ayamiseba v Republic of Vanuatu* [2008] VUSC 15 to which the Ombudsman had referred.

22. Despite that mistake, the Judge was correct to distinguish the three decisions. The first two cases did not concern circumstances like the present, in which the Court making the order was not competent to do so. In *de Robillard*, the Court did refer to the importance of court orders being observed and referred, amongst other authorities, to *Isaacs v Robertson*. However, the issue in *de Robillard* concerned a court *order* and not, as in this case a right created by an order of a court.

23. For these reasons, the Ombudsman does not establish Grounds 1(a) – (c). The Judge was correct to find that the warrant was invalid from the outset.

The "*conversion*" of the search warrant – Ground 1(d)

24. By Ground 1(d), the Ombudsman complained about the Judge's finding at [32] that his agents had "*converted*" the unlawful warrant and had presented it to the First Respondent as a lawful warrant. It is, with respect to the Judge, not entirely clear what His Honour intended by his use of the term "*converted*" in this context. As we understand it, the conversion alleged by the Respondents was the tort of conversion in respect of the documents seized by the Ombudsman. The Respondents were not alleging conversion of the warrant itself.

25. However, the gist of the Judge's findings is that the Ombudsman's agents had presented the search warrant to the First Respondent as though it was a lawful document, when it was not. There is no error in that conclusion.

The s. 41 immunity from action – grounds 1(e), (f) and (h)

26. Section 41 provides forms of protection to the Ombudsman, his officers and the employees in respect of conduct carried out under, or for the purposes of, the Ombudsman Act. It provides:

> ***"41. Immunities***
>
> *(1) Neither the Ombudsman nor an officer or employee of the Ombudsman is liable for any act or omission done or ordered to be done or made in good faith and without negligence under or for the purposes of the Constitution or this Act.*
>
> *(2) Neither criminal nor civil proceedings are to be issued against the Ombudsman, or an officer or employee of the Ombudsman, for anything done, said or omitted by the Ombudsman, or the officer or employee, under or for the purposes of the Constitution or this Act.*
>
> *(3) However, subsection (2) does not apply if it is shown that the Ombudsman, or the officer or employee, acted in bad faith."*

27. The primary Judge concluded that s.41 did not protect the Ombudsman from the Respondents' claims. His Honour held:

> 39. *The failure or omission to apply to the Supreme Court for the search warrant and the failure to give notice to the claimant under sections 21 and 22 of the Act rendered the search warrant issued and acted upon to be unlawful. The failure and/or omissions was a negligent act or omission.*
>
> 40. *Although this is not criminal action, the principle that "ignorance of the law or fact" is no defence to any criminal charge should equally apply to civil law. To ignore a law or fact and say it was an "honest mistake", is it excusable? I do not think so. To excuse such action would be to open the door to other unjustified actions.*

28. The Ombudsman contended that the Judge had been incorrect in finding that s.41 did not protect him from action because:

(a) his agents had believed that they were acting on a lawful warrant obtained from a competent court, had acted "*with good intentions*" and had followed previous practices (Ground 1(e));

(b) it was open to him to rely on the "*honest mistake*" of his officers, with the consequence that their actions had been in "*good faith*" and without "*any malice, bad faith and negligent act*" (Ground 1(f)); and

(c) the respondents had to establish more than a mere breach of ss.21 and 22 of the Ombudsman Act in order to establish bad faith and a negligent act for the purposes of s.41 (Ground 1(h)).

29. We commence by noting some aspects of s. 41. It consists of three elements, all of which form part of a scheme for the protection of the Ombudsman from actions in respect of the "*proper*" performance of his/her duties.

30. Subsection (1) provides that the Ombudsman and his officers have immunity from suit in respect of acts or omissions done or made "*in good faith and without negligence*" if those acts or omissions were done or made (relevantly) "*under or for the purposes of ... this Act*". It can be raised by the Ombudsman as a defence to an action. The Ombudsman would have the onus of showing that the act in question was done in good faith *and* without negligence. See *Republic of Vanuatu v Toro* [2016] VUCA 27 at [30] in respect of the comparable provision in s. 9 of the Land Leases Act 1983.

