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

Civil
Case No. 276 of 2020

BETWEEN: BRED (VANUATU) LIMITED

Applicant

CLARENCE NGWELE

AND: First Respondent

TEOMA HOLDINGS LIMITED

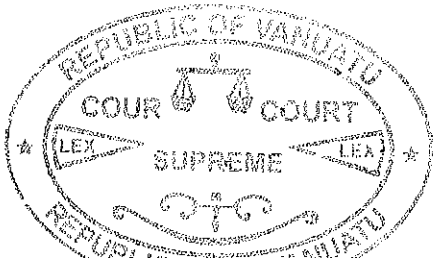
AND: Second Respondent

Date of Hearing:	***14th May, 2020***
Delivered:	***12th June, 2020***
Before:	***The master Cybelle Cenac-Dantes***
In Attendance:	***Stephanie Mahuk counsel for the Applicant, Robert Sugden counsel for the Respondents***
Present:	

JUDGMENT

Headnote

Application for a Power of Sale Order – Master's Jurisdiction to hear power of sale applications – Practice Direction lacks force of law – master not a Judge of the Supreme Court – Doctrine of Precedent - Original Jurisdiction of the master – Appeals from Masters decisions



A. INTRODUCTION

1. This is a simple and standard Application filed by the Bred Bank to obtain a Power of Sale order under section 59 of the Land Leases Act (hereinafter called 'the Act'). Counsel for the Respondents raised some preliminary jurisdictional issues. I thought it best to deal with them first, as my decision would likely impact whether I could continue with the hearing of the substantive Application.

B. ISSUES

2. Mr. Sugden raised 3 issues:

(i) The master does not have jurisdiction to hear section 59 Applications under the Act because Practice Direction 1 of the Chief Justice dated the 16th December, 2015 did not have the force of law.

(ii) The master is not bound to follow the decision of Justice Chetwynd in Civil Case 815 of 2018; Serah Kekei v Bred (Vanuatu) Ltd.

(iii) The master is not a judge of the Supreme Court and does not therefore have original jurisdiction to hear and determine section 59 Applications. Original jurisdiction rests solely with Judges under the Constitution, whose decisions are appealable to the Court of Appeal as of right, whereas an appeal from the masters is heard by a single Supreme Court judge.

C. ISSUE (i)

The master does not have jurisdiction to hear section 59 Applications under the Act because Practice Direction 1 of the Chief Justice dated the 16th December, 2015 did not have the force of law.

3. The thrust of Mr. Sugden's argument is,

(i) The Chief Justice's power to create Rules of Court and Practice Directions falls to be made pursuant to section 66 of the Judicial Services and Courts Act (as amended) [Cap 270] (hereinafter called 'the Courts Act');

(ii) Any Practice Direction by the Chief Justice is subsidiary legislation and therefore subject to be gazetted; and

(iii) The failure to gazette Practice Direction 1, which provides for all the matters which the master has jurisdiction to hear (including section 59 foreclosure applications) therefore confines the masters to dealing only with those matters directly stated at section 42(3) of the Courts Act.

4. Counsel did not take me specifically through section 66 of the Courts Act to demonstrate how he interpreted the section so as to read into it that this was the relevant provision under which the Chief Justice could pass his Practice Directions. I am not convinced that this is the correct provision to be applied.

5. It has been the practice that section 29 of the Courts Act is the provision under which the Chief Justice has made his Practice Directions, as an adjunct to the Rules, without reference to the Judicial Services Commission or publication in the Gazette. I am convinced that this is correct, as the right to expound on Rules of Court for the edification of the Bar and the Bench, for the purpose of ensuring that cases are dealt with fairly and expeditiously is historically given to Chief Justice's, without more.

6. I therefore do not find that the Practice Direction of the Chief Justice was required to be gazetted to have the force of law, and consequently, Practice Direction 1 of the 16th December, 2015, in keeping with section 42(3)(b) of the Courts Act validly and lawfully identifies all those matters for which the master has jurisdiction, including foreclosure applications under section 59 of the Land Leases Act.

D. ISSUE (ii)

The master is not bound to follow the appeal decision of Justice Chetwynd in Civil Case 815 of 2018.

