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

Civil Appeal
Case No. 25/941 COA/CIVA
[2025] VUCA 21

BETWEEN: NORTHERN ISLAND STEVEDORING COMPANY LIMITED
Appellant

AND: REPUBLIC OF VANUATU
Respondent

Date of Hearing:	***8th May 2025***
Coram:	***Hon. Justice J Mansfield*** ***Hon. Justice R Asher*** ***Hon. Justice D Aru*** ***Hon. Justice VM Trief*** ***Hon. Justice EP Goldsbrough***
Counsel:	***Mr Avock Godden for the Appellant*** ***Mr Sammy Aron for the Respondent***
Date of Judgment:	***16th May 2025***

JUDGMENT OF THE COURT

Introduction

1. In November 2015, Northern Islands Stevedoring Company Limited (the Appellants) entered into a Concession Agreement with the Republic of Vanuatu (the Respondent) to operate and maintain port operations at NISCOL Wharf in Luganville on the island of Santo. It is, perhaps, called NISCOL Wharf because the 2015 Concession Agreement was not the first agreement that the same parties had entered into. There is a reference to an agreement in 1991 in this appeal book. That original agreement was extended twice before the current agreement was entered into on 29 November 2015.

2. The Appellant company, locally incorporated and colloquially known as NISCOL, comprises four Provincial Governments, namely the Sanma, Penama, Malampa, and Torba provinces, the Luganville Municipal Council, and the Government of Vanuatu. The largest shareholder is Sanma Province.

3. In April 2017, the Maritime Sector Regulatory Act No. 26 of 2016 came into force. By amendment in 2022, that legislation came to be known as the Vanuatu Maritime Safety Authority Act (VMSA).

It is a charge levied under a Regulation made under that legislation which forms the basis of these proceedings and this appeal.

4. The claim, filed on 24 May 2024, from which this appeal arises, is for a debt. The alleged debt represents concession fees of VT 2 million per year for the years 2022, 2023, and 2024, totalling VT 6 million, together with a surcharge payable for late payment at a rate of 25%. The concession fee is levied pursuant to Order 188 of 2022, known as the Maritime Concession and Levy Fees Regulations, which was made by the Minister of Infrastructure and Public Utilities under the VMSA. That Order is exhibited at AB B 227-9.

5. Following that Order, invoices, also exhibited in AB B 231-6, were issued. It is not an issue in this appeal that Order 188 of 2022 was made by the appropriate authority, gazetted and invoices duly produced and served, nor that none of those invoices were settled by the Appellant. The issue on this appeal is whether Order 188 of 2022 applied to the Appellant, given the terms of the Concession Agreement of 2015.

The Appeal

6. In its notice of appeal, the Appellant raised four grounds of appeal. The first ground is a procedural ground concerning an application to strike out the claim and an application to show cause why the claim should not be struck out following non-compliance with orders made for the management of the case. The second ground of appeal concerns the relationship between VMSA and the Government Contracts and Tenders Act. The third and fourth grounds concern the interpretation of the Concession Agreement.

7. At the outset of this appeal, counsel for the Appellant indicated that he did not seek to challenge Order 188 of 2022 per se, merely the proper application of that order as against the Appellant. We mention this as it is referred to by the trial judge in his judgment, where, at p. 28, he discussed the failure to challenge the order by way of Judicial Review (JR).

8. Counsel for the Appellant briefly traversed the reasons why Order 188 of 2022 may have been challenged as ultra vires the legislation under which it was made, sufficiently to demonstrate that the decision made by the Appellant not to bring judicial review (JR) proceedings was a good decision. It was a good decision, as JR would, in our view, inevitably have failed. By raising the matter as he did, counsel allowed this court to determine, as between his client and the Respondent, whether the debt could properly be enforced. By that route, the issue could still be determined by this Court as between the parties to the present case.

9. We agree that Order 188 of 2022, as made under s 56 VMSA, was made within jurisdiction and in accordance with the powers and ambit of the relevant legislation. Charged as it was by the legislation with ensuring

> the effective regulation of ports and port facilities through the promotion of efficient and safe port operations and the protection of the rights of port users to access ports and port facilities on fair and equitable terms (s 2 (b) VMSA)

and promoting

> the security of shipping and port operations, and to facilitate compliance with all security related aspects of applicable international maritime conventions (s2 (d) VMSA).

there are inevitable costs incurred by the Respondent that it is entitled to charge users of those regulated facilities by way of recovery.