31. Subsection (2) is in the nature of a privative provision. It prohibits both criminal and civil proceedings being brought against the Ombudsman, or the Ombudsman's officers or employees, "*for anything done, said or omitted by the Ombudsman or the officers or employees under, of the purposes of this act*". As can be seen, unlike subs. (1), the protection for which subs. (2) provides is not qualified by

a requirement that the acts and omissions be "*in good faith and without negligence*". Moreover, while subs. (1) is concerned with protecting the Ombudsman, the officers and the employees from liability, subs. (2) seems to protect the Ombudsman, the officers and the employees from any action at all. However, despite its apparent width, it is doubtful that subs. (2) would mean that declaratory or injunctive relief may not be granted to persons affected by unlawful acts of the Ombudsman, or the officers or employees: *Heery v Criminal Justice Commission* [2000] QCA 511, [2001] 2 Qd 610 at [23] – [25]; *Kaldas v Barbour* [2017] NSWCA 275 at [56].

32. Subsection (3) however qualifies the protection granted by subs. (2) by stating that it does not apply "*if it is shown*" that the Ombudsman, or the officer or the employees "*acted in bad faith*". The expression "*if it is shown*" indicates that the onus of proof of bad faith will be on the person bringing the claim against the Ombudsman. This qualification may not be established by proof that the act in question was not made in good faith or was negligent because an absence of good faith is not necessarily synonymous with bad faith and a person may be careless without acting in bad faith.

33. In contexts like s. 41, the term "*negligence*" is usually regarded as referring to carelessness and not to the tort of negligence: *Oris Funds Management Ltd. v National Austalia Bank Ltd.* [2003] VSC 315 at [70] and following.

34. The obvious purpose of subs. (1) is to allow the Ombudsman, and the officers and employees, to perform their functions under the Ombudsman Act without the risk of incurring a personal liability for doing so, providing that they act without carelessness and in good faith.

35. Analogues of s. 41(1) and the requirement of good faith have been discussed in a number of cases in Australia. It has been recognized that the requirement of good faith may have a variable content, depending upon the circumstances of the given case. Thus, in *Bankstown City Council v Alamdo Holdings Pty Ltd* [2005] HCA 46; (2005) 223 CLR 660, Gleeson CJ, McHugh, Gummow and Hayne JJ said at [50]:

> "*[G]iven the range of advice, acts and omissions to which section 733(1) may apply, what is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute.*"

36. The cases in Australia indicate that, depending on context, the term "*good faith*" may be a reference to an actual state of mind, irrespective of the quality or character of the causes which induce it, so that something will be done, or omitted to be done, in good faith if the party was honest, albeit careless. Alternatively, the term may be a reference to an objective standard, i.e., requiring the exercise of the caution and diligence to be expected of an honest person of ordinary prudence: *Mid Density Developments Pty Ltd. v Rockdale Municipal Council* [1993] HCA 408; (1993) 44 FCR 290; *Cannane v J Cannane Pty Ltd.* [1998] HCA 26, (1998) 192 CLR 557 at 596.

37. In the case of s. 41(1), the juxtaposition of the term "*in good faith*" with the term "*negligence*" suggests that the former understanding is the preferable view.

38. Some other propositions regarding the requirement of good faith can be drawn from authorities in Australia:

(i) A failure to attempt to discharge the function or duties conscientiously may amount to a lack of good faith, as may a conscious ignoring of the means by which a statutory duty or function may be discharged: *Alamdo* at [49];

(ii) There may be a want of good faith even though the respondent has not acted dishonestly: *Alamdo* at [49];

(iii) There will be an absence of good faith if the person had no intention of exercising the power for the purpose for which it was granted (*Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32 at [32]), or had no honest belief in a state of facts which would have excused the wrongful act: *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598 at 606; and

(iv) Good faith may require a state of mind or knowledge other than personal honesty and absence of malice: *Alamdo* at [50]; *Mid Density Developments* at 29. In the latter case it was said, at 300, that good faith requires more than "*honest ineptitude*". In *Mid Density Developments*, that "*something more*" was lacking because of the absence of a "*real attempt*" by the officers of the Council to provide accurate information in response to a request made to it – see also *State of South Australia v Clark* [1996] SASC 5499; (1996) 66 SASR 199 at 234.

