

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

Judicial Review
Case No. 20/1901 SC/JUDR

BETWEEN: Vanuatu Ferry Limited
Claimant

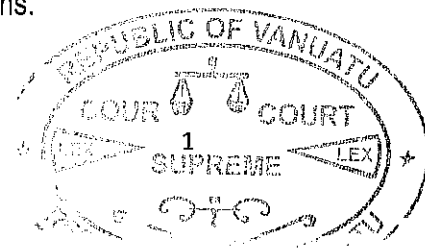
AND: Republic of Vanuatu
Defendant

Dates of Trial: 26 and 27 July 2021
Before: Justice V.M. Trief
In Attendance: Claimant – Mr M. Hurley
Defendant – Mr L. Huri
Date of Decision: 10 December 2021

JUDGMENT

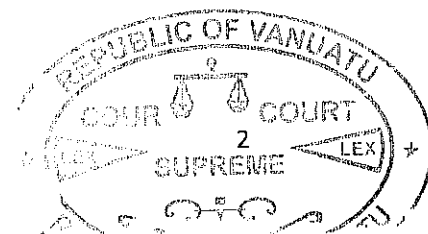
A. Introduction

1. This was a claim for judicial review in relation to decisions by the Defendant State's Director of the National Disaster Management Office ('NDMO') and Director of Immigration to refuse entry into Vanuatu of the Claimant Vanuatu Ferry Limited's ('VFL') maritime vessel registration no: RV-6443 known as Vanuatu Cargo (the 'Vessel') and its crew.
2. The Vessel is a Vanuatu-flagged ship. In March 2020, it went to Australia for slipway services. In the same month, a State of Emergency ('SOE') was declared for Vanuatu due to the Covid-19 pandemic. VFL repeatedly wrote letters to Government entities seeking approval for the Vessel's return to Vanuatu. No response was received until by letters dated 2 July 2020, the 2 Directors refused entry to the Vessel and crew.
3. On 22 July 2020, Court orders were obtained urgently to permit the Vessel's return into Vanuatu. VFL then filed its Claim seeking judicial review of the decisions.



B. Facts

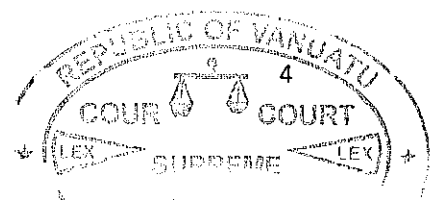
4. The following facts are from the Sworn statement of Marcel Galenon, a Director of VFL, ["**Exhibit C1**"] and the matters admitted in the Defence to the Amended Claim.
5. VFL is the registered owner of the Vessel.
6. The Vessel is registered in Vanuatu pursuant to the provisions of the *Shipping Act* [CAP. 53].
7. On 1 May 2019, Seaworks Vanuatu conducted an underwater survey of the Vessel after which the Office of the Maritime Regulator (the 'OMR') declared that it was satisfied with the underwater section of the Vessel.
8. Under s. 20 of the *Shipping Act*, out of water surveys are mandatory for vessels such as the Vessel.
9. On 22 May 2019, the Fleet Captain of the Vessel wrote to the OMR requesting to postpone the slipping of the Vessel until February 2020.
10. Following the request by the Fleet Captain, on 29 May 2019, the VFL received a letter from the OMR confirming an extension to the slipping of the Vessel until March 2020.
11. On 10 March 2020, the Vessel obtained a Certificate of Clearance pursuant to subs. 23(1) of the *Immigration Act* No. 17 of 2010 to leave Vanuatu.
12. On 11 March 2020, the Vessel departed with a crew of 10, who undertook the voyage to the slipway at the port of Yamba in New South Wales, Australia. The Vessel then underwent repairs and refurbishment works.
13. On 26 March 2020, by Orders No. 34 and 35 of 2020, an SOE was declared for Vanuatu pursuant to art. 69(b) of the Constitution to prevent and control the threat and spread of Covid-19.
14. On 31 March 2020, by Order No. 41 of 2020, the SOE was extended for 2 weeks.
15. On 8 April 2020, VFL received a Notice from the OMR advising that the directive referred to in Order No. 35 of 2020 had been lifted and that all domestic vessels were now allowed to resume normal operations.
16. On 11 April 2020, by Order No. 46 of 2020, there was a further extension to the SOE for 30 days due to the severe impacts of Tropical Cyclone Harold ('TC Harold') and the continuous outbreak of Covid-19.
17. In addition, the Minister for Climate Change issued Order No. 47 of 2020 which included that all Vanuatu borders were not open to receive any international flights or vessels unless they were providing international relief supplies.