10. The trial judge set out at p 13 – 18 the circumstances of the application to strike out and to show cause and his decision on those matters beginning at p 21. We can find no error in the determination of either of those matters and therefore turn to the substantive argument on this appeal, that is, whether, in the circumstances of this Concession Agreement, the prescribed Concession Fee is indeed payable by the Appellant. We are grateful to counsel for the Appellant who conceded that the 1st ground of appeal need not occupy this Court so as to allow the Court to consider the real merits of the substantive appeal.

11. The submission on this point arises from the amended defence filed on 13 August 2024 at p 2 (j) and (p). In that document, the genesis of the submission can be seen, which is that the Order cannot apply to the Appellant because it breaches Clause 26 of the Concession Agreement. Furthermore, as the Appellant is a state-owned enterprise, the state is liable for its debts.

Discussion

12. The Appellant is a corporate entity registered under the Companies Act 2012 (AB B 289) and following. It is therefore incorrect to submit that it is a state-owned enterprise. That the state is a shareholder within that corporate entity does not make it such.

13. Clause 26 of the Concession Agreement provides only for the amendment of the agreement. Although it is not set out in the amended defence, Clause 26 appears to become relevant only if it is considered that the agreement, in Clauses 15 and 16, is regarded as not allowing for the imposition and payment of the Concession Fee prescribed in Order 188 of 2022.

14. The principal submission of the Appellant on this question is that the effect of Clauses 15 and 16 limits exclusively fees and charges payable to the Respondent under the Concession Agreement. Clause 15 provides that: -

> (1) The parties agree that the Government will retain 25 % of the net monthly operating profit received by the Stevedore
>
> (2) The parties agree that the 25% of the net monthly operating profit received by the Stevedore for quay dues and other related charges must be paid to the Department of Ports and Harbours within 15 days after the end of each calendar month.

15. Clause 16 provides: -

(1) The Stevedore is obligated to settle in full and final satisfaction any outstanding Government fees pertaining to port dues or tariffs . . . . and

(2) If there are outstanding port dues and tariffs then the Stevedore must negotiate with the Government and a monthly payment schedule which is reasonable and flexible to the Stevedore must be designed and adhered to.

16. With the greatest respect to that submission, we find it impossible to import such 'exclusivity' to be read or implied into the Concession Agreement as the submission suggests. We arrive at that conclusion considering no more than the language used. However construed, the words which appear in those two clauses import no such restriction as is suggested. They set out an arrangement for the payment of a percentage of the operating profit, but contain no prohibition of the Government imposing further different tariffs for costs it incurs.

17. We would take the matter a step further and refer to the established principle that a contract agreed between parties cannot exclude or effectively fetter the authority of Parliament to legislate, provided Parliament acts within its powers under the Constitution and the law, by imposing further taxes or levies or concession fees as it deems fit. Nor can any such contract fetter the lawful exercise by the Executive of delegated powers provided by Parliament under legislation.

18. This principle can be found in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500. That rule provides that the government cannot enter into contracts that purport to constrain future executive action. It is known as the rule against fetters and has been widely applied – see *Birkdale District Electric Supply Co Ltd v Corp of Southport* [1926] AC 355 (HL) in the United Kingdom and *The Power Co Ltd v Gore District Council* [1996] NZCA 483 from New Zealand.

19. Given that we found earlier in this judgment that the order made by the relevant Minister was within the powers of the empowering legislation, Parliament has not exceeded either its powers under the Constitution or the law. Indeed, this principle does not need to be invoked as we have concluded that Clauses 15 and 16 of the Concession Agreement do not operate to prohibit the imposition of the concession fees.

Decision

20. The appeal is dismissed. Costs of VT 50,000 are to be paid by the Appellant to the Respondent.

Dated at Port Vila this 16th day of May 2025

BY THE COURT

Hon. Justice John Mansfield

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU