

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

Judicial Review
Case No. 24/3492 SC/JUDR

BETWEEN: **INTERNATIONAL FINANCE TRUST COMPANY LIMITED**
Applicant

AND: **TEDDY GARAE**
First Defendant

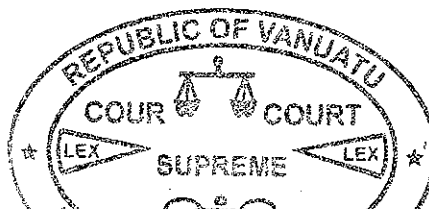
AND: **REPUBLIC OF VANUATU**
Second Defendant

Hearing: 28 January 2025
Before: Hon. Chief Justice Vincent Lunabek
Counsel: Mr MJ Hurley for the Applicant
Mr L Huri for the First and Second Defendants
Date of Delivery of Judgment: 04 April 2025

REASONS FOR JUDGMENT

A. Introduction

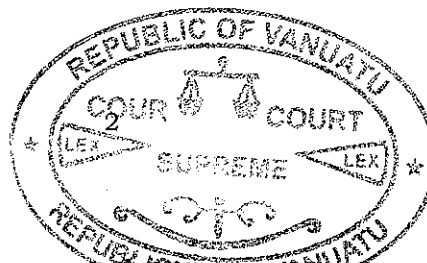
1. This is an urgent claim for Judicial Review filed on 1 November 2024 by the Claimant, International Finance Trust Company Limited (IFTC), seeking to quash the following decisions made by the First Defendant, then Director of the Vanuatu Financial Intelligence Unit (FIU):-
 - (a) Decision set out in the Vanuatu Financial Intelligence Unit's letter to the Claimant dated 18 October 2024 to cancel the Claimant's conditional registration under the Anti-Money Laundering and Counter Terrorism Act NO. 13 of 2014, as amended (AMLCT) ("The Act");
 - (b) Decision set out in the Vanuatu Financial Intelligence Unit's letter to the Claimant's Lawyers dated 29 October 2024 requiring the Claimant to resubmit its application for registration; and
 - (c) Decision(s) set out in the Vanuatu Financial Intelligence Unit's correspondence/directives to the effect that BSP shall close the claimant's accounts held with BSP with immediate effect.
2. The urgent claim for Judicial Review (claim) is supported by the following sworn statements and exhibits:



- (a) A sworn statement of Daniel Agius filed on 1 November 2024 – Exhibit C4;
 - (b) An email from Mark Hurley to Josiah Kuatpen dated 17 September 2024 attaching Hurley's letter dated 16 September 2024 and copied to Teddy Garae and Apollo Jacques – Exhibit C1;
 - (c) An email from Mark Hurley to Josiah Kuatpen dated 25 October 2024 attaching Hurley lawyers' letter dated 25 October 2024 and the Vanuatu Financial Services Commission's (VFSC) letter dated 24 October 2024 – Exhibit C2 and copied to Mackenzie Bani, Kirsty Tavo, Teddy Garae and Roy Albert Samuel – Exhibit C2; and
 - (d) An email exchange between Mackenzie Bani, FIU, and Scott Proud, on IFTC's behalf, dated 18 November 2024 – Exhibit C3.
3. The Defence to the claim is filed on 4 December 2024 and it is supported by a sworn statement of Teddy Garae filed on 5 December 2024 – Exhibit D1.
 4. In its Defence and the evidence of Teddy Garae (the current Director of the Vanuatu Financial Intelligence Unit and the only witness relied on by the Defendants), the Defendants say that IFTC is not entitled to the relief sought or to any other relief.
 5. IFTC's position is this and it submits that once this Court analyses the facts and the relevant legal principles, it will conclude that the FIU's decisions that IFTC seeks to quash (set out at paragraph 1 above) were arbitrary, capricious, done in bad faith, and unreasonable to warrant the Court's intervention to quash those decisions.