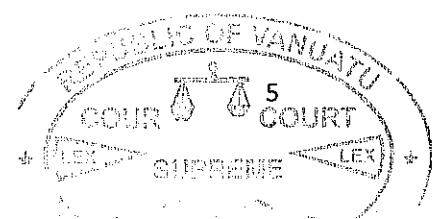
18. By letter dated 24 April 2020, the VFL Commercial Manager wrote to the National Task Force Team at the NDMO advising of the VFL's intention to bring the Vessel back to Vanuatu in mid-May 2020 and requesting information about the applicable Covid-19 measures.
19. It was noted in that letter that a 6 day voyage and 9 days aboard the Vessel upon arrival would complete the 14 day quarantine period.
20. It was also noted that given the multiple disasters that the country was currently experiencing, the Vessel was an ideal vessel to assist with disaster management.
21. There was no response from the NDMO to that letter.
22. On 12 May 2020:
 - a. By Order No. 69 of 2020, the Minister for Climate Change repealed Order No. 47 of 2020;
 - b. By Order No. 70 of 2020, the SOE was extended for a further 30 days; and
 - c. The Minister for Climate Change issued Order No. 71 of 2020 which included that all Vanuatu borders were not open to receive any international flights or vessels unless they were providing international relief supplies and international cargoes.
23. Following receipt of those Orders, on 13 May 2020, the VFL wrote to the Prime Minister to request that the Vessel and its Ni-Vanuatu crew be allowed to re-enter home waters.
24. There was no response from the Prime Minister to that letter.
25. On 18 May 2020, the OMR issued Notice No. 32 of 2020 under the *Shipping Act* notifying all registered domestic owners and agents that the annual survey requirements for 2020 were to be enforced and that surveys must be completed by 1 August 2020.
26. On 22 May 2020, by Order No. 77 of 2020, the Minister for Climate Change amended Order No. 71 of 2020 by deleting para. (b) and substituted it with paras (ba) and (bb) as follows:
 - (ba) *The Ministry of Internal Affairs, the Ministry of Finance, the Ministry of Infrastructure and Public Utilities and the Ministry of Foreign Affairs must ensure that:*
 - (i) *Vanuatu citizens who are authorized by the NDMO to be repatriated back to Port Vila are repatriated subject to such conditions as may be imposed and supervised by the NDMO and the Ministry of Health; and*
 - (ii) *non-citizens who are authorised to travel into Vanuatu by the NDMO are allowed into the country subject to such conditions as may be imposed and supervised by the NDMO and the Ministry of Health; and*
 - (bb) *the Ministry of Infrastructure and Public Utilities must ensure that Port Vila Bauerfield International Airport is the only international port of entry for the purposes set out under subparagraphs (ba)(i) and (ba)(ii).*



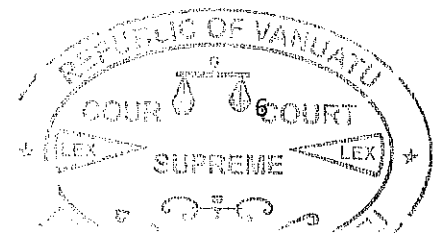
27. By letter dated 28 May 2020, the VFL Commercial Manager wrote to Abraham Nasak, Director of NDMO requesting him to provide a repatriation plan for the crew of the Vessel and the names of the crew were included in the attachment to that letter.
28. There was no response from the Director of NDMO to that letter.
29. By letter dated 2 June 2020, the VFL Commercial Manager wrote to the OMR to give formal notice that the Vessel was seaworthy, following a major refit and service, that the crew had been confined to the boatyard during that refit and offered to quarantine for 14 days following a 7 day passage from New South Wales. The repatriation plan was attached to the letter.
30. That letter and repatriation plan were also copied to a number of Ministries including Health and Immigration as well as to the NDMO.
31. There was no response from any of the addressees to that letter.
32. On 3 June 2020, the VFL Commercial Manager wrote to the Director of Immigration and provided crew passports and associated visas and permits along with a repatriation plan for the Director's consideration.
33. There was no response to that letter.
34. On 5 June 2020, the VFL Commercial Manager wrote to the Chairperson of the Advisory Team for Covid-19 at the NDMO in which, amongst other things, he noted the failures to correspond by NDMO and various Ministries and requested a response.
35. VFL moved the departure date for the Vessel to 10 June 2020 from Yamba pending a response from the NDMO.
36. There was no response from the NDMO to that letter.
37. On 11 June 2020, by Order No. 81 of 2020, the SOE was extended for another 30 days.
38. On 26 June 2020, the VFL Commercial Manager wrote to the Fleet Captain requesting him to prepare for the return voyage, pending advice from the State Law Office.
39. On 26 June 2020, the VFL Commercial Manager again wrote to Mr Nasak, Director of NDMO, to advise amongst other things, that following confirmation from Mr Kiero at the Prime Minister's Office, the Vessel could return to Vanuatu provided that VFL met all of the costs of doing so.
40. The Director of NDMO did not respond to that letter.
41. On 29 June 2020, the VFL Commercial Manager advised all relevant authorities by letter that the Vessel's expected date of arrival would likely be between 5 July and 6 July 2020.



42. On 2 July 2020, the VFL received a letter from Mr Nasak in which he stated that the VFL had breached Emergency Regulation Orders No. 71 and 77 of 2020 and therefore would be dealt with in accordance with the *Disaster Risk Management Act* ('DRM Act').
43. By the letter dated 2 July 2020, Mr Nasak in purported exercise of his powers under the DRM Act directed the following:
- a. that the repatriation of citizens and non-citizens was closed from 24 June 2020 to the 1st week of August 2020;
 - b. the Vessel must not enter Vanuatu waters from its international voyage from 24 June 2020 to the end of the 1st week of August 2020;
 - c. in the event that the Vessel was in Vanuatu waters, it must leave Vanuatu waters with immediate effect;
 - d. in the event that the Vessel was in Vanuatu waters, all citizens and non-citizens must not be allowed to disembark or discharge any goods or seek anchorage within the port of Port Vila or any international port;
 - e. The Vanuatu Police Force was to summon John Mark Bell, the VFL Commercial Manager to investigate and question him for alleged breach of Covid-19 SOE Orders No. 71 and 77 of 2020; and
 - f. If these directives were ignored, further action would be taken against the Vessel, master and owner.
44. By letter dated 2 July 2020, Jeffrey Markson, Director of the Immigration Department wrote to the Vessel Master refusing entry to all passengers on the Vessel in terms, *inter alia*:
- a. subsequent to para. 22(1)(a) of the Immigration Act, for failing to provide a list in duplicate of all officers, crew and passengers on the Vessel;
 - b. para. 22(1)(c) – use all reasonable means to prevent any person on the Vessel entering or departing Vanuatu in contravention of this Act;
 - c. Immigration would ensure that you will be removed from the country with all reasonable means to enter the country as you have breach[ed] the Immigration Act for not providing the list of the persons on-board the Vessel; and
 - d. subject to para. 22(2)(a) – inform an immigration officer of any person on the Vessel who has a contagious or other disease, or has a health condition, which poses a risk to the health of the community in Vanuatu; and because the Master had not complied with the border measures in regards to the Covid-19 pandemic, would enforce s. 24(1) of the Immigration Act which states: (a) *to receive and retain the person on the vessel or aircraft using such force as may be reasonably necessary in the circumstances; and (b) to transport the person from Vanuatu to a place outside Vanuatu as determined by the Director.*