39. At the appeal hearing, Mrs Samuel said that the Ombudsman relied principally on the immunity granted by subs (1), and accepted that it was for the Ombudsman to show that the search warrant had been obtained and executed in good faith without negligence. Counsel for the respondents accepted that, despite the Ombudsman's reliance on s. 41(1), the terms of subs (2) made it incumbent on the Respondents to show that the s. 41(3) qualification was enlivened, viz., that the Ombudsman's conduct had been in bad faith.

40. In the summary of his conclusions at [44(e)], the primary Judge said that the Ombudsman's conduct in applying for, obtaining and executing the search warrant had been in bad faith and negligent. In the body of his reasons, the Judge said that it had been negligent of the Ombudsman not to seek the search warrant from the Supreme Court, it being the only court authorized to issue it, and not to give the s. 22 notice. However, His Honour did not give reasons for his finding of bad faith.

41. Mrs Samuel emphasized the evidence indicating that the officers and agents of the Ombudsman had acted in conformity with practices previously adopted in the Ombudsman's office with respect to the issue of search warrants. This meant, she submitted, that the making of the application for the search warrant to the Magistrates Court had been an honest mistake. Counsel also referred to the evidence

that the Ombudsman's officers had "*good intentions*" in not first serving on the First Respondent the s. 22 notice required by s. 24(1)(a). They had wished to preclude the possibility of the First Respondent "*interfering with the investigation*" if he had been given prior notice of it. Counsel also referred to the steps taken by the Ombudsman's officers to satisfy themselves that there was a proper basis on which to commence the investigation and to seek the search warrant.

42. Despite these submissions, we consider that the Judge's finding that the Ombudsman had acted carelessly was inevitable. It is to be remembered that, in seeking the search warrant, the Ombudsman was proposing conduct which would impinge in a serious way upon one of the fundamental rights guaranteed by the Constitution, i.e., protection of the privacy of the home (Article 5(1)(j)). It especially behoved the Ombudsman in that circumstance to ensure that he acted in accordance with the law and to ensure that his proposed conduct was properly authorized.

43. It should have been a simple matter for the Ombudsman to ensure that the Court he approached for the issue of the warrant was authorized to do so. That was as easy as reading the definition in s. 1 of the Ombudsman Act of the term "*Court*" used in s. 24(1). That simple check should have taken the Ombudsman and his officers no more than a moment.

44. Likewise, it should have been a straightforward exercise for the Ombudsman to satisfy himself of the requirements for a search warrant specified in s. 24. That the Ombudsman and his officers chose to act in accordance with the unlawful practice they had adopted previously tends to confirm, rather than negate, their carelessness. We repeat that the obtaining and execution of a search warrant involves a gross interference with private rights. It is a reasonable expectation that those proposing such an action will be careful to ensure that they have lawful authority to do so.

45. In short, we are satisfied that there was no error in the Judge's finding that the conduct of the Ombudsman in obtaining and executing the search warrant was negligent for the purposes of s. 41(1).

46. That conclusion, and the necessity of considering the issue of bad faith under s. 41(3), makes it unnecessary for us to consider separately whether the Ombudsman acted without good faith for the purposes of s. 41(1).

47. In relation to the concept of bad faith, we again draw some assistance from the Australian authorities. They indicate that common forms of bad faith in contexts like the present are the exercise of a statutory power for an unauthorized purpose or its exercise despite an absence of belief that the power was necessary for achievement of the statutory purpose: *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170.

48. Counsel for the Respondents relied on a number of matters in the Ombudsman's own evidence which, although not referred to by the Judge, warranted a conclusion of bad faith in the present case.