B. Relevant provisions of the (AMLCT) Act No. 13 of 2014, as amended (Act)

6. IFTC is a licensee under the Company and Trust Services Providers Act No. 8 of 2010 as amended (CTSP Act) and it is a reporting entity under Section 2(j) of the Act.
7. Section 4 of the Act establishes the FIU.
8. The FIU has the powers and functions set out under the Act. Under Section 5(2) of the Act, the FIU has the power to do all things that are necessary or convenient to be done for in connection with the performance of its functions. In the defence to the claim (at paragraph 2(i)), the Defendants plead that although the Act does not provide for conditional registration (of a reporting entity), Section 5(2) provides "*for convenience to be done by the FIU and on that basis, the Director of the FIU gave liberty for reporting entities already in operation to continue operating and rectify the deficiencies in due course including the IFTC*". Mr Teddy Garae gave evidence to the same effect in his sworn statement at paragraph 11 of Exhibit D1.
9. Under Section 7(2) of the Act:



"The Director is to perform the functions and exercise the powers of the Unit specified under this Act".

10. Sub-Section 9(1), (2), (3) and (4) of the Act provide as follows:

- (1) The Director must establish and maintain a register of reporting entities;
- (2) A reporting entity must not provide a service or establish a business relationship with a customer unless the reporting entity is registered on the register;
- (3) An application for registration by a reporting entity must be made to the Director in the prescribed form, including its name and such other details as are prescribed by the Regulations;
- (4) If a reporting entity is regulated by a domestic regulatory authority under a regulatory law, the Director must not enter the reporting entity on the register unless:
 - (a) The application complies with the requirements in subsection (3); and
 - (b) The reporting entity meets the requirements of the regulatory law; and
 - (c) The reporting entity meets the fit and proper criteria prescribed by the Regulations;

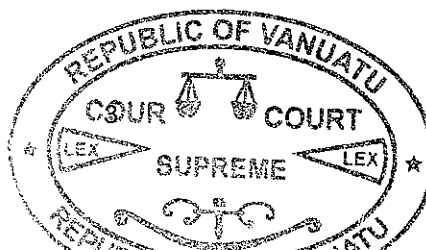
C. Relevant Facts

11. In a letter dated 13 March 2019, the FIU issued IFTC with conditional registration under Section 9(4) of the Act after having been satisfied that IFTC had submitted its application in compliance with Section 9(3) of the Act (Conditional Registration).
12. The conditional registration was subject to four matters set out in "bullet points" in the FIU's letter dated 13 March 2019. The relevant part of the letter reads:

"In accordance with section 9(4) of the Anti-Money Laundering & Counter Terrorism Financing Act No. 13 of 2014 ("AML & CTF Act"), I am satisfied that International Finance Trust Company Limited has submitted its application in compliance with section 9(3) of the AML & CTF Act.

However, there are pending submissions of required information regarding:

- *Regulatory confirmation;*
- *Certified copy of Mr Scott Proud's Australian passport;*
- *Certified copy of Mr Daniel Agius' Australian passport; and*
- *Confirmation of employment status of Mr Michael Liu;*



Therefore, International Finance Trust Company Limited is conditionally entered on the FIU Register of Reporting Entities on this 13th day of March in the year 2019, pending complete submission of the above outstanding information.

*Kindly provide the above outstanding information to this office by **Wednesday 27th March 2019**.*

This conditional registration remains valid until the above or any outstanding information is satisfactorily submitted."

13. The first bullet point was "Regulatory confirmation".
14. Mr Teddy Garae conceded, among other matters in his cross-examination that IFTC provided the FIU with the documents it required in the second, third and fourth bullet points of the letter of 13 March 2019.
15. It is of note that the terms of the FIU's letter dated 13 March 2019 include the two final paragraphs:

"Therefore, International Finance Trust Company Limited is conditionally entered on the FIU Register of Reporting Entities on this 13th day of March the year 2019, pending complete submission of the above outstanding information.

Kindly provide the above outstanding information to this office by Wednesday 27th of March 2019.