45. VFL had already provided the crew list in the letter to the OMR dated 2 June 2020 which was copied to the Immigration Department on 2 June 2020. Further, the Master of the Vessel was unaware of any person on the Vessel who had a contagious or other disease, or had a health condition, which posed a risk to the health of the community in Vanuatu.
46. All of the crew are either Ni-Vanuatu or residents of Vanuatu.
47. On 4 July 2020, the VFL Commercial Manager wrote to the NDMO to request a meeting to attempt to resolve the return of the Vessel.
48. The Director of NDMO did not respond to that letter.
49. On 13 July 2020, by Order No. 94 of 2020, the Minister of Climate Change amended Order No. 71 of 2020 by inserting paragraph 1(aa) after paragraph 1(a):
1. (a) ...
 - (aa) *the Ministry of Infrastructure and Public Utilities and the Department of Ports and Harbour must ensure that all local registered vessels and vessels registered internationally as Vanuatu vessels, which are outside Vanuatu waters, do not enter Vanuatu waters.*
50. Also by Order No. 94 of 2020, subpara. 1(ba)(ia) was inserted after paragraph 1(ba)(i):
1. (ba) ...
 - (i)
 - (ia) *the repatriation of Vanuatu citizens and non-citizens must not occur from the 11th day of July 2020 to the 31st day of July 2020.*
51. On 15 July 2020, the VFL Commercial Manager wrote to the Prime Minister and the Director of Health requesting their support as the crew had spent 21 days in quarantine after a 7 day passage, and that there was insufficient food and water on board. He also requested that the crew be tested for Covid-19 to allow them to return to their homes and families.
52. Also on 15 July 2020, the VFL Commercial Manager wrote to the NDMO confirming that the crew had no water or provisions left, that the VFL would pay for Covid tests and requesting clearance to disembark.
53. Between 17 July 2020 and 21 July 2020, a series of emails were exchanged between the VFL Commercial Manager, the OMR, Ministry of Health and NDMO regarding the provision of food and water to the crew.
54. Despite the best endeavours of the VFL, the authorities denied the delivery of food and water to the crew.
55. On 22 July 2020, the VFL sent a further email to Ports and Marine Department requesting permission to place provisions aboard the Vessel.



56. On 22 July 2020, at 1.25pm the Ports and Marine Department emailed VFL confirming that permission would not be given to allow provisions to be handed to the crew.
57. In all of the premises, the VFL urgently sought and obtained Orders from this Court in the evening of 22 July 2020 permitting the Vessel's return into Vanuatu.
58. By on or about 28 July 2020, the State had complied with the terms of paras 2-4 of the Court's Orders dated 22 July 2020:
2. *Pending final determination of the Claim for Judicial Review in this proceeding, the application be permitted to berth the Vessel, official no: RV-6443 known as Vanuatu Cargo (the 'Vessel'), at Ifira Wharf but no one is to disembark the Vessel until the Ministry of Health, the Department of Customs and the Immigration Department have cleared the Vessel and the 10 crew members on board and permitted those crew members re-entry to Port Vila, Efate, in the Republic of Vanuatu.*
 3. *Such regulatory steps referred to in paragraph 2 of these Orders are to be completed by the Ministry of Health, the Department of Customs and the Immigration Department by 4.30pm on Thursday 23 July 2020.*
 4. *The Department of Customs is to facilitate delivery of food and water supplied to it by the applicant to the crew on board the Vessel by 4.30pm on Thursday 23 July 2020.*
59. On 2 September 2020, by Order No. 150 of 2020, the Minister of Climate Change amended Order No. 71 of 2020 para. 1(aa), deleting the words "do not enter Vanuatu waters" and substituted by the words "enter Vanuatu waters subject to the conditions as maybe imposed and supervised by the NDMO and the Ministry of Health". New subparas 1(ab) and 1(bb) were inserted as follows:
1. ...
 - (ab) *the Ministry of Infrastructure and Public Utilities and the Department of Ports and Harbour must ensure that Port Vila is the only international port of entry for the purposes set out under paragraph 1(aa).*
 - ...
 - (bb) *Ministry of Infrastructure and Public Utilities and the Department of Ports and Harbour must ensure that Port Vila Bauerfield International Airport and Port Vila are the only international ports of entry for the purposes set out under subparagraphs (ba)(i) and (ba)(ii).*

C. The Law

60. The long title of the DRM Act is:

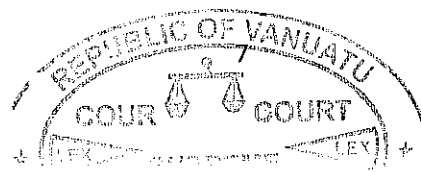
An Act to regulate the management of disasters and for related purposes.

61. Section 1 of the DRM Act includes the following definitions:

1. *In this Act, unless the contrary intention appears:*

...

Committee means the National Disaster Committee established under section 3:



Director means the Director of the National Disaster Management Office;

....

disaster management means the organization, planning and application of measures to prepare for, respond to and recover from disasters;

...

government agency means:

- (a) a Ministry; or
- (b) an office or body established under the Constitution; or
- (c) an office or body established under an Act of Parliament; or
- (d) a prescribed agency;

...

Minister means the Minister responsible for Meteorology, Geological Hazards and Climate Change;

...

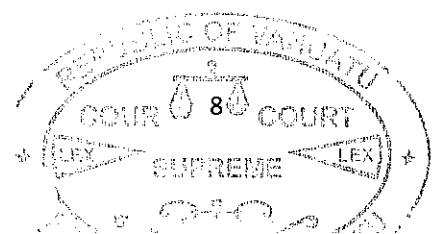
response means actions taken directly before, during or immediately after a disaster in order to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected;

...

