

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

**Judicial Review**  
**Case No. 19/2634 SC/JUDR**

**BETWEEN:** **Clarence Lavinya Ngwele**  
First Claimant  
**Terrence John Kerr**  
Second Claimant  
**Peter John Fogarty**  
Third Claimant  
**Isleno Leasing Company Ltd**  
Fourth Claimant

**AND:** **Senior Magistrate Peter Moses**  
Defendant

**AND:** **Public Prosecutor**  
Interested Party

*Date of hearing:* 15 November 2019  
*Date of judgment:* 23 December 2019  
*Before:* Justice V.M. Trief  
*Counsel:* Claimant – Mr R. Sugden  
Defendant – Mr S. Kalsakau  
Interested Party – Mr S. Blessing

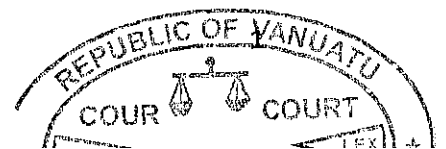
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**JUDGMENT AS TO RULE 17.8 MATTERS**

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A. Introduction

1. This is a claim for judicial review of the Defendant's decision at Preliminary Inquiry committing the Claimants to the Supreme Court for trial. The Claimants seek an order quashing the Defendant's order in relation to Count 2 of the Amended Draft Information.



2. There has already been a first hearing in the Supreme Court after the committal. The outcome of this judicial review claim could have an effect on the trial in the Criminal Proceeding by removing Count 2 from the issues in that trial. Accordingly, the parties sought to argue the r. 17.8 matters as soon as was possible. This judgment determines those matters.

B. Factual background

3. The Claimants and Mr Yoan Noel Marisua were charged with two counts. Count 1 contained a charge of Obtaining by deceptionm contrary to s. 130B of the *Penal Code* [CAP. 135]. Count 2 charged them with Making false and misleading statement with intent to obtain money, contrary to ss 130C and 30 of the *Penal Code*.
4. On 25 September 2019, the Defendant held a Preliminary Inquiry then committed the Claimants for trial in the Supreme Court on both counts.
5. The Claimants seek judicial review of the Defendant's order in so far as it committed them for trial on Count 2 (the 'decision').

C. Issues

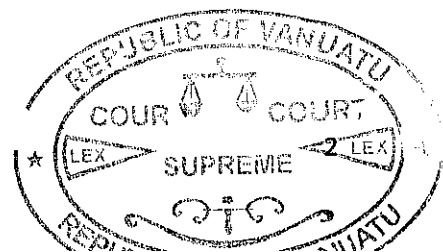
6. Rule 17.8(3) of the *Civil Procedure Rules* ('CPR') provides that the judge will not hear the claim unless he or she is satisfied as to the four matters set out in that rule. If the judge is not satisfied about those matters, he or she must decline to hear the claim and strike it out (r. 17.8(5)).
7. The Defendant does not dispute that the Claimants are directly affected by the Defendant's decision (r. 17.8(3)(b)).
8. Accordingly, the remaining issues for determination are:
  - (1) Do the Claimants have an arguable case?
  - (2) Has there been undue delay in making the claim?
  - (3) Is there another remedy that resolves the matter fully and directly?

D. Issue (1): Do the Claimants have an arguable case?

9. The Claimants seek an order on the grounds set out in the claim numbered 1-14.
10. At the r. 17.8 conference I granted leave for a ground numbered 15 to be added:

*None of the prosecution material contained evidence that could prove that any of the Defendants knew that, when Peter Fogarty signed the Deed of Release on behalf of AVOL he did not have lawful authority to do so.*

11. In short, the Claimants allege that:



- 11.1 Count 2 of the Amended Draft Information was a charge pursuant to ss 130C and 30 of the *Penal Code* alleging that the Claimants made or concurred in making a Deed of Release (the 'Deed') the terms of which were false or misleading in material particulars with the intention of obtaining a sum for the First and Fourth Claimants;
- 11.2 The Defendant was required to be satisfied that there was some evidence to establish each of the elements of Count 2, as per *Moti v Public Prosecutor* [1999] VUCA 5;
- 11.3 Criminal intent is an element of the charge pursuant to subs. 6(1) of the *Penal Code*. Therefore there must be evidence of a dishonest intent – that is an intent to gain money for a recipient who the Claimants believed had no right to receive it;
- 11.4 There was no material before the Defendant that the Claimants knew that the Deed was false in the way alleged; and
- 11.5 Also, there was no material that could establish that any Claimant knew of that falseness.

12. The Defendant's defence states that he relies on the Amended Draft Information, that the evidence of the Public Prosecutor speaks for itself and that based on this, he was satisfied that there was a *prima facie* case and committed the matter for trial in the Supreme Court. Further, that the Defendant will abide the orders of the Court. Finally, that the claim is an abuse of process.

13. Section 145 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC') lays down the procedure to be followed by a Senior Magistrate holding a preliminary inquiry. Relevantly, subs. 145(2) provides:

145. ...  
(2) *The Senior Magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information.*

14. The Court of Appeal held in *Moti v Public Prosecutor* [1999] VUCA 5 at p. 3 that ss 145 and 146 of the CPC require that the Senior Magistrate be satisfied in respect of each count with which the appellant is charged, that there was some evidence to establish each of the elements or ingredients of the offences.

15. The charge against the Claimants is contrary to ss 130C and 30 of the *Penal Code*:

130C. *A person must not, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, make or publish, or concur in making or publishing, any statement (whether or not in writing) –*

- (a) *which he or she knows to be false or misleading in a material particular; or*



- (b) *which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.*

and: 30. *Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.*

16. The elements accordingly include that:

- A person must not.... make or publish, or concur in making or publishing, any statement...;
- which he or she **knows** to be false or misleading in a material particular; **or**
- which is false or misleading a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.

17. The charge is laid in the following terms:

***ISLENO LEASING COMPANY LIMITED, CLARENCE LAVINYA NGWELE, PETER JOHN FOGARTY, YOAN NOEL MARIASUA and TERRENCE JOHN KERR at Port Vila between the 9<sup>th</sup> May 2011 and 17<sup>th</sup> October 2011 with intent to obtain for Isleno Leasing Company Limited and Clarence Lavinya Ngwele money in the sum of 51,809,325 Vatus made, concurred in making, or executed a written statement or document, namely a Deed of Release dated 17<sup>th</sup> October 2011 the terms of which were false or misleading in material particulars:***

***THAT the terms of the Deed were false or misleading for the following reasons:***

- a. *the terms were never agreed to by AVOL;*
- b. *Peter John Fogarty acted without prior approval of the AVOL Board and had no authority to bind AVOL to the terms of the Deed of Release;*

***AND the false or misleading terms included clause "B", and clauses 1.1, 1.2, 1.3, 1.4, 1.5 and 8 of the Deed of Release;***

***AND THAT the defendants acted in breach of section 130C(a) in the following ways:***

- a. *Clarence Lavinya Ngwele concurred in the making of the Deed and signed the same;*
- b. *Peter John Fogarty concurred in the making of the Deed and signed it;*
- c. *Yoan Noel Mariasua concurred in the making of the Deed, witnessed Peter Fogarty's signature on the Deed and facilitated the circumstances leading to the signing of the Deed; and*
- d. *Terrence John Kerr concurred with the making of the Deed and produced a draft Deed of Release consisting of terms, most of which were adopted in the final Deed.*

18. At the outset, I note that the charge does not anywhere set out that the Claimants **knew** that the Deed (statement) that they made was false or misleading in a material particular.

19. Mr Sugden submitted that there had to be some evidence that:

23.1 The Deed was false in the way alleged by the Prosecution; **and**

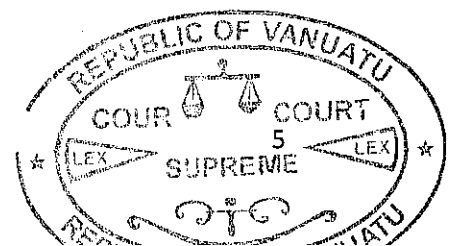
23.2 in respect of each of the Claimants, that he, she or it knew of that falseness.



20. Mr Sugden submitted that the Deed could not be false in the way alleged by the Prosecution due to a combination of Mr Fogarty being the Acting Chief Executive Office of AVOL, the indoor management rule (the rule in Turquand's case), and s. 193 of the *Companies Act* [CAP. 191]. He submitted that there was no evidence upon which it could be found that Mr Fogarty did not have authority to sign the Deed on behalf of AVOL and therefore there is no evidence that the Deed was false in the way alleged by Count 2.
21. The Defendant in making his Preliminary Inquiry ruling was not looking at any of these ultimate issues. The question for him was whether or not there was some evidence that the Deed was false in the way alleged.
22. As the Hon. Chief Justice stated in *PP v Hollingson Issachar Van* LR V2 at p. 743:

*It must at all times be remembered that a committing magistrate is not trying a defendant. All that the law requires of him is to assess the evidence and to decide whether there is a prima facie case upon which a defendant should be tried upon. He is not called upon to ask himself, if I were a tribunal of fact, would I convict the defendant. Under the law, all he needs to ask himself is; upon the evidence that I have heard, has the prosecution shown that there is a prima facie case for the defendant to answer. If so, the defendant ought to be committed to stand his trial.*

23. Mr Blessing's sworn statement sets out that the criminal case involves over 1,600,000 evidentiary documents. He attached to his sworn statements copies of both his and Mr Sugden's filed written submissions for the Preliminary Inquiry. The Prosecution's submissions consists of a series of tables summarising the evidence under each element of the charges. Prosecution set out at p. 20 and then pp 26-27 the evidence that the Deed was false in the way they alleged. It repeats that throughout its submissions, including at pp 32, 36-37, 42, 45-46, 57 and 60-61. I am satisfied having regard to that material that there was some evidence before the Defendant that the Deed was false in the way alleged.
24. Mr Sugden submitted that the knowledge required in respect of each Claimant was actual knowledge, **not** constructive knowledge. In his submission, there was no material before the Defendant capable of establishing the element of criminal intent.
25. Mr Kalsakau submitted that the evidence or material before the Defendant relevant to Count 2 in fact showed that each of the Claimants had knowingly made false or misleading statements in an attempt to obtain money or an advantage for the Fourth Claimant against AVOL. This was made or concurred by the making of the Deed despite the fact that Mr Fogarty had not been authorised by the AVOL Board to enter into such deed, and that the First Claimant who was in a relationship with the Second Claimant knew of this but recklessly entered into the Deed knowing it to be false or misleading. Further, the role of the Defendant at the Preliminary Inquiry was to be satisfied that there was a *prima facie* case which required the Claimants to be tried. It was not his role to be satisfied that based on the evidence the Claimants would be convicted. Finally, whether or not the *mens rea* for the alleged offence has been made out is a matter for the trial judge and not the Defendant.



26. The Prosecution's submissions set out for each Claimant the evidence that he, she or it knew of the alleged falseness in the Deed at:

- 34.1 First Claimant at pp 21-23 and 27-29;
- 34.2 Second Claimant at pp 33-35 and 37-38;
- 34.3 Third Claimant at pp 43-46; and
- 34.4 Yoan Noel MAriasua at 47-62.

27. I am satisfied having regard to that material that there was some evidence before the Defendant that the Claimants knew of the alleged falseness in the Deed.

28. In the circumstances, my answer to the question, "Do the Claimants have an arguable case?" is, "**No**".

E. Issue (2): Has there been undue delay in making the claim?

29. Mr Sugden submitted that this claim has been made without undue delay for the purpose of r. 17.8(3)(c) in that the Defendant's P.I. ruling was made on 25 September 2019 and this claim was filed on 1 October 2019.

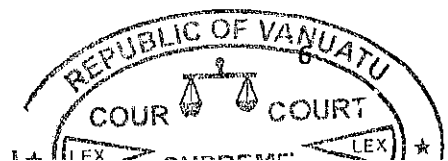
30. Mr Kalsakau submitted that the question of undue delay is not as simple as looking at the passage of time between the date that the impugned decision was made and the time of bringing the claim. He submitted that the Court may also look at the substantial hardship or prejudice to the rights of any person or the detriment to good administration. He submitted that given that the criminal case is being progressed by Saksak J in the Supreme Court, the bringing of this claim is prejudicial and detrimental to the good administration of justice.

31. I cannot agree with that submission. Preliminary Inquiry rulings by Senior Magistrates are amenable to judicial review. It follows that a claim for judicial review may be filed even as the criminal case is being progressed through the Supreme Court. Accordingly, that fact in and of itself does not constitute prejudice to the rights of any person or detriment to good administration. It also cannot be a factor to say that therefore there has been undue delay in making the claim.

32. My answer to the question, "Has there been undue delay in making the claim?" is "**No**".

F. Issue (3): Is there another remedy that resolves the matter fully and directly?

33. Mr Sugden submitted that there is no other remedy that resolves the matter fully and directly. No appeal is available from a decision by a Senior Magistrate on a Preliminary Inquiry because the P.I. ruling is not a conviction and subs. 200(1) of the *Criminal Procedure Code* allows appeals from a Magistrate's Court only for conviction after trial.



34. Mr Kalsakau submitted that there are other remedies that would resolve the matter fully and directly namely a no case submission, a defended trial or appeal. These remedies arise in a trial. The Claimants are seeking to impugn the Defendant's decision for the very reason of avoiding a trial on Count 2. As stated above, a Senior Magistrate's decision on Preliminary Inquiry is amenable to judicial review. Accordingly, I consider that this claim for judicial review is the Claimants' only remedy that would solve the matter fully and directly at this point in time where a Preliminary Inquiry ruling has been made and before commencement of a trial in the Supreme Court.

35. My answer to the question, "Is there another remedy that resolves the matter fully and directly?" is "No."

G. Result and Decision

36. In conclusion, I answer each of the issues as follows:

16.1 Do the Claimants have an arguable case? "No."

16.2 Has there been undue delay in making the claim? "No."

16.3 Is there another remedy that resolves the matter fully and directly? "No."

37. Accordingly, I am not satisfied about the matters in subrule 17.8(3) and so I must decline to hear the claim and hereby strike it out.

38. Costs follow the event. The Claimants are to pay costs to the Defendant which failing agreement are to be taxed by the Master.

**DATED at Port Vila this 23<sup>rd</sup> day of December 2019  
BY THE COURT**

*V.M. Trief*  
V.M. Trief  
Judge