This conditional registration remains valid until the above or any outstanding information is satisfactorily submitted".

16. That means that the only outstanding issue preventing IFTC from obtaining final registration under the Act was "Regulatory confirmation".
17. During his cross-examination, Mr Garae agreed that the reference to "Regulatory confirmation" in the FIU's letter of 13 March 2019 was a reference to IFCT's need to satisfy the VFSC that it complied with requirements under the CTSP (because IFTC is a licensee under the CTSP Act).
18. In or about June 2018, the VFSC conducted an on-site review of IFTC under the powers vested in the VFSC under the CTSP Act. The VFSC's final on-site review report was released to IFTC under cover of the VFSC's letter dated 8 November 2019.
19. The VFSC's letter dated 8 November 2019 listed 15 matters, being what the VFSC described as "the key issues that have been identified and needs immediate remedial action". The relevant part of that letter of 8 November 2019 reads:

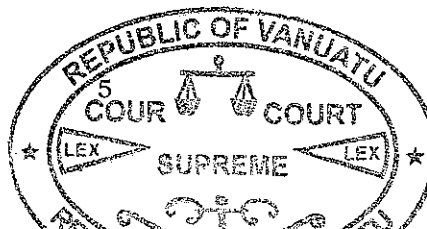
"The VFSC's overall findings is outlined in the report on page 12, however, the key issues that have been identified and needs immediate remedial action is summarised below:



1. Failure to carry out an audit of all trust monies held by IFTC as a requirement of CTSP Act;
2. Failure to meet the minimum capital requirement and solvency;
3. Failure to hold allowable assets as required by the CTSP Act;
4. Failure to risk rate its clients;
5. Failure to identify Politically exposed persons;
6. Using IFTC's lower level staff as beneficial owners of some of their companies limited by Guarantees;
7. Failure to conduct proper CDD exercise on its clients;
8. Failure to keep proper records of its CDD exercise;
9. Failure to conduct CDD on beneficiaries of trust when effecting changes;
10. Failure to identify trust funds or assets relating to 9 existing trusts;
11. Failure to hold and keep proper board minutes;
12. Failure to comply with its own written code of conduct;
13. Failure to comply with its own written risk guideline;
14. No complaints procedure manual;
15. No evidence of SARs or STRs filed at FIU.

We trust this report is clear to you and should you require further clarification please do not hesitate to contact our supervision team". (Exhibit C4, DA – 1).

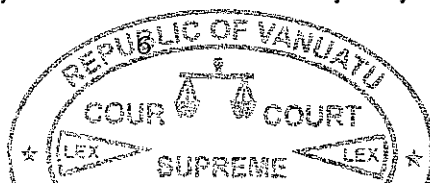
20. By March 2020, the VFSC was satisfied that IFTC had addressed 13 of those 15 enumerated matters because by the VFSC's letter to IFTC dated 30 March 2020, it stated that *"The two issues such as the solvency position of the IFTC and the audit of trust monies under the IFTC management remains unresolved given the different positions taken by the parties"*, and the VFSC informed IFTC that it has decided to appoint an independent auditor pursuant to section 33 of the CTSP Act.
21. The FIU communicated with IFTC by letter dated 21 September 2021 and by email on 18 February 2023 (In response to the IFCT's email of 17 September 2023) about the status of IFTC's need to satisfy outstanding issues identified in the VFSC's onsite inspection report in 2018.
22. In his sworn statement (Exhibit D1), Mr Garae produced copies of correspondence passing between the FIU and VFSC in May and June 2023 about IFTC's compliance with the CTSP Act ("TG5" and "TG6") of Exhibit D1).
23. It is noted that IFTC commenced Judicial Review case No. 31 of 2024 against the VFSC because it was unable to resolve its dispute with the VFSC about the two outstanding issues, namely:
 - (a) The provision of consolidation accounts; and
 - (b) Whether IFTC was insolvent.
24. By Hastings J's Rule 17.8 Decision dated 6 March 2024 in *International Finance Trust Company Limited v Vanuatu Financial Services Commission* [2024] VUSC 84, His Lordship decided that IFTC had an arguable case about the reasonableness of the VFSC's decision to appoint an inspector under the CTSP Act because IFTC contended that the evidence it had provided to the VFSC resolved those last two issues (Exhibit C4, DA – 1).