49. First, counsel referred to the evidence by which the Ombudsman had sought to justify his investigators' conduct. In his sworn statement, the Ombudsman referred to:

(i) a belief that the first respondent would tamper with or destroy evidence if alerted to the enquiry;

(ii) a belief that he had the power, under s. 20(1)(a) of the Ombudsman Act, to determine the method and means of enquiry into matters referred to him;

(iii) the discretion available to him under s. 21(2) of the Ombudsman Act.

50. The manner in which the Ombudsman's sworn statement is expressed suggests that the first of these considerations was operative in the mind of the Ombudsman and his officers at the time they sought the search warrant. This is confirmed by the sworn statements of the investigators.

51. The manner in which the second and third matters are expressed suggests that they are in the nature of a retrospective rationalization by the Ombudsman.

52. Sections 20 and 21 on which the Ombudsman relies state:

"20. Ombudsman may determine own proceedings

(1) Subject to this Act and subsections (2) and (3), the Ombudsman may determine:

a. the methods by which complaints are acted upon, and

b. the scope and manner of enquiries to be made; and

c. the form, frequency and distribution of his or her conclusions and recommendations.

(2) The methods determined under subsection (1) (a) must not result in complaints not being dealt with through any lack of procedural formality.

(3) The rules of procedural fairness apply to any enquiry conducted by the Ombudsman.

21. Procedures of the Ombudsman

(1) Subject to subsection (2), before commencing an enquiry into the conduct of a government agency, or a leader, the Ombudsman must give written notice to the person in charge of the government agency, or the leader, as the case requires, of his or her intention to make an enquiry.

(2) The Ombudsman does not have to give notice if the Ombudsman has reasonable grounds for believing that to do so will interfere with his or her enquiry.

(3) *Subject to subsection (4), the Ombudsman, when enquiring into the conduct of a government agency, or a leader, is not required to hold any hearing and a person is not entitled as of right to be heard by the Ombudsman.*

(4) *The Ombudsman must not make a report that is adverse to a government agency or a leader unless, before completing the relevant enquiry, the Ombudsman has given the person in charge of the government agency, or the leader, as the case requires, an opportunity to comment, either orally or in writing, on the subject of the enquiry.*

(5) *Subject to subsection (6), if an Ombudsman's report is adverse to a government agency, or a leader, the Ombudsman must include in the report the substance of any statement that the person in charge of the government agency, or the leader, as the case requires, may have made in explanation of or opposition to the Ombudsman's conclusions.*

(6) *If the person in charge of the government agency, or the leader, as the case requires, agrees that it is not necessary for the Ombudsman to comply with subsection (5), the Ombudsman does not have to comply with the subsection."*

53. The Ombudsman's belief that it had been open to him to proceed under ss. 20 and 21 in the present case is, with respect to him, plainly wrong and does him no credit. Section 20 commences with the words "*Subject to this Act*", thereby indicating that, despite its terms, the Ombudsman still has to comply with the other provisions in the Ombudsman Act, including s. 24. Moreover, ss. 22 – 24 are in the nature of a specific code about the means by which the Ombudsman may obtain evidence. The fact that the Ombudsman has a discretion about giving the different notice required by s. 21(1) cannot reasonably be understood as the grant of a similar discretion about the giving of the notice required by s. 24(1)(a), especially when s.24 does not bestow any corresponding discretion.

54. The fact that the Ombudsman and his investigators put forward the explanation of a concern that the First Respondent would tamper with or destroy evidence as a justification for not serving a notice under s. 22 suggests that they made a deliberate decision not to comply with the statute, and that they had proceeded on the basis that the perceived worthy ends would justify the unlawful means. That of itself is suggestive of bad faith. The Parliament has decided that the subjects of a proposed search warrant should have had a prior opportunity to provide the documents required by the Ombudsman, despite the fact that they will thereby be alerted to an investigation by the Ombudsman. It is not for the Ombudsman deliberately to ignore this statutory requirement.

55. In his submissions on the appeal, counsel for the Respondents drew attention to the sworn statement of the Ombudsman made on 12 August 2021, in which he deposed at [12] that the First Respondent was interfering with his enquiry. He noted that in the cross-examination at the trial, the Ombudsman had not been able to identify any evidence supporting that assertion and submitted that this meant that the Ombudsman had misled the Magistrate as to the issue the warrant.

56. We do not accept that submission as the sworn statement of the Ombudsman was made well after the search warrant had been issued. There is no evidence that the Ombudsman himself had made any sworn statement relied upon in the request to the Magistrate for the issue of the warrant.

57. Despite that, the Ombudsman's evidence of a belief that it was not necessary for him to comply with ss. 22 – 24 in relation to the issue of the search warrant is concerning. It tends to confirm that a deliberate decision was made not to comply with the plain and straightforward requirements of the Ombudsman Act because of a view that to do so would be inconvenient.

58. In our view, that circumstance, coupled with the grave departures from the requirements of the Ombudsman Act, is evidence of bad faith, for the purposes of s. 41(3). The Judge was correct in that finding even though His Honour did not give reasons for doing so.

Miscellaneous findings of fact – Ground 1(g)

59. By Ground 1(g), the Ombudsman complains of the Judge's preference for the evidence of the claimants over that of the Respondent's officers.

60. The Judge considered some of the evidence adduced by the Ombudsman to be "*contradictory and inconsistent*" and he provided examples of this. The Judge made that assessment when determining that he preferred the evidence of the Respondents as to the manner in which the warrant had been executed.

61. Counsel for the Ombudsman submitted that the matters to which the Judge referred were minor or irrelevant. They may have been minor but it was for the judge to assess the credibility of the witnesses at trial. The matters to which the judge referred were open to him in that assessment and were used to inform the Judge's assessment of the appropriate damages. In this respect, we note again that no complaint was made about the level of damages awarded to the two Respondents.

62. This ground of appeal fails.

The Respondents' notice of contention

63. By notice of alternative contention, the Respondents contend that the Judge should have found that s. 41 was not enlivened in this case in any event. We can deal with this issue shortly.

64. Counsel's submissions was that the conduct of the Ombudsman in obtaining a warrant from a Magistrate with no authority to do so and without complying with the statutory conditions for the issue of a warrant meant that the conduct of the investigators could not be said to be "*under or for the purposes of [the Ombudsman Act]*" for the purposes of ss. 41(1) and (2). He relied for this submission on the decision of the High Court of Australia in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476. We consider that the decision in *Plaintiff S157* is distinguishable from the

present circumstances because it was very much influenced by the inconsistency of the privative clause in question (s. 477 of the Migration Act 1958 (Cth)) with the provisions in the Australian Constitution concerning the jurisdiction of the High Court of Australia.

65. More apposite to the present case is the decision in *Little v Commonwealth* [1947] HCA 24; (1947) 75 CLR 94. In that case, Dixon J said, at 108, of expression such as "*[an] act done in pursuance of this section*" in the grant of immunity that: "*such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment*".

66. That is the reasoning which we consider appropriate presently. In our view, the qualification concerning an absence of good faith, negligence and bad faith contained in subs. 41(1) and (2) means those provisions can be understood as referring to circumstances in which the Ombudsman and his officers have purported to act under and for the purposes of the Ombudsman Act.

67. Hence, we do not uphold the Respondents' notice of contention.

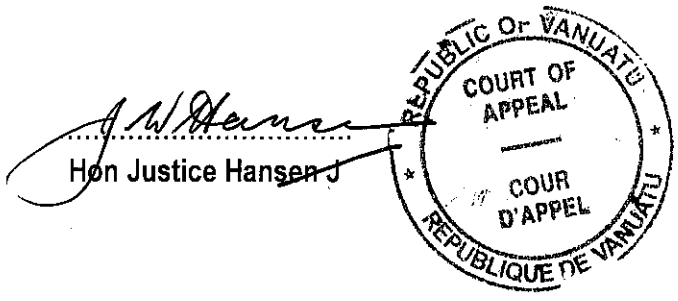
Conclusion

68. For the reasons given earlier, we dismiss the appeal against the judgment of the primary Judge.

69. The Appellant is to pay the Respondents' costs which we fix in the sum of VT300,000.

DATED at Port Vila, this 17th day of February 2023

BY THE COURT



Hon Justice Hansen J