

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

Civil Case No. 156 of 2017

**BETWEEN:** INTERNATIONAL GREEN STRUCTURES LLC  
Claimant

**AND:** NATIONAL HOUSING CORPORATION  
Defendant

**AND:** THE GOVERNMENT OF THE REPUBLIC OF VANUATU  
Second Defendant

**Hearing:** 5<sup>th</sup> February 2018  
**Before:** Justice Chetwynd  
**Counsel:** Mr Morrison for the Claimant  
Mr Huri for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

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**DECISION ON APPLICATION TO BE REMOVED AS A PARTY**

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1. This is an application by the Government of the Republic of Vanuatu, the Second Defendant ("the Government"), to be removed as a party in this proceeding. International Green Structures LLC ("IGS LLC") is the Claimant and the First Defendant is the Vanuatu National Housing Corporation ("NHC"). I have dealt with the application on the basis of written submissions.

2. The Claim involves a contract between NHC, GRD Construction Company Ltd ("GRD") and IGS LLC. A copy of the contract is annexed to a Memorandum dated and filed on 5<sup>th</sup> February 2018 by IGS LLC's counsel. The Claim avers that contract was dated on or about November 2014. The copy is signed but undated. In brief and as set out in the Claim, the contract involved the construction of some 2000 green technology homes in Vanuatu. No payment has ever been made by NHC and IGS LLC says it has expended something in the region of USD 3 million. GRD are not party to the proceeding.

3. The basis for naming the Government as a party is set out in Paragraph I (3) of the Claim namely, "The Second Defendant is the Government of the Republic of Vanuatu of which, at all material times, the First Defendant was an arm or organ of being a Government Agency". Despite the somewhat distorted language the Claim is simply that the NHC was part of the State and therefore (in accordance with section 57(2) of the Public Finance and Economic Management Act) the State was liable to pay NHC's creditors.

4. The application lodged by the Government is based on the proposition that IGS LLC was not a contracting party. The Government refers to a contract dated 25<sup>th</sup> April 2014. It is annexed to the sworn statement of Jelinda Emleo Toa filed on 22<sup>nd</sup> November 2017 as JET 1. Counsel for IGS LLC say that contract was cancelled and



replaced by the one annexed to the Memorandum and referred to in paragraph 2 above. Thus, the arguments put forward by the parties diverged somewhat. Counsel for IGS LLC concentrated on the provisions of the Public Finance and Economic Management Act and the argument the Government was liable to pay the debts of an arm of Government whereas counsel for the defendants referred only to the issue of privity of contract. On the basis that JET 1 was not the final contract governing the dealings between NHC and ISG LLC, the defendants' arguments must fail.

5. We are left then with the issue of State liability. This was an issue which concerned the Court of Appeal in the case of *Benard v Government of Vanuatu*<sup>1</sup>. In that case Mr Benard was owed money by the Vanuatu Maritime Authority. The Court of Appeal set out the salient facts in this manner;

*"The Appellant worked for the VMA under a contract of employment with the Commissioner of Maritime Affairs (the Commissioner). His employment came to an end when the VMA went out of existence as a consequence of the coming into force of the Vanuatu Maritime Authority (Repeal) Act (the Repeal Act) on 1 January 2008. He had not been paid for the period September - December 2007. The Commissioner had made efforts to pay the Appellant but the payments were not effected because of the intervention of the Attorney General, who said that the source of the funds was not a proper source from which such payment could be made. The Appellant then commenced proceedings against the Respondents as a result of this intervention by the Attorney General. Those proceedings were commenced before the Repeal Act was passed. He did not at that time commence proceedings against the VMA, because there was no dispute between him and the VMA as to his entitlement to be paid for the work he had done during the relevant period."*

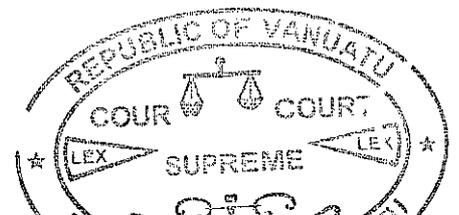
6. The Primary Judge found against Mr Benard and as the Court of Appeal put it, his decision was based on:

*"....a number of English, Australian and New Zealand cases in which statutory corporations have been found not to be part of the Crown or the State. The Judge said that he considered that the intention of the VMA Act was clear. The VMA was established so that it could fulfil certain functions without the Government having to be involved in its day to day activities. He said that it could not be said that the Government was responsible for decisions of the VMA in areas where the VMA had sole and independent authority to act."*

7. The Justices of Appeal travelled a different route and considered the central issue to be:

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<sup>1</sup> *Benard v Government of the Republic of Vanuatu* [2009] VUCA 42; Civil Appeal Case No 17 of 2009 (30 October 2009)



*"... whether the Government is liable for debts owed by the State. That question is answered by Section 57 of the PFEM Act. Section 57(1) says the Government is not liable to contribute toward the payment of debts or liabilities of the State, but that subsection is expressly made subject to Section 57(2). Section 57(2) specifies that Section 57(1) does not apply in relation to, among others, "any sum the State is liable to pay to any creditor of the State." As the term "State" is defined to include a Government agency, that provision can effectively be read as providing that the Government is liable for "any sum a Government agency is liable to pay to any creditor of the Government agency"."*

The Court went on to say:

*"The Solicitor General strongly warned of catastrophic consequences for the Government if the interpretation outlined above were adopted by the Court, because it would mean the Government is liable for debts of Government agencies that it did not intend to accept liability for. We are unable to assess how "catastrophic" the consequences will be, but we cannot allow such consequences to divert us from deciding the case on the basis of what seems to us to be the unambiguous wording of the section. In any event, those consequences are limited to historic debts because the definition of "Government agency" has now been removed from the definitions in the PFEM Act by Section 1 of the Public Finance and Economic Management (Amendment) Act 2009, which came into force on 18 May 2009. The definition of "the State" has also been changed. The outcome of those amendments is that the reference to "the State" in section 57(2)(d) is now a reference to "the Republic of Vanuatu", so the scope of the liability of the Government under section 57 has been narrowed to avoid the "catastrophic" consequences. And we are mindful that Section 1(2) of the PFEM Act allowed the Minister to exclude a Government agency from the application of the whole or part of the PFEM Act by publishing a Gazette notice to that effect. That mechanism allowed the Government to manage the liabilities it accepted under section 57 but there was no suggestion that it was used in relation to the VMA.*

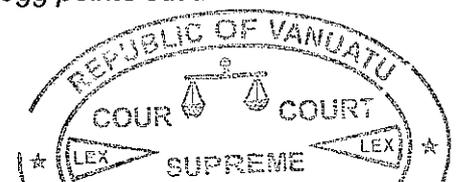
*For the reasons set out above, we come to a different conclusion on the issue before us from that reached by Dawson J. But we do so on a basis that was not fully aired before him and therefore not addressed in his judgment.*

#### **LIMITED SCOPE OF THIS DECISION**

*If it were not for that broad definition of "Government agency" in the PFEM Act (prior to the 2009 amendment), we would not have been inclined to conclude that the VMA was within the concept of "State" on normal principles.*

8. In coming to their conclusion the Court considered a leading text by Professor W Hogg "Liability of the Crown" [3<sup>rd</sup> Edition 2000].

*"There is a good deal of jurisprudence on the method of determining whether a statutory corporation is part of the State or Crown or independent from the State. The position is carefully summarised in the leading text by Professor W. Hogg, "Liability of the Crown" [3<sup>rd</sup> Ed 2000]. Professor Hogg points out that the*



Courts traditionally determined the question by asking whether the functions of the public corporation are such that they properly belong within the "province of Government". But this has now given way to a control test, where the question whether a public corporation as an agent of the Crown depends upon "the nature and degree of control which the Crown exercises over it" (see page 334). The fact that a board is appointed by Ministers (as is the case in relation to the VMA), is not, however, decisive: see **Metropolitan Meat Industry Board v. Sheedy** [1927] AC 899. In the present case, we would not have considered the degree of ministerial control (exemplified by Section 9) as sufficient for that purpose."

However, Professor Hogg makes it clear that any analysis must be governed by the statutory framework. As he puts it, if a statute expressly provides for a public corporation to be an agent of the Crown (or State), then it will be an agent for the Crown/State (see page 337)."

9. It seems clear from the decision of the Court of Appeal that had *Benard* been decided on the law as set out in the Public Finance and Economic Management (Amendment) Act 2009 (which came into force on 18 May 2009) the appeal would not have been allowed because there was insufficient Ministerial or Government control of the VMA set out in the Vanuatu Maritime Authority Act. The test of control as proposed by Professor Hogg was not satisfied. It is necessary then to look at the situation as set out in the legislation leading to the operation of the National Housing Corporation.

10. Unfortunately the National Housing Corporation Act [Cap 188] ("the Act") does not have a helpful provision as envisaged by Professor Hogg. The Act does not expressly provide for the NHC to be an agent of the State. However it does have some provisions which assist. Section 2 provides:

#### ***Establishment of the National Housing Corporation***

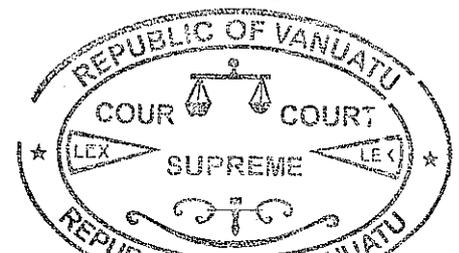
2. There is hereby established a body corporate to be known as the **National Housing Corporation**.

(1) The Corporation shall have perpetual succession and a common seal and may sue and be sued in its corporate name.

(2) The Corporation shall consist of no fewer than five members nor more than seven members appointed by the Minister.

(3) Of the members at least three shall be appointed from amongst persons who have special qualifications in, and had experience of, matters relating to engineering, architecture, accountancy, finance, law, economics or business management.

(4) The Minister shall appoint a Chairman and a Deputy Chairman from among the members of the Corporation.



(5) *A member of the Corporation (including the Chairman and Deputy Chairman) shall hold office for a term not exceeding 3 years and shall be eligible for re-appointment.*

(7) *A member of the Corporation may at any time resign his office by notice in writing addressed to the Chairman who shall forthwith cause it to be forwarded to the Minister.*

(8) *The Minister may remove a member from office at any time by notice published in the Gazette.*

(9) *The Corporation may make rules governing its own procedure.*

11. Whilst the NHC could make its own rules of procedure the Minister controlled the makeup of the NHC. This is clearly relevant in regard to "the nature and the degree of control" the State had or has over the NHC.

12. Section 3 of the Act emphasises the degree of control:

***Policy***

*The Corporation shall be responsible for the execution of the policy of the Government in relation to housing. In the exercise of its functions, powers and duties the Corporation shall be subject to the directions given to it by the Minister.*

Section 4(1) of the Act further provides:

***Functions of the Corporation***

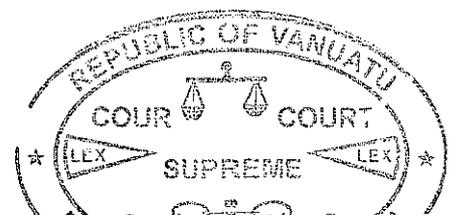
(1) *The functions of the Corporation shall be to provide houses and ancillary buildings for sale or for leasing in accordance with programmes approved by the Minister.*

13. An examination of the provisions in the Act in relation to the finances of the NHC also reveal close control by the Minister or by the State. See section 13 relating to funding, section 14 dealing with accounts and audits, section 15 providing for submission of estimates for purposes of grants, section 18 in respect of guarantee of loans to the NHC and section 18 concerning control of borrowing.

14. Towards the end of the Act, section 20 makes provision for further control by regulations;

***Regulations***

*The Minister may by Order make regulations for the purpose of carrying out the provisions of this Act.*



Finally section 21 provides for Ministerial control over local authority housing policy as well as central government housing policy;

***Housing functions of local authorities***

*The powers and duties of public authorities in relation to the provision of housing for the public shall be subject to the direction, supervision and control of the Minister.*

15. In my view the provisions of the Act envisage such a high degree of control by the Minister and therefore by the State that the NHC can but be considered as a part of the State. The situation of the NHC is very different from that of the VMA as found in *Benard*. There are more specific provisions in the Act relating to the control and direction of the NHC than appear in the Vanuatu Maritime Authority Act in regard to the VMA. The two statutory bodies are very different in composition and operation.

16. In the circumstances it would be wrong to remove the State as a party to these proceedings. The application by the Second Defendant is refused.

17. The costs of the application shall be paid by the Second Defendant to the Claimant. The costs are to be taxed on a standard basis if not agreed.

**DATED at Port Vila this 13<sup>th</sup> day of February 2018.**

**BY THE COURT**

  
**D. CHETWYND**  
Judge