25. Following Hastings J's r17.8 Decision, IFTC and VFSC filed their respective evidence in preparation for final hearing (scheduled on 30 October 2024) (paragraph 14 of Exhibit C4).
26. Mr Garae has also produced copies of correspondence passing between the FIU and VFSC in April and May 2024 about IFTC's compliance with the CTSP Act (paragraphs 20 – 21 of Exh. D1 and "TG7" and "TG8" pp 162 – 165). It is noted that for reasons that are not explained, in the VFSC's letter to the FIU dated 3 May 2024, it failed to disclose the existence of Judicial Review Case No. 31 of 2024 and Hastings J's 17.8 Decision.
27. By letter to the FIU dated 16 September 2024 by IFTC's lawyers, Hurley Lawyers, the FIU was informed, among other matters, that IFTC's judicial review proceeding against the VFSC was listed for hearing on 30 October 2024 and stated:

"IFTC has filed evidence from its external accountants and from a specialist overseas accounting firm demonstrating that IFTC has complied with all of the requirements of the CTSP Act and the Regulations thereunder. We are in discussion with Mr Kalsakau (VFSC's lawyer) and we are hopeful that all issues VFSC had concerning IFTC will be resolved without the need for the hearing on 30 October 2024. We will let you know if that occurs". (Exh. C1 and Exh. C4, DA – 1 pp 37 – 38).

28. Mr Garae admitted in his cross-examination that he had seen that correspondence and discussed it with the then Acting Director of the FIU, Mr Kuatpen and other FIU's officers. There is no evidence that the FIU responded to that letter.
29. On 25 September 2024, IFTC's representatives, Messrs Agius and Proud (directors of the iCount Limited, a company within the group of companies of which IFTC is a member), together with Mark Hurley, IFTC's lawyer, met with the FIU and senior members of the FIU. During that meeting, IFTC's representatives reiterated the matters set out in Hurley Lawyer's letter dated 16 September 2024 (Exh. C1), emphasised IFTC's willingness to comply with all regulatory requirements of the FIU and sought direction from the FIU as to any other issues, pending resolution of IFTC's two outstanding issues with the VFSC (paragraph 17 of Exhibit C4).
30. The FIU sent a letter dated 8 October 2024 to Mr Proud, Director of iProperty Limited (another company within the group of companies of which IFTC is a member). That letter included the First Defendant's reference to "IFTC's failure to satisfy the said regulatory requirements"; (paragraph 18 of Exhibit C4 and DA – 1, p.41).
31. Then, the FIU sent a letter to IFTC dated 18 October 2024 advising it that due to outstanding issues with the VFSC it had cancelled IFTC's conditional registration under the Act (paragraph 19 of Exhibit C4 and DA – 1, p.42). It is a clear finding of fact that the cancellation of the IFTC's registration under the Act, was made by the FIU without any prior warning.
32. Hurley Lawyers wrote to the FIU on 25 October 2024 to advise it that all issues with the VFSC had been resolved (Exhibit C2 and paragraph 21 of Exhibit C4 and DA – 1, pp. 43 – 44). That correspondent attached a copy of the VFSC's letter to Hurley Lawyers dated 24 October 2024



which included the VFSC's fourth paragraph: "Accordingly, for the purpose of satisfying the last remaining matters in the onsite review report of 2018, we are now satisfied that IFTC is solvent and that there is no more pending issues as identified in the abovementioned report." That letter of VFSC to Mr Hurley Lawyers dated 24 October 2024 was attached to Exhibit D1 and "TG1".