62. Section 2 of the DRM Act provides as follows:

2. The objectives of this Act are:

- (a) to establish the necessary institutions and mandates for effective disaster risk management in Vanuatu, including an integrated approach to disaster risk reduction and climate change adaptation, disaster preparedness and response, at the national, provincial and municipal level; and
- (b) to ensure the development and implementation of disaster risk management policies, strategies and plans at national, provincial and municipal level; and
- (c) to support a whole-of-society approach to disaster risk management through education awareness, capacity building and training of elected officials, government employees, the private sector, non-governmental organisations and communities that is also gender responsive and respectful of indigenous and traditional knowledge systems; and
- (d) to support a whole-of-government approach to disaster risk management, especially the integration of disaster risk reduction and climate change adaptation across the different sectors and through all levels of Government, through information-sharing, cooperation and joint planning, as appropriate; and
- (e) to govern the declaration of emergencies in disaster situations; and
- (f) to ensure disaster response operations are coordinated and effective; and
- (g) to facilitate the entry and coordination of international humanitarian assistance when required during disaster situations; and
- (h) to establish an Emergency Fund.

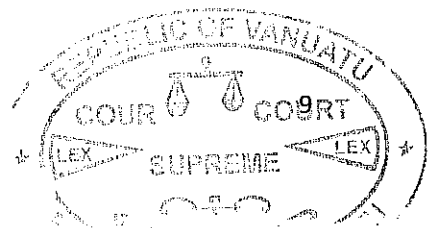


63. Sections 3 and 4 of the DRM Act establish the National Disaster Committee and provide for its composition as follows:

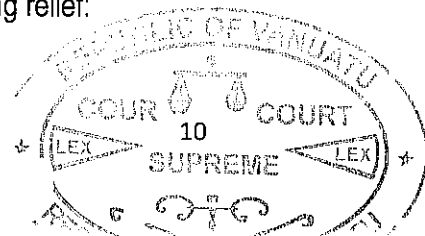
3. *The National Disaster Committee is established.*
4. (1) *The Committee consists of the following persons:*
 - (a) *the Director General; and*
 - (b) *the Director General of the Ministry responsible for Finance and Economic Management; and*
 - (c) *the Director General of the Ministry responsible for Foreign Affairs and External Trade; and*
 - (d) *the Director General of the Ministry responsible for Internal Affairs; and*
 - (e) *the Director General of the Ministry responsible for Infrastructure and Public Utilities; and*
 - (f) *the Director General of the Prime Minister's Office; and*
 - (g) *the Director; and*
 - (h) *the Commissioner of Police; and*
 - (i) *the Chief Executive Officer of the Vanuatu Red Cross Society.*
- (2) *The Chairperson may invite any other person as he or she considers necessary depending on the type of disaster, to attend a meeting of the Committee to provide advice or information on a matter that is before the Committee.*
- (3) *The person invited under subsection (2) has no right to vote in any meetings of the Committee.*

64. Sections 5 and 6 of the DRM Act provide for the National Disaster Committee's functions and powers as follows:

5. *The Committee has the following functions:*
 - (a) *to advise to the government agencies on disaster risk management including planning, preparation, preparedness and response; and*
 - (b) *to advise the Minister on the need for an extension or an end of a state of emergency; and*
 - (c) *to oversee the implementation of disaster risk management policies implemented by the Office, government agencies, partner agencies, civil society and the private sector; and*
 - (d) *to advise the Minister on emergency response and assistance as required; and*
 - (e) *to advise the Minister on the need for a declaration of a state of emergency under this Act; and*
 - (f) *to advise the Minister on the need to request international assistance to counter the effect of a disaster and on any agreement proposed to be entered into by the Government in relation to such assistance; and*



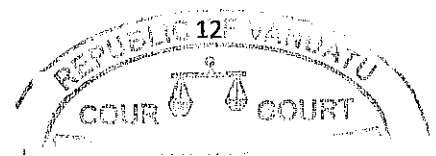
- (g) *to carry out such other functions as may be conferred on the Committee under this Act or any other Act.*
6. (1) *The Committee has the power to do all things necessary or convenient to be done, for or in connection with the performance of its functions under this Act.*
- (2) *Without limiting subsection (1), the Committee may require a government agency to carry out any action or responsibility or make available assets, premises or personnel as is necessary for the purposes of response, rescue and relief operations.*
65. Subsections 35(1) and (2) of the DRM Act provide as follows:
35. (1) *If a declaration of a state of emergency is in force, the Minister may, on the advice of the Committee, direct any government agency to do or refrain from doing any act or to exercise or refrain from exercising any function.*
- (2) *If a direction is given to a government agency under this section, the government agency must comply with the direction despite the provisions of any other Act.*
66. Vanuatu is a signatory to the *United Nations Convention on the Law of the Sea* (the 'Convention') ratified on 10 August 1999 and is as reflected in the *Maritime Act* [CAP. 131]. Vanuatu is bound by the articles of the Convention.
67. The provisions of the Convention include Article 94 (Duties of Flag State) to, *inter alia*, under subclause (3) ensure "safety at sea".
68. Vanuatu joined the World Health Organization ('WHO') as a Member State on 7 March 1983.
69. The *International Health Regulations 2005* ('IHR') are binding upon all the 194 States member of the WHO. Accordingly Vanuatu is bound by the articles of the IHR.
70. The IHR provide a framework to respond to sanitary emergencies while avoiding "*unnecessary interference with international traffic and trade*" (Article 2 of the IHR).
71. In relation to maritime transport, the principle is that of "*free pratique*", meaning "*the permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores*" (Article 1 of the IHR).
72. Furthermore, Article 28.1 of the IHR states that "*a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry*". Article 28.2 specifies, *inter alia*, that a ship "*shall not be refused free pratique by State Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies...*"
- D. Pleadings
73. By its Amended Claim for Judicial Review, the VFL seeks the following relief:



- a. A declaration that the 2 July 2020 decision of the State, through its Director of NDMO, by reliance on Orders No. 71 and 77 of 2020 or otherwise to refuse to allow the Vessel to enter the port of Port Vila, Efate, Republic of Vanuatu ('Decision 1') was unlawful; and
 - b. A declaration that the 2 July 2020 decision of the State, through its Director of Immigration, to refuse entry for all passengers on board the Vessel to enter the port of Port Vila, Efate, Republic of Vanuatu ('Decision 2') was unlawful.
74. VFL alleges that to the extent that the State refused to permit food and water to be delivered to the Vessel's crew during the period from when the VFL requested permission to do so, that is between or about 15 July 2020 to 22 July 2020, that was in breach of the State's obligations to ensure the safety of crew members at sea and thereby a breach of its obligations under the Convention.
75. VFL also alleges that both Decisions 1 and 2 were in breach of the Articles of the IHR pleaded and were therefore unlawful.
76. Finally, the VFL alleges that given that the State through its various Ministries, Departments and entities were on notice from at least 28 May 2020 that the Vessel was shortly to be en route to Vanuatu waters, Decisions 1 and 2 had the quality of outrageous irrationality and unreasonableness that warrants the Court's intervention under *Wednesbury* principles: *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 230, applied, for example, in *Sandy v Vanuatu Rowing Association [Inc.]* [2015] VUCA 28 at [16].
77. VFL's claim is disputed. By its Defence to the Amended Claim, the State stated that the Vessel was denied entry into Vanuatu pursuant to Order No. 71 of 2020. It alleged that at the time, Government agencies were dealing with multiple natural disasters therefore it was reasonable that VFL's letters were not responded to until the Decisions 1 and 2 dated 2 July 2020. It alleged that the Director of Immigration did not receive the VFL's letter dated 3 June 2020 to him. All other allegations were generally denied.
78. The issues, therefore, between the parties are as follows:
 - a) Did the Director of Immigration receive VFL's letter to him dated 3 June 2020? **[Issue 1]**
 - b) By refusing from 15-22 July 2020 to permit food and water to be delivered to the Vessel's crew, did the State breach its obligations under the Convention to ensure the safety of crew members at sea? **[Issue 2]**
 - c) Were Decisions 1 and 2 made in breach of the State's obligations under Article 28 of the IHR and therefore unlawful? **[Issue 3]**
 - d) Given that the State through its various Ministries, Departments and entities was on notice from at least 28 May 2020 that the Vessel was shortly to be en route to Vanuatu waters, were Decisions 1 and 2 of such irrationality and unreasonableness as to warrant the Court's intervention under *Wednesbury* principles? **[Issue 4]**



- E. Issue 1: Did the Director of Immigration receive VFL's letter to him dated 3 June 2020?
79. By his sworn statement [**“Exhibit C2”**], John Mark Bell, VFL Commercial Manager evidenced that he wrote a letter dated 3 June 2020 to the Director of Immigration and provided crew passports and associated visas and permits along with a repatriation plan for the Director's consideration. He delivered the letter to Mr Markson at the office of the NDMO. The secretary there told him that Mr Markson and others were in a meeting. Mr Bell could not recall if he handed the letter to Mr Markson or left it with the secretary.
80. Mr Bell was not cross-examined.
81. Jeffrey Markson, the Director of the Department of Immigration (the 'Department'), by his Sworn statement [**“Exhibit D3”**] evidenced that the Department never received the letter dated 3 June 2020 or its attachments, or any other letters from the VFL prior to the Vessel's arrival. He stated that the Department received all correspondence relating to the Vessel after the Vessel was already in Vanuatu waters.
82. Mr Markson confirmed in cross-examination that he received VFL's 3 June 2020 letter in July 2020 when he was called to an urgent meeting at the NDMO and shown the letter. The meeting participants were informed that the Vessel was already in Vanuatu. He then wrote his 2 July 2020 letter.
83. Mr Markson accepted in cross-examination that he had seen Mr Bell's sworn statement before he made his own sworn statement. He accepted that the 3 June 2020 letter was written before the Vessel entered Vanuatu waters.
84. Mr Markson evidenced that the Vessel was denied entry into Vanuatu pursuant to the Instrument of Directions to Government Agencies relating to Covid-19 and TC Harold Order No. 71 of 2020. He denied the Vessel entry to ensure border security by ensuring that persons arriving through international borders were screened and checked for Covid-19 which posed social and economic risk to the people and environment of Vanuatu. He agreed in cross-examination that if there had not been a lockdown in place and the information had been received prior to the Vessel's entry, the Department would have followed the normal process in relation to the Vessel and its crew. As it was, all the decisions were hinged to the Orders by the NDMO and the Minister of Climate Change.
85. Earlier on in cross-examination, Mr Markson was questioned about how the Department receives mail and by whom. Mr Markson stated that the 2 women employees of the Department, Stacy and Graziella, who work at its front reception counter receive all mail. The incoming mail is recorded in a logbook.
86. I found it telling that Mr Markson twice evaded directly answering if the incoming mail logbook was checked. Both times he stated that he called Stacy and the other officers in but no one had the letter.
87. I also found it telling that Mr Markson stated that all the Director's incoming mail is kept in the incoming mail file for each calendar month but he did not volunteer any information



about whether he or his officers had checked the files for June 2020 and since for VFL's letters.

88. Accordingly, I considered that Mr Markson sought to be a witness of truth in deposing that he did not receive the 3 June 2020 letter until the Vessel was already in Vanuatu waters, but I could not believe he was entirely reliable or credible in his evasiveness about checking the Department's incoming mail logbook and giving no information about whether the monthly incoming mail files had been checked for VFL's letters.

