

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

Civil
Case No. 23/3055 SC/CIVL

BETWEEN: EDWARD RORY MCGUIRE
Claimant

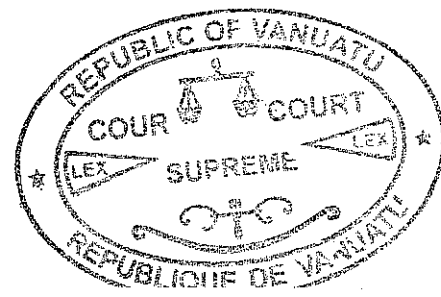
AND: THE REPUBLIC OF VANUATU
First Defendant

**AND: TELECOMMUNICATION RADIO BROADCASTING
REGULATOR (TRBR)**
Second Defendant

Date: *6th day of June, 2024*
Before: *Justice W. K. Hastings*
Distribution: *Ms. H. Harrison for the Claimant*
Mr. JT. Wells for the First Defendant
Ms. K. Tavoa for the Second Defendant

DECISION

1. The Claimant Edward McGuire has filed a claim and an application for an order that a Starlink satellite dish, cable and router be returned to him. The Defendant opposes the application and has applied to strike out the claim. Both applications were heard together.
2. On 14 March 2023, the police seized a Starlink satellite dish, cable and router from the residence of Cainton Milroy, having earlier obtained a search warrant. Mr McGuire purchased the Starlink devices and loaned them to Mr Milroy.
3. There was nothing unusual in the search warrant application. On 8 March 2023, the Telecommunications Radio Broadcasting Regulator (TRBR or the Regulator) requested the police to investigate how the Starlink devices got into Vanuatu without the TRBR's knowledge and to confiscate them. In his sworn statement filed 27 May 2024, Police Constable Leimas Kalman confirmed that Milroy Cainton made several Facebook posts about using the Starlink devices. The Constable annexed copies of those Facebook posts to his sworn statement. The police formed a suspicion that offences against s 12(1) and (3) of the TRBR Act had been committed. On the basis of that suspicion, on 10 March 2023 Police Officer Jimmy Nimisa applied to a Magistrate for a warrant to search the residences of Cainton Milroy, Edward McGuire and Witnol Benkor and to seize any items



related to the alleged offending. The Magistrate granted the search warrant under s 55 of the Criminal Procedure Code [Cap. 136] on 10 March 2023, and it was executed on 14 March 2023.

4. Section 12 of the Telecommunications, Radiocommunications and Broadcasting Regulation Act (the Act) provides as follows:

12. Requirement to hold licence

(1). *A person must not provide a telecommunications service except under and in accordance with a licence or exception.*

(2). *A person must not install or operate a radiocommunications device in Vanuatu or its territorial waters or airspace, or in any ship or aircraft registered in or under the law of Vanuatu, except:*

(i). under and in accordance with a licence or exception; or

(ii). when such radiocommunications device is registered for use by a foreign registered ship or aircraft for the appropriate class of operation in the country of registration of the ship or aircraft.

(3). *A person must not import, offer for sale, sell or use any equipment which may be prescribed by Regulations without a licence.*

5. On 8 November 2023, Edward McGuire filed this claim and an application to release the Starlink devices. It was filed as an urgent application, but as the Starlink devices were seized 8 months earlier, I declined urgency in my Minute of 30 November 2023 and timetabled the steps necessary to hear the application. For various reasons the application was unable to be heard until May 2024.
6. The application was opposed by the Defendants who also applied to strike out the proceedings.

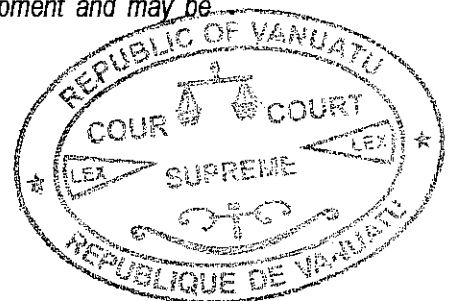
Submissions

7. Mrs Harrison submitted on behalf of the Claimant/Applicant that the TRBR Act does not allow confiscation of these devices. She relied on s 9 which provides as follows:

9. Equipment inspection

(1). *If the Regulator reasonably believes that any person has in their control or is using any equipment contrary to this Act or a Regulation, the Regulator may:*

(a). search any premises, vehicle, ship or aircraft for the equipment and may be accompanied by a police officer; and



(b). inspect, take photographs or make sketches of the equipment; and

(c). operate the equipment, if necessary to ascertain its nature or the manner of its use.

(2). No compensation is payable in respect of the exercise or purported exercise by the Regulator of any power in this section, except that reasonable compensation is to be paid for any loss or damage to equipment which results from the negligence of the Regulator.

8. She submitted the police could have inspected, taken photographs, made sketches and even operated the equipment, but they could not have, under s 9, seized the equipment.
9. Mrs Harrison also submitted that no notice under s 6 of the State Proceedings Act was necessary because she made an urgent application.
10. Mr Wells submitted that at the time of the seizure, the use of a Starlink device was unlawful in Vanuatu under s 12 of the TRBR Act. Having formed a suspicion as a result of the Facebook posts that the Claimant/Applicant was in breach of s 12, the police began their investigation into the alleged criminal activity. Under s 55 of the Criminal Procedure Code, the police may, during an investigation, request a warrant to search, seize and detain anything they reasonably suspect is involved in the commission of an offence:

55. Power to issue search warrants

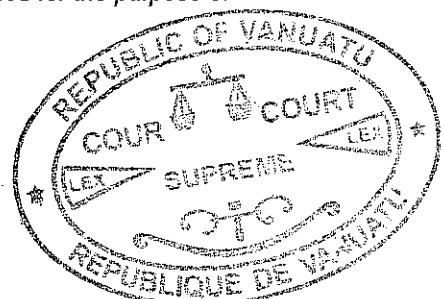
Where it is proved on oath to a judicial officer that in fact or according to reasonable suspicion anything upon, by or in respect of which an offence has been committed or anything which is necessary for the conduct of an investigation into any offence is in any building, ship, aircraft, vehicle, box, receptacle or other place, the judicial officer may by the issue of a search warrant authorise a police officer or other person therein named to search the building, ship, aircraft, vehicle, box, receptacle or place named or described in the warrant for any such thing, and if anything searched for be found, to seize it and detain it for use in evidence.

11. Section 58 authorises the detention of any property seized:

58. Detention of property seized

(1) When anything is seized in accordance with sections 55, 56 and 57 it may be detained until the conclusion of the case, reasonable care being taken for its preservation.

(2) If any appeal is made, the court may order it to be further detained for the purpose of the appeal.

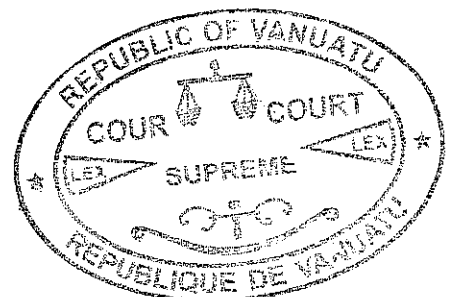


(3) If no appeal is made, the court shall direct such thing to be restored to the person from whom it was taken, unless the court sees fit and is authorised or required by law to dispose of it otherwise.

12. Mr Wells also submitted that following my decision that this application was not urgent, s 6 of the State Proceedings Act had to be complied with. No s 6 notice has been given.

Discussion

13. The Claimant/Applicant has misread the TRBR Act. The provisions of s 9 are explicit. They apply only to the Regulator, not the Police. The Regulator has limited powers to search for, inspect, photograph, sketch and operate equipment the Regulator reasonably believes is being used contrary to the Act. Section 9 of the TRBR Act does not trump ss 55 and 58 of the Criminal Procedure Code. Sections 55 and 58 of the Criminal Procedure Code apply to any offence which a police officer reasonably suspects has been or is being committed. It is not limited to offences in the Penal Code. The TRBR Act does not exclude the operation of ss 55 and 58, and the Criminal Procedure Code does not exempt the TRBR Act from its scope of application.
14. Section 55 applies during an investigation and does not require there to be a charge filed. Section 58 of the Criminal Procedure Code, unlike s 9 of the TRBR Act, permits the detention of anything seized during an investigation until "*the conclusion of the case.*"
15. In this case, the police acted on a complaint from the Regulator. The police are not bound by s 9 (only the Regulator is), and no issue has been raised that they acted in breach of s 55 or s 58 of the Criminal Procedure Code.
16. The application to release the Starlink devices on the ground that s 9 of the TRBR Act applies must therefore fail.
17. I turn now to the strike-out application. Striking out any statement of a case has been called a "*draconian remedy*" (*Asiansky Television plc v Bayer Rosen* [2001] EWCA Civ 1792). Although striking out a claim is not inherently contrary to the Constitution's guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004 EWCA Civ 266]). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial.



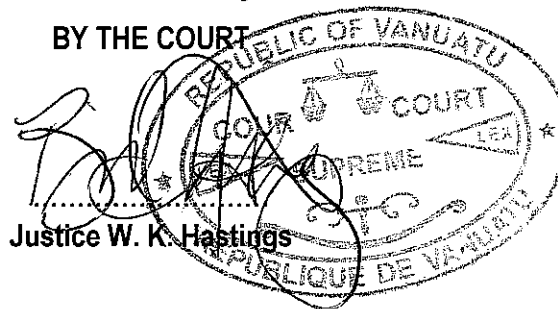
18. As pleaded, and having declined the application to release the Starlink devices, this claim discloses no serious factual issue. It is related entirely to the seizure and detention of the Starlink devices, which I have decided were legally seized and detained under ss 55 and 58 of the Criminal Procedure Code.
19. As the offending alleged is fineable-only, the police have one year from the alleged date on which the offending was committed to prosecute any charge. Any issues concerning an alleged breach of s 12 of the TRBR Act, such as whether or not a telecommunications service was being provided (amongst other possible defences) are for argument in the criminal proceeding, not this civil claim.
20. Having decided neither the claim nor the application was urgent, a s 6 notice needed to be given under the State Proceedings Act. Not giving such notice is a bar to these proceedings, and another reason for striking them out: *Republic of Vanuatu v Kwang Sing 1* [2013] VUCA 35. Mrs Harrison relied on *Republic of Vanuatu v Napuat* [2023] VUCA 8. She submitted that the Court of Appeal held in that case that an applicant “does not require notice however the delay is justified because the Applicant’s former lawyer did not immediately file the case straight away.” I am somewhat confused by this submission as it seems to blend two different matters. In *Napuat*, the s 6 notice was given 8 months before the claim against the Republic was filed, and was therefore of no effect. In this case, no s 6 notice was ever given. The Court of Appeal confirmed its judgment in *Kwang Sing*, that the obligation to give a s 6 notice “is absolute.”

Result

21. The application to release the Starlink devices is declined.
22. The claim is struck out.
23. Costs are awarded to the Defendants to be taxed if they are not agreed.

DATED at Port Vila this 6th day of June, 2024

BY THE COURT



Justice W. K. Hastings