33. The FIU by its letter dated 29 October 2024 to Hurley Lawyers advised that its decision to cancel the IFTC's conditional registration was maintained and IFTC would need to resubmit its application for registration (Exhibit C1 and paragraph 22 of Exhibit C4 and DA – 1, p. 45).
34. IFTC resubmitted its application under the Act on 31 October 2024 (paragraph 23 of the Exhibit C4 and DA – 1, pp. 46 – 47).
35. By e-mail exchange on 18 November 2024 between Mr Proud on IFTC's behalf and Mr Bani on FIU's behalf, Mr Proud asked:

(a) *"Is FIU review of IFTC registration as a Reporting Entity nearing completion?"*

(b) *"What is the regular time taken by FIU to review Reporting Entity submissions?"*

36. In response, Mr Bani stated: *"Thank you for your email. We will respond to your email soon."* (Exhibit C3).
37. There is no evidence of any subsequent response from the FIU to advise IFTC as to when its resubmitted application under the Act would be determined.
38. By the FIU's letter dated 28 October 2024 to IFTC's bank, it informed BSP, among other things:

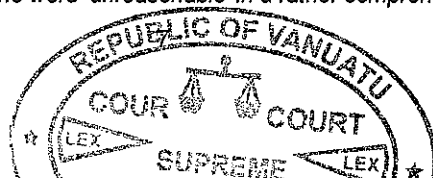
(a) *"IFTC continues to have issues with the audit of its trust funds thus not fully complying to its obligations under Part 3 of the CTSP Act, therefore, the FIU was unable to complete its registration and issue a complete registration confirmation"; and*

(b) *"the FIU may resume its registration process with IFTC if IFTC is deemed compliant to the CTSP Act and if it fully rectifies its outstanding issues with the regulator, the Vanuatu Financial Services Commission ("VFSC")."*

D. Legal Principles

39. It is well settled that Courts will intervene to quash decisions made by public authorities if they exercise their statutory powers unreasonably. In the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947 EWCA Civ 1; [1948] 1 KB 223 at 229 (*Wednesbury*)], 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'. [Emphasis added].

40. Wednesbury principles are a part of Vanuatu's jurisprudence (see for example, *Vohor v President of the Republic of Vanuatu* [2015] VUCA 40 at [31]; *Sandy v Vanuatu Rowing Association (Inc.)* VUCA 48 at [16] and [25].
41. In *Sharp v Wakefield* [1891] AC 179 at 180, Lord Halsbury LC observed that a discretionary power conferred by statute is intended to be exercised "*according to the rules of reason and justice, not according to private opinion; according to law, and not humour ... (and) not arbitrary, vague, and fanciful, but legal and regular*".
42. In addition, there have been developments in other common law jurisdictions about the principles of legal unreasonableness. Mr Hurley referred the Court to the article by Michael Barber (former Federal Court of Australia judge) and his associate, Alice Nagel, in their paper "*Legal Unreasonableness: Life after Lr*" [2015] AI Admin Law F1; (2025) 79 AIAL Forum 1, which helpfully set out those developments. What follow is a summary of these developments in the referred article –

United Kingdom

43. In England and Wales in *R v Department of Education and Employment; Ex parte Begbie* Laws LJ stated that the principle of variegated unreasonableness review is closely intertwined with other developments in the United Kingdom, such as the doctrine of substantive legitimate expectation. At their roots, each of these concepts is directed towards limiting 'abuse of power'; [2000] 1 WLR115 at [78].

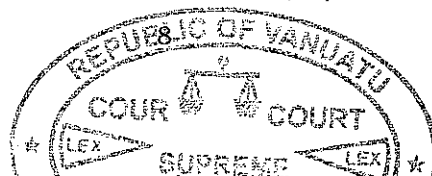
New Zealand

44. Since the 1990s, the New Zealand courts have followed the United Kingdom and recognised a standard of legal unreasonableness. In *Wolf v Minister of Immigration* [2004] NZ AR414; [2004] NZHC7, Wild J stated:

"The stringent level at which the Wednesbury test was pitched recognised fundamentally, judicial review is a check on the decision-making process, not upon the merits of the decision."