89. I consider therefore that it is more likely than not that VFL delivered its letter to Mr Markson dated 3 June 2020 but that the Department has not checked its incoming mail logbook and files as to whether or not it received the letter or indeed VFL's other letters.

F. Issue 2: By refusing from 15-22 July 2020 to permit food and water to be delivered to the Vessel's crew, did the State breach its obligations under the Convention to ensure the safety of crew members at sea?

90. Sub-articles 94(3) and (5) of the Convention provide the following duties of flag States:

94. (3) *Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:*

...

(b) *the manning of ships, labour conditions..., taking into account the applicable international instruments;*

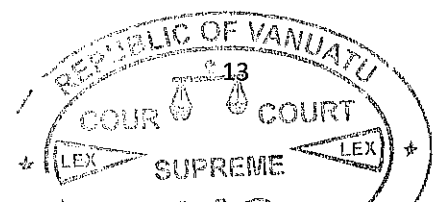
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(5) *In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.*

(my emphasis)

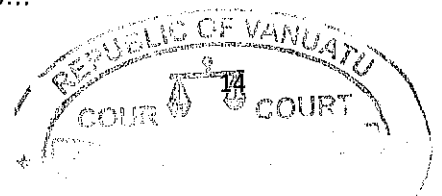
91. Mr Galenon attached a letter dated 21 July 2020 from the Australian shipyard that the Vessel was slipped at which stated that as the Vessel was "an internationally registered Vanuatu flagged vessel, it was subject to Australian Maritime Crew Visa 988 Compliance for a restricted duration in Australian waters for vessel repair. Once repair works were completed the vessel is required to depart Australia" [page 95 of **MG-1** attachments, "**Exhibit C1**"].

92. Mr Galenon was challenged in cross-examination that there were other reasons for the Vessel to return to Vanuatu including to assist with disaster management and because of VFL's financial circumstances as a result of the Vessel undergoing repairs in Australia. He stated that it was pretty obvious that if the Vessel were in Vanuatu, it could assist with disaster management. However, the main reason it had to return to Vanuatu was that it had to leave Australia once the work on it at the dry dock had been completed. He stated that the fact that the Vessel remained in Australia longer than expected



caused VFL to incur additional financial costs that they were anxious to alleviate – he believed that was simple good corporate management.

93. None of the matters put in cross-examination displaced Mr Galenon's evidence that the Vessel had to leave Australia on completion of its repairs and return to its home state Vanuatu.
94. VFL first wrote to the Government advising of its intention to bring the Vessel back to Vanuatu by its letter dated 24 April 2020 to the National Task Force Team at the NDMO. It also requested in that letter information about the applicable Covid-19 measures. No response was received to that letter.
95. It wrote another 8 letters to addressees including the Prime Minister, Director of NDMO, Director of Immigration and Director of Health. It is admitted in the Defence that the letters were received. None were answered.
96. VFL moved its departure date to 10 June 2020.
97. VFL's 9th letter was to the Prime Minister and the Director of Health dated 15 July 2020 requesting their support as the crew had spent 21 days in quarantine after a 7 day passage, and that there was insufficient food and water on board. It was also requested that the crew be tested for Covid-19 to allow them to return to their homes and families.
98. VFL's 10th letter, also dated 15 July 2020, was to the NDMO confirming that the crew had run out of water and provisions, that the VFL would pay for Covid tests and requesting clearance to disembark.
99. Between 17 July 2020 and 21 July 2020, a series of emails were exchanged between the VFL Commercial Manager, the OMR, Ministry of Health and NDMO regarding the provision of food and water to the crew.
100. Despite VFL's best endeavours of the VFL, the authorities denied the delivery of food and water to the crew.
101. In the circumstances, the State's refusal from 15-22 July 2020 to permit food and water to be delivered to the Vessel's crew constituted a breach of its obligations under the Convention to ensure the safety of crew members at sea.
102. Accordingly, I answer Issue 2, "Yes."
- G. Issue 3: Were Decisions 1 and 2 made in breach of the State's obligations under Article 28 of the IHR and therefore unlawful?
103. Article 28.1 of the IHR states that "*a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry*". Article 28.2 specifies, *inter alia*, that a ship "*shall not be refused free pratique by State Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies...*"

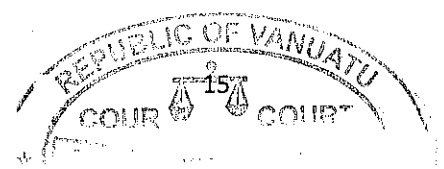


104. The principle of “*free pratique*” in relation to maritime transport is defined in Article 1 of the IHR to mean “*the permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores*”.
105. Both Decisions 1 and 2 were made in reliance on Order No. 71 of 2020 which provided that all Vanuatu borders were not open to receive any international flights or vessels unless they were providing international relief supplies and international cargoes. Order No. 71 of 2020 was amended by Order No. 77 of 2020, dated 22 May 2020, which provided that Port Vila Bauerfield International Airport was the only international port of entry for the purposes of the repatriation of Vanuatu citizens and the entry of non-citizens.
106. The Minister of Climate Change issued Order No. 71 of 2020 (as amended) under the DRM Act giving directions to different Government agencies in relation to Covid-19.
107. I accept therefore that Order No. 71 of 2020 (as amended), and Decisions 1 and 2, were made for public health reasons which prevented the Vessel from entering a home port, from disembarking and from taking on water and food.
108. Both Decisions were therefore made in breach of the State’s obligations under Article 28 of the IHR and are unlawful. I answer Issue 3, “**Yes.**”
109. The declarations sought will be made.
- H. Issue 4: Given that the State through its various Ministries, Departments and entities was on notice from at least 28 May 2020 that the Vessel was shortly to be en route to Vanuatu waters, were Decisions 1 and 2 of such irrationality and unreasonableness as to warrant the Court’s intervention under *Wednesbury* principles?
110. Decisions 1 and 2 were also attacked on the basis of unreasonableness warranting the Court’s intervention under *Wednesbury* principles.
111. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229, Lord Greene MR stated that:

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation¹ gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

(my emphasis)

¹ [1926] Ch. 66.



112. Mr Hurley submitted that the Decisions and Orders No. 71 and 77 of 2020 were unlawful with reference to locally registered ships because the Orders made no provision for them even though the Vanuatu authorities had had notice since 24 April 2020 of the Vessel's intended return, the National Disaster Committee knew on 9 June 2020 that many vessel owners had requested to return to Vanuatu [annexure "AB2" to Additional Sworn Statement of Abraham Nasak, "Exhibit D2"] and the OMR knew on 26 June 2020 that the Vessel repairs were complete and it was ready to return to Vanuatu [annexure "AB3", "Exhibit D2"].
113. He submitted that Order No. 94 of 2020 dated 13 July 2020 (further amending Order No. 71 of 2020) was also unreasonable in prohibiting Vanuatu flagged ships from entering Vanuatu and prohibiting the repatriation of Vanuatu citizens and non-citizens from 11-31 July 2020 as the Vessel was already in Vanuatu waters which was known to the authorities.
114. Mr Hurley submitted that an assessment of reasonableness requires a balancing exercise between the interest of the whole of Vanuatu to protect it from Covid-19 and that of the return of the VFL's Vessel. The State's case effectively is that the risk of Covid-19 was so great that it prevented the return of the Vessel. He submitted that in contrast, Order No. 71 of 2020 was amended by Order No. 150 of 2020 dated 2 September 2020 which was reasonable and should have been in place at all times as it struck the correct balance in the interest of public health and safety, and allowed Government agencies to discharge their roles and functions.
115. By that Order, all Vanuatu flagged ships were allowed to enter Vanuatu waters subject to the conditions imposed by the NDMO and the Ministry of Health, and Port Vila Bauerfield International Airport and Port Vila were prescribed as the only international ports of entry (the latter for ships).
116. He submitted that the Decisions were taken based on the Orders in place however different decisions could have been made. If the Minister could make Order No. 150 of 2020 on 2 September 2020 with the balance struck in it, why not earlier? The Director of NDMO's Directive dated 7 April 2020 to all domestic air and sea operations stated that all previous restrictions were now lifted and could resume normal operations 'subject to meeting normal safety and regulatory requirements'. If the Director of NDMO could make that direction on 7 April 2020, why not earlier?
117. Mr Hurley submitted that the striking of the balance was capable of being made, as it was in Order No. 150 of 2020, except that the decision-makers closed their minds to it at the time. He submitted that Decisions 1 and 2 and the Orders therefore were *Wednesbury* unreasonable.
118. He submitted that it was not reasonable for someone in Mr Nasak's position to say that the NDMO did not respond to VFL because they were caught up in other issues.
119. Mr Huri submitted for the State that the Decisions were reasonable given that from February-July 2020, Vanuatu experienced multiple disasters including the effects of the Covid-19 pandemic, TC Harold and the food shortage on Tanna due to volcanic ash fall.



There was no response from the different Government agencies due to the fact that the SOE and Orders were in place and the Government had to deal with the different issues that arose therefore VFL's issue was not a priority.

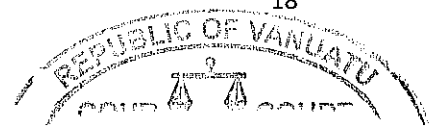
120. He submitted that the Orders were reasonable as was the lack of response to VFL as it was always intended that the travel restrictions would be eased from August 2020.
121. He submitted that even though none of the Government agencies responded to VFL that did not justify the Vessel entering Vanuatu waters contrary to the Orders.

Discussion

122. The Vessel had to leave Australia on completion of its repairs. Its place to return to was Vanuatu, its flag State.
123. VFL wrote to the Director of NDMO on 28 May 2020, to the OMR on 2 June 2020, to the Director of Immigration on 3 June 2020, to the Chairperson of the Advisory Team for Covid-19 at the NDMO on 5 June 2020, again to the Director of NDMO on 26 June 2020 and all relevant authorities on 29 June 2020 seeking approval for the Vessel's return. The repatriation plan was provided with the letter dated 2 June 2020. The Director of Immigration was written to in accordance with the *Immigration Act*.
124. There was no response from any addressee so VFL delayed the Vessel's departure until 26 June 2020 after it received confirmation from Mr Kiero at the Prime Minister's Office that the Vessel could return to Vanuatu provided that VFL met all of the costs of doing so.
125. The response by way of the 2 July 2020 Decisions was made when the Vessel was already in Vanuatu waters.
126. The Vessel and crew were denied entry in reliance on the Orders No. 71 and 77 of 2020.
127. The Vessel only entered a port of entry after urgent relief had been obtained from the Court including that no one could disembark the Vessel until the Ministry of Health, Department of Customs and the Immigration Department had cleared the Vessel and permitted the crew's entry.
128. I now deal with each of the State's submissions in turn.
129. First, whether or not the Vessel was justified by the lack of response to VFL to enter Vanuatu waters contrary to the Orders was not in issue.
130. Secondly, I reject the submission that the Orders and lack of response to VFL were reasonable as it was always intended that the travel restrictions would be eased from August 2020. The restrictions were not eased until 2 September 2020 (by Order No. 150 of 2020). There is no basis to that submission.