7. At the beginning of the hearing Ms. Mahuk, through her written submissions had brought to the attention of counsel and the court the judgment of Justice Chetwynd in Civil Case 815 of 2018, wherein he determined a similar issue as to the jurisdiction of the master to attend to foreclosure applications. His determination was that the master had that power. Mr. Sugden was unfamiliar with the said case as it had never been published on Paclii[1]. Notwithstanding, counsel wished to proceed with his submission and indicated that the master could still hear his arguments and rule accordingly.

8. This raised an interesting question which had not yet come before the court. That is, whether a master was bound, by the doctrine of precedent, to follow the judgments of a Judge of the Supreme Court or only to follow it out of judicial comity.

9. There is currently no authority in Vanuatu on the question of whether and how far a master is bound by the decision of a Supreme Court Judge. This is not surprising as the legislative post of master is of recent vintage.

[1] Since the hearing the judgement has been published on Paclii

10. The hypothesis is this, that:

    (a) Because decisions of Supreme Court Judges bind other Judges below them due to the status of the decision as being one emanating from the Supreme Court; and
    (b) The master occupying a position at a lower level to a Supreme Court Judge; therefore
    (c) A master is inevitably bound to adhere to the decision of a Supreme Court Judge.

11. The doctrine of precedent is not concerned with the status or seniority of judges but rather the superiority of the court from whence the judgement hails. Consequently, the decision of a Supreme Court Judge, exercising the jurisdiction of the Supreme Court, and the decision of a master of the Supreme Court, exercising the jurisdiction of the Supreme Court are decisions of a court of co-ordinate jurisdiction.[2]

> A judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction.

12. As concerns the doctrine of precedent, the courts have not been concerned with the status of *judges* but rather the status of the *courts*.

13. It has long been thought that a master of the Court occupied a position in the judicial hierarchy inferior to that of a judge, brought about, no doubt, based on their limited jurisdiction and the historical omission of the title of "Judge" being assigned to them.

14. In the case of Randall v Randall[3] it was argued that the decision of the judge should be preferred to that of the Master. The argument was rejected in these terms:

> Mr. Littman asserted that the decisions of a master of the High Court is not of the same 'quality' as that of a Judge of the High Court and that consequently a judgment of a Judge should be preferred to that of a Master..... In my judgment a decision of a master and a Judge of the High Court are of the same standing in terms of the doctrine of precedent. They both are judges of the High Court exercising the same jurisdiction, though the jurisdiction of the Masters is subject to certain restrictions.

15. My conclusion therefore is that the master shares co-ordinate jurisdiction with the Judges of the Supreme Court and is not bound by such judgments. Her court is not a court of inferior jurisdiction. Her judgments are treated in the same way as those of the judges of the Supreme Court. That is, they are not overruled but departed from

[2] Halsbury and Police Authority for Yorkshire v Watson (1947) KB 842; Coral Reef Limited v Silverbond Enterprises Limited and Eiroholdings Invest [2016] EWHC 874 (Ch)
[3] [2014] EWHC 3134 (Ch); Ms. Muna Abdule et al v The Foreign and Commonwealth Office et al [2018] EWHC 692 (QB)

when it appears right to do so. She is of course, like the Supreme Court Judges, bound by decisions of the only superior court of Vanuatu, the Court of Appeal.

16. I will return to this issue later on in my decision in addressing whether I accept the reasoning of Justice Chetwynd or would depart from it.

E. ISSUE (III)

17. **The master is not a judge of the Supreme Court and does not therefore have original jurisdiction to hear and determine section 59 Applications. Original jurisdiction rests solely with Judges under the Constitution and whose decisions are appealable to the Court of Appeal as of right, whereas an appeal from the masters is heard by a single Supreme Court judge.**

18. Now to the crux of Mr. Sugden's argument. Counsel argues that the Constitution (as amended) provides for the appointment of a Chief Justice and his 12 judges to the Supreme Court, together with the right of appeal from its original jurisdiction to a Court of Appeal. There are two issues to be extracted from this argument:

    1. That the master is not a judge of the Supreme Court;
    2. That the master cannot exercise an original jurisdiction, particularly as her decisions are only appealable to a single judge of the Supreme Court.