45. Then at [47] Wild J stated:

"Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the



decision: upon who made it; by what process; what the decision involves (i.e. its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences, for them. This is a rather long-winded way saying, as Lord Steyn so succinctly did in Daly:

"In administrative law context is everything."

46. Wild J quashed the Minister's decision to deport Mr Wild because, although he did not find the Tribunal's decision (during which the Minister's decision was sought to be quashed) was perverse, irrational or unreasonable in the *Wednesbury* sense, the decision could not survive when assessed upon the lower standard of reasonableness – or higher level of judicial scrutiny – which is his Lordship considered was appropriate in that case (Ibid [72]).

Australia

47. The High Court of Australia in *Minister for Immigration and Citizenship v Li* [2013] HA 18; 2013) 249 CLR 332 (Li) quashed the Minister's decision to refuse Ms Li's visa application. Ms Li sought a merits review before the Migration Review Tribunal. Ms Li's agent asked the Tribunal not to make any decision until the assessment authority had reconsidered its assessment because she had obtained further work experience. The Tribunal refused her adjournment request.

48. All members of the High Court held that the refusal to grant Ms Li's adjournment request in these circumstances was arbitrary and unreasonable. In reaching this conclusion, the Court revisited the test of legal unreasonableness and held that Lord Greene MR's statement of principle in *Wednesbury* does not exhaustively cover the errors in decision making that will give rise to a finding of legal unreasonableness in Australia.

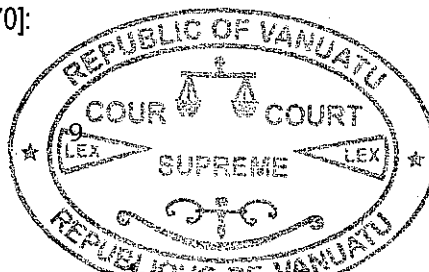
49. French CJ said in *Li* at [28]:

"After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense." [Emphasis added]

50. And at [30] French CJ stated:

"Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut [83], may be characterized as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves."

51. Hayne, Kiefel and Bell JJ stated at [70]:

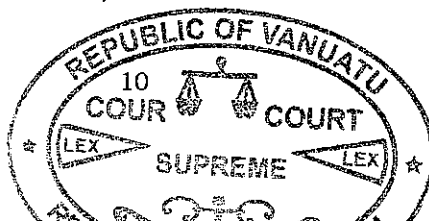


"Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification." [Emphasis added]

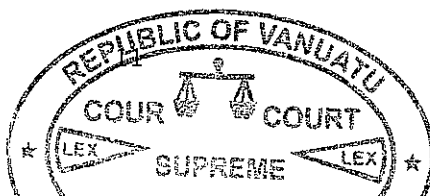
52. After the judgment in *Li*, legal unreasonableness has been successfully invoked on numerous occasions in Australia. See for example *Minister for Immigration and Others v Singh* [2014] FCAFC1; *S2RHL v Minister for Immigration and Citizenship* [2013] FCA 1093; and *SZSNW v Minister for Immigration and Others* [2014 FC CA 134].

E. Mr Garae's and the Defendants' evidence

53. By the FIU's letter to IFTC dated 13 March 2019, it had approved IFTC's application under section 9(4) of the Act, subject only to the outstanding issue of regulatory compliance (it is common ground that IFTC satisfied the second, third and fourth bullet points in that letter). Although the FIU had requested in that letter the provision of information, including, regulatory compliance by 27 March 2019, the FIU did not say that if the information was not provided by that date the conditional registration would lapse. Instead, in the final paragraph of that letter, it stated: "***This conditional registration remains valid until the above or any outstanding information is satisfactorily submitted.***" [Emphasis added].
54. It is common ground that until the FIU made its decision dated 18 October 2024 (the subject of the first quashing order IFTC seeks), the conditional registration remained in force, pending IFTC's resolution of two outstanding issues with the VFSC so that regulatory compliance was fulfilled.
55. The evidence is that because of a dispute between IFTC and VFSC about resolution of those two outstanding issues, IFTC commenced Judicial Review Case No. 31 of 2024.
56. IFTC kept the FIU informed of the progress of that Judicial Review Case and told it that it was listed for hearing on 30 October 2024. IFTC's lawyers wrote to the VFSC on 17 September 2024 (Exh. C1 and Exh. C4, DA-1, pp. 37 – 38), including, to inform it that it was hopeful that all issues VFSC has concerning IFTC will be resolved without the need for the hearing on 30 October 2024 and that they will let the FIU know if that occurs.
57. There was a meeting held between IFTC's representatives and its lawyer with Mr Kuatpen and members of the FIU on 25 September 2024 during which the matters were discussed as disposed Mr Agius at paragraph 17 of Exh. C4 (set out at paragraph 29 above).
58. Then, without any prior warning, the FIU sent a letter to IFTC dated 18 October 2024 advising it that due to outstanding issues with the VFSC it had cancelled IFTC's conditional registration under the Act.
59. Having regard to the above facts and legal principles, with respect to Mr Garae's and the Defendants' evidence, I find and accept that their evidence is unsatisfactory in numerous respects as follow:



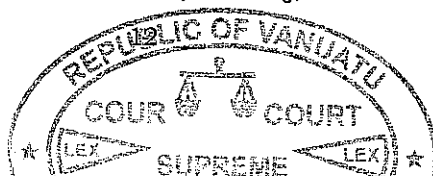
- a) during cross-examination, Mr Garae said that the FIU took into account the matters set out in IFTC's lawyers' letter to the FIU dated 16 September 2024 (Exh. C1) and that it was relevant material before the FIU made its cancellation decision on 18 October 2024. Mr Garae said that he discussed that letter with Mr Kuatpen and other FIU officers. But it is found and accepted that having regard to the contents of that letter it was unreasonable for the FIU to cancel the conditional registration by its letter dated 18 October 2024 without seeking an update from IFTC as to how it was progressing with resolving its outstanding issues with the VFSC that the FIU had been informed were listed for hearing on 30 October 2024;
- b) Mr Garae was unable to give any satisfactory response as to why IFTC's lawyers' letter to the FIU dated 16 September 2024 (Exh. C1) was not included in his sworn statement (Exh. D1). Paragraph 22 of Exh. D1 fails to recognise the relevance of that correspondence;
- c) during cross-examination, Mr Garae also said (even though he was overseas at that time), he had discussed with Mr Kuatpen and other FIU officers the meeting with IFTC's representatives and its lawyer on 25 September 2024. Having regard to the matters discussed during that meeting (as deposed by Mr Agius), it underlines the unreasonableness of the FIU's decision to cancel the conditional registration by its letter dated 18 October 2024;
- d) despite the numerous opportunities given to Mr Garae during cross-examination to explain why there was an imperative to cancel IFTC's conditional registration having regard to the information conveyed to the FIU (in Exh. C1 and during the meeting on 25 September 2024), Mr Garae's answers were unresponsive. Instead, he was prone to speechmaking and asserted that a deadline had been given to IFTC to satisfy the outstanding regulatory issues with the VFSC prior to 16 September 2024. However, he was unable to point to any evidence of such deadline having been given to IFTC;
- e) Mr Garae's attempts to blame iProperty Limited flies in the face of the contents of the FIU's letter dated 18 October 2024. That letter does not refer to iProperty. Instead, that letter refers to "IFTC continues to have issues with the audit of its trust funds thus not fully complying to its obligations under Part 3 of the CTSP Act..." That letter also stated: "...IFTC's conditional registration is now cancelled and is no longer a conditionally registered reporting entity. The decision remains valid until the above-mentioned issues are sorted out with the relevant regulatory agency." By that statement, it is found and accepted that the FIU gave IFTC the legitimate expectation that if it resolved outstanding issues with the VFSC,



the FIU would be prepared to reverse its decision to cancel IFTC's conditional registration;

- f) even though IFTC