131. The remaining submission for the State is that the Decisions were reasonable as Vanuatu had experienced multiple disasters, the SOE and Orders were in place and the Government had to deal with the different issues that arose therefore VFL's issue was not a priority.
132. The first point to make is that there is no dispute about the SOE. It needs to be and is distinguished from the Orders made.
133. Secondly, the Orders were made pursuant to subs. 35(1) of the DRM Act which provides that when a declaration of an SOE is in force, the Minister of Climate Change may, on the advice of the National Disaster Committee, direct any government agency to do or not do an act or to exercise or not exercise any function.
134. An agency so directed must comply with the direction despite the provisions of any Act: subs. 35(2), DRM Act.
135. Parliament obviously intended to give such power to the Minister, acting on the advice of the National Disaster Committee, to exercise during an SOE to fulfil the purpose of the Act for the effective management of disasters including through an integrated approach to disaster response and coordinated and effective disaster response operations.
136. The purpose of the Act is evident from the long title of the DRM Act: 'An Act to regulate the management of disasters and for related purposes' and from the objectives of the DRM Act which include to establish an integrated approach to disaster response (para. 2(a)) and to ensure disaster response operations are coordinated and effective (para. 2(f)).
137. The purpose of the DRM Act is also reflected in the composition of the National Disaster Committee which includes the Director Generals of key Ministries, the Director of NDMO and the Commissioner of Police.
138. Contrary to the State's submission, clearly the DRM Act was passed for exactly the situation in which Vanuatu was experiencing multiple disasters, an SOE had been declared and Orders made. In that situation, the Government would be faced with many different disaster response issues and in accordance with the Act, needed to deal with them in an integrated and coordinated manner.
139. In the circumstances and given the purpose of the DRM Act, when VFL brought the plight of the Vessel's return to Vanuatu to the attention of the authorities, it was a relevant matter for their consideration as Orders No. 71 and 77 of 2020 did not provide for locally registered ships.
140. However, rather than recognising that and working out what could be done in response, the State's response was that the Vessel could not return as the Orders had been made. In doing so, the State failed to take into account a relevant consideration.
141. Further, in the circumstances and given the purpose of the DRM Act, the Government agencies' failure to respond to VFL was not reasonable. VFL wrote letter after letter

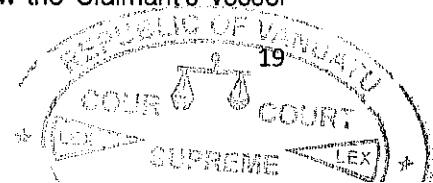


bringing a relevant consideration to the attention of the Government agencies who made up the National Disaster Committee whose function was to advise the Minister to make directions so that the disaster response was coordinated and effective however those decision-makers closed their minds to that.

142. The unreasonableness of the State's actions is underscored by the making of Order No. 94 of 2020 eleven days after the Decisions were made. That Order prohibited the entry into Vanuatu waters of all locally registered vessels who were outside Vanuatu waters. The Order provided for vessels who were outside Vanuatu waters however the situation of locally registered ships already in Vanuatu waters (the Vessel) continued to be completely overlooked.
143. Finally, I agree with Mr Hurley's submissions that in contrast, Order No. 150 of 2020 was reasonable and should have been in place at all times as it struck the correct balance in the interest of public health and safety, and allowed Government agencies to discharge their roles and functions. There has been no explanation given for the State as to why the amendment made by way of Order No. 150 of 2020 could not have been made earlier.
144. In the circumstances and for the reasons given, Decisions 1 and 2 and Orders No. 71, 77 and 94 of 2020 with reference to locally registered ships were of such unreasonableness as to warrant the Court's intervention under *Wednesbury* principles.
145. I answer Issue 4, "**Yes.**"

I. Result and Decision

146. In conclusion, I answer the issues as follows:
- a) Issue 1: Did the Director of Immigration receive VFL's letter to him dated 3 June 2020? "**Yes.**"
 - b) Issue 2: By refusing from 15-22 July 2020 to permit food and water to be delivered to the Vessel's crew, did the State breach its obligations under the Convention to ensure the safety of crew members at sea? "**Yes.**"
 - c) Issue 3: Were Decisions 1 and 2 made in breach of the State's obligations under Article 28 of the IHR and therefore unlawful? "**Yes.**"
 - d) Issue 4: Given that the State through its various Ministries, Departments and entities was on notice from at least 28 May 2020 that the Vessel was shortly to be en route to Vanuatu waters, were Decisions 1 and 2 of such irrationality and unreasonableness as to warrant the Court's intervention under *Wednesbury* principles? "**Yes.**"
147. Accordingly, judgment is entered for the Claimant and the following declarations made:
- a) Declaration that the decision of the Defendant, through its Director of the National Disaster Management Office, of 2 July 2020 by reliance on Orders No. 71 and 77 of 2020 or otherwise to refuse to allow the Claimant's vessel



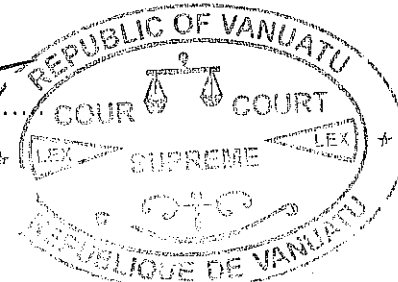
registration no: RV-6443 known as Vanuatu Cargo to enter the port of Port Vila, Efate, Republic of Vanuatu, was unlawful;

- b) Declaration that the decision of the Defendant, through its Director of Immigration and Passport Office, of 2 July 2020 to refuse entry for all passengers on board Vanuatu Cargo to enter the port of Port Vila, Efate, Republic of Vanuatu, was unlawful; and
- c) Declaration that Orders No. 71, 77 and 94 of 2020 with reference to locally registered ships were of such unreasonableness as to warrant the Court's intervention under *Wednesbury* principles and were unlawful.

148. The parties are to file and serve their submissions as to costs **by 4pm on 7 February 2022.**

**DATED at Port Vila this 10th day of December 2021
BY THE COURT**

VM Trief
Justice Viran Molisa Trief

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem of a scale of justice. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are positioned on either side of the scale. Below the scale, the word "SUPREME" is written. On the left and right sides, the word "LEX" is written within decorative flourishes.