19. Article 49(2) (as amended) of the Constitution provides for the appointment of the Chief Justice and 12 judges. The judges are appointed by the President on the advice of the Judicial and Services Commission[4] (hereinafter referred to as "the JSC"). Mr. Sugden correctly stated that the Constitution makes no specific mention of the master as a judge of the court. His point is enhanced by the fact that the master, unlike the judges, is appointed by the JSC and not the President.

20. There appears to be an unfortunate tension between the law and the intention of the legislature, wherein lies the complication. Therefore, it is necessary to look at the interaction of the Statutes to ensure, that in construing their meaning, no absurdity of the legislature's intention arises as to what the master is intended to be.

21. In looking at what the master is, it is perhaps simpler to start with what the master is not. Based on the legislation it seems apparent that the master is not a judge under the Constitution or a Judicial Officer under the Courts Act. I say this because:

    (a) Part 1, section 1 of the Courts Act defines the word *"Judge"* as a person appointed as a member of the judiciary under Article 47(2) of the Constitution. The same Part defines the word *"Judicial Officer"* as a Judge or Magistrate. It seems clear then that the master is neither Judge nor Judicial Officer. Delving

[4] Art. 47(2) of the Constitution and Section 33 of the Courts Act

further into Part 1, section 2 the master is again not named as being part of the judicial service. There may be some argument to be made within the phrase **"other judicial officers"** but I will return to this at a later stage.

(b) Part 4 of the Courts Act, under the heading **SUPREME COURT AND JUDGES** deals with matters related to judges separately to matters related to masters. Masters are dealt with under the heading **OFFICERS AND EMPLOYEES.** Additional ammunition to suggest that the master is not a judge or member of the judiciary.

(c) Schedule-Part 1 to the Courts Act deals, in toto, with all salaries and benefits due to judges and masters. Part 3 of the said Schedule details the class of benefits due to both, and both judges and masters are collectively referred to as judicial officers. Notwithstanding, there is an obvious ambivalence as to the status of the master.

22. From the above, it is quite clear as to who or what a judge is. What is less clear is what sort of creature the master is. She seems to be neither pheasant nor fowl, yet appears to enjoy some of the same plumage as her counterparts.

23. Without a full consideration of the role of the master within the Supreme Court, the drafters have culled together a provision to appoint a master without defining her position within the judiciary and ensuring that all attendant legislation was accordingly amended to reflect the new addition and entry to the Judiciary. Hence the vacuum within which the master now finds herself unavoidably placed. And as the law abhors a vacuum, some sense will have to made of this conundrum.

F. Analysis and Decision of Issue (iii)

24. The question of the jurisdiction of the master and her standing as a 'judge' is not new. It has been argued before English courts, though never before these courts. It is a bold argument, and not one which would have arisen in my mind had counsel not brought it to the fore. In mulling over the issue I would most certainly not suggest that I have found the point easy to determine.

25. It is understandable how this complication has arisen. The master has historically evolved out of the courts of the United Kingdom as far back as the 12th Century. With the passage of time masters were elevated from mere court officers, conducting the civil business of the courts to being afforded full judicial powers by 1867 with the power to transact the same business as a Judge in Chambers except for certain limitations. By 1981 masters were referred to as judicial officers, and at present, are described as "judges." Each evolution was preceded by its relevant legislation.

26. For comparative purposes I note that the two commonwealth jurisdictions of New Zealand and the United Kingdom recognize their masters as judges; New Zealand refers to them as Associate Judges.

27. There are 3 facts that I can readily accept of Mr. Sugden's argument:

    1. That masters are not judges in the strict sense of the word under the Constitution.
    2. That the Supreme Court always has original jurisdiction under the Constitution.
    3. That the Constitution makes provision for Appeals from the Supreme Court to the Court of Appeal from that original jurisdiction.

28. Having determined these facts to be indisputable, it is necessary to proceed further to determine what exactly is the nature of a master. In doing so I will pose the following questions:

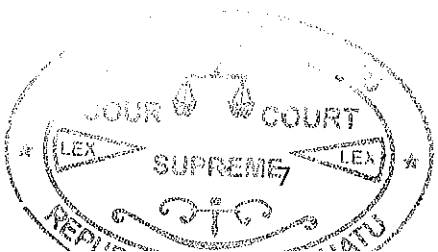
    1. Is the master a judicial officer of the Supreme Court.
    2. Can the master properly exercise original jurisdiction.
    3. What forum are the master's decisions appealable to.

G. Is the master a judicial officer of the Supreme Court?

29. Neither the Constitution nor the Courts Act designates the master as a judicial officer. In fact, the Courts Act places the master in the same category it would appear with ordinary **"Officers and Employees"** of the Supreme Court who perform strictly administrative functions. Without the ability to go behind the legislation to understand the mind of the drafter this would seem quite bizarre, that an officer within the Supreme Court, with the benefit of legal training and several years' experience, exercising full judicial functions, albeit with limited jurisdiction, and acting in all and every capacity as a judge, save for certain limitations, is nowhere designated, at the very least, a judicial officer.

30. Mr. Sugden's argument is that the master does not have the jurisdiction designated to her by the Chief Justice by virtue of his Practice Direction. Having determined that the Practice Direction of the Chief Justice is lawful, it does raise the further question of the judicial capacity of the master under Statute.

31. The master is an officer who operates within the Supreme Court. Her appointment flows from the JSC, and those specific acts which she can perform under legislation and the Civil Procedure Rules (CPR) are fleshed out in the Practice Direction of the Chief Justice. It would appear therefore, on the face of it, that the master does have jurisdiction to act regardless of the legal fatality that places her outside both the Constitution and the Courts Act.



32. There is no doubt, I am sure, of the purpose behind the appointment of masters as part of the Supreme Court and the role they are meant to perform. Where the consternation lies is in recognizing that the master, in being neither judge nor judicial officer exposes an absurdity in the law that could not have been the intention of the legislature.

33. While there is a strong historic and practical foundation for the master to be named a judge of the Supreme Court, I cannot say with certainty, after reviewing the law that there was an intention for the legislature to have included the master within the definition of *"Judge"* under the Constitution. What I am certain of is that there was every intention for the master to have been a judicial officer with all its attendant authority. I say this for the following reasons:

(i) The master's role as stated by the Courts Act was to undertake certain judicial functions being performed by Judges such as taxation of bills, applications for probates, direction hearings, preliminary enquires into applications for adoption and any other functions and jurisdiction of the Supreme Court as prescribed by the Rules of Court. The master was therefore clearly placed within the judicial sphere.

(ii) Section 42(11) of the Courts Act provides that a master or deputy has the same protection and immunity as a judge when they perform the functions of a judge. In spite of section 42(2) of the Courts Act, the original jurisdiction of a judge to continue to hear and determine matters designated to the master under the Courts Act is not diluted. The law has simply made allowance for a particular type of procedural judge to deal with specific classes of cases. For that purpose, it would be absurd to conclude that a master is not a judicial officer for the purposes intended by the legislator.

(iii) Masters are required to take the same judicial oath as judges on assuming judicial office which would also be a pointer to the same conclusion.

(iv) Masters are referred to in the Schedule to the Courts Act, Part 1, as a judicial officer together with judges of the court.

(v) Under the Oaths Act[5], the master is not excluded from the definition of judicial officer. The use of the word *"includes"* suggests that it is not an exhaustive definition and that other officers performing duties and responsibilities *like* judges, magistrates, and masters may be included.

(vi) Section 1(2) of the Courts Act recognizes that there may be judicial officers who are neither judge nor magistrate. The definition in section 1(1) applies unless the contrary intention appears, and in my view, a contrary intention does appear.

[5] Chapter 37, Section 1 of the Laws of the Republic of Vanuatu

H. Can the master properly exercise original jurisdiction?

34. The original jurisdiction of the court as provided for under the Constitution is the right of the Supreme Court to hear and determine all matters at first instance, within its jurisdiction, unless limited by Statute.

35. As has already been established, the master has jurisdiction, as it presently stands, both under the Courts Act and the Practice Direction of the Chief Justice to attend to all matters under her purview as if she was a single judge of the Supreme Court. In so doing, it becomes quite apparent that the masters do and can deal with matters in an original jurisdiction. As Judicial Officers sitting under the umbrella of the Supreme Court they exercise all the power, functions and jurisdiction of the Supreme Court as prescribed by the Rules of Court.[6] By implication, the Chief Justice has accordingly designated, by his Practice Direction, that wheresoever in the Civil Procedure Rules (CPR) reference is made to the court, or a judge of the court, it would include the master once it fell within her remit under the Practice Direction.

36. Although the work of masters is largely procedural such as issuing case management directions and overseeing the preliminary steps to adoption, by dint of referral, it would be impossible for the Chief Justice to divorce the original aspect of an application or claim emanating from a judge when transmitting it to a master. Consequently, acts done by the master may often times dispose of the substantive application or claim and not merely attend to procedural steps. By way of example, masters may be considered to be sitting in an original jurisdiction when they hear and determine applications for probate, claims for liquidation, applications for summary judgment and enforcement of foreign judgments by claim.

37. The novelty of this issue has necessitated border crossing to consider the judicial views of the High Court of Australia on this well ventilated issue. It was previously opined that where judicial power was vested in the courts it was to be exercised solely by the judges and not the officers of those courts.[7]

38. The narrow interpretation of these decisions were later overruled[8] and upheld in later decisions[9], offering a less limited concept of "court."

39. The sole dissentient in the **Kotsis** judgment, **Gibbs J,** delivered the leading judgment in **The Commonwealth v Hospital Contribution Fund** case **(HCF)**. Building upon his previous finding that the definition of *"court"* could not be so narrowly construed as to entirely exclude its masters, registrars and other officers, he presented the broader view, that regardless of the definition of *"the court"* being composed of the Chief Justice, a President of the Court of Appeal and such other Judges of Appeal and

[6] Section 42(3)(b) of the Judicial Services and Courts Act [CAP 270]
[7] Kotsis v Kotsis [1970] HCA 61 and Knight v Knight [1971] HCA 21
[8] The Commonwealth v Hospital Contribution Fund [1982] HCA 13
[9] Harris v Caladine [1991] HCA 9

Judges as the Governor may from time to time appoint", that the word "court" under the legislation and the Constitution must, perforce, *"extend to the organization through which the jurisdiction of the court is exercised."*[10] The coincident views of the judges in **HCF** was that such a restrictive interpretation of the composition of the court could *"easily lead to great inconvenience and absurdity if pushed to extremes."*[11]

40. I find the reasoning of the majority in this judgment to be compelling.

41. Mr. Sugden's arguments are not far off the mark of those made by the Commonwealth in the **HCF** case, that is, that it was not constitutionally possible to invest the master with original jurisdiction because the master was not constituted as part of the court. In the case at bar, the jurisdiction and power which the master is called on to exercise is, without doubt, the same jurisdiction and power of the Supreme Court. And while I have determined that the masters are not judges of the Supreme Court, they are part of the organization through which the powers and jurisdiction of the court [is] exercised.

42. **Murphy J** in **HCF** expressed the view that *"the Constitution is to be read as the general framework of government and not narrowly and pedantically, as it so often is. The Constitution, in investing, or providing for the investing of jurisdiction in courts should not be taken as allowing the exercise of the jurisdiction only by those who, in the strictest sense constitute the court, such as justices of the High Court and other federal courts: it should be taken as permitting the exercise by officers who are under the supervision of those who constitute the court."*[12]

43. The Constitution of Vanuatu at Chapter 8, Article 47 provides for the *"administration of justice to be vested in the judiciary"* made up of the Chief Justice and his Judges appointed under the Constitution. The Courts Act in contemplation of the provisions of the Constitution provides within it the means by which this is to be achieved.

> An Act to provide for the independence of the Judicial Service.....the Courts of the Republic of Vanuatu, and for related purposes.

Justice Chetwynd was therefore correct in CC815 of 2018, and I accept his reasoning when he found that the Constitution could not be read in isolation to the Courts Act.

44. While I accept that original jurisdiction is committed to the Supreme Court, the Parliament, by the Courts Act has conferred judicial power and judicial functions on the masters, with the means for the Chief Justice to extend those functions as is within his power to do:

[10] Supra, n. 8, para. 21
[11] Ibid, para. 16
[12] Ibid, para. 16

> The master or a deputy master ..... may exercise *such* of the powers, functions and jurisdiction of the Supreme Court as may be prescribed by the Rules of Court.

45. The role of the masters is to assist the court in the exercise of its jurisdiction, power and function. The question then becomes a matter of how far, if at all, the court can delegate its functions to masters. Apart from the obvious conferral of judicial power on the masters by the Courts Act, the case of **Harris v Caladine** prescribes that *"judges of a superior court have power to delegate which they may exercise by rules of court, whether pursuant to a general rule-making power or in the exercise of an inherent jurisdiction. They stand in no need of a statutory power to delegate. However, the terms of a relevant statutory power may serve to restrict any inherent power to delegate."*[13] The Courts Act has in no way restricted this inherent right of the court.

46. **Harris** prescribes further that as long as two conditions are observed, that is, (1) that the judges maintain responsibility for the exercise of their jurisdiction, powers and functions of the court and retain their jurisdiction, albeit that jurisdiction has been conferred on another officer of the court, and (2) that any decision of those officers upon whom that jurisdiction, power and function has been conferred is subject to review or appeal on questions of both law and fact then the delegation will be valid. More so if the review is by way of hearing de novo.[14]

47. As a final word on the point, I cite the dicta of Gibbs J as an appropriate summation:

> *This system does not in any way involve a relaxation of the safeguards of individual liberty which are provided by the existence of a separate and independent judiciary. The judges control the officers of the courts and can call their orders in question whenever necessary. On the other hand, the system entails the great benefit that the judges are not obliged to perform functions which can with equal efficiency be performed by masters and registrars so that the time of the judges is spared for matters of greater importance. If the judges themselves are obliged to exercise all the jurisdiction that is quite satisfactorily exercised by masters and registrars, some of which is of a comparatively minor and routine character, a considerable increase in the numbers of the judiciary will be required. The Constitution itself discloses no reason, and I can think of none, why its framers, in adopting the expedient of allowing State courts to be invested with federal jurisdiction, should have intended at the same time to reject the organization through which the State courts operated, when that organization was established in practice and useful in operation.....If Parliament intends that the invested jurisdiction should be exercised only by some parts of that organization to the exclusion of others it must make its intention plain. It is not correct to say, as was submitted.....that it would require clear words in the Commonwealth Act before there could be an effective investiture of the officers of the court; on the contrary, if the invested power is not to be exercised by the officers forming part of the organization of the court who would, in accordance with State law, exercise such a power on behalf of the court in analogous cases, an intention to bring about that result must appear in the Commonwealth Act, if not expressly, at least by necessary implication.*[15]

[13] Supra, n.9, para. 13
[14] Ibid, para. 11
[15] Supra, n. 7, para. 12 & 13

I. What forum are the master's decisions appealable to?

48. An examination of section 42(4) of the Courts Act gives a litigant the right to appeal to a single judge of the Supreme Court from any decision of the masters. The Constitution guarantees the right of appeal from the Supreme Court when sitting in an original jurisdiction. This Constitutional right could not be eroded by an Act of Parliament insofar as it affects appeals from an original jurisdiction.

49. In the case at bar, the master would be sitting in an original jurisdiction when she hears and determines foreclosure applications. Based on the reasoning of the Justices in the aforementioned cases discussed at H above, the masters properly exercise an original jurisdiction on behalf of the court and the safeguard for the liberty of the litigant exists in the process of the review, legislatively referred to as an appeal, to a single judge of the court from the masters decision. It is my opinion that the exercise which the judges undertake under section 42(4) of the Courts Act of the master's decisions should more properly be called a review or hearing de novo and not an appeal.

50. As the arguments of Mr. Sugden were heavily slanted against the masters decisions being unassailable before the Court of Appeal, I will add that it is my considered opinion, that while the review or appeal of the masters decision to a single judge of the Supreme Court by way of a rehearing is a mechanism by which the Supreme Court exercises its responsibility under its original jurisdiction, the decision of a single judge from the decision of the masters is a decision of the Supreme Court which should rightly fall under Article 50 of the Constitution. I do not therefore believe that the decision of the Supreme Court judge on a review of the master's decision should be final.

J. CONCLUSION

51. I found this to be an engaging and indeed daring argument and thank counsel for raising an issue which I think we all have taken for granted. Both counsel were most helpful in their clarity of presentation in relation to the issues they wished to highlight which has made a difficult exercise much easier. I thank them for their assistance.

52. Notwithstanding my ruling, I believe that some statutory amendment will be required to better clarify the position of the master within the Supreme Court and the judiciary and a possible review of section 42(4) of the Courts Act.

53. Due to the novel point on jurisdiction raised by counsel I considered this a matter of sufficient public import to make no award as to costs.

BY THE COURT

MASTER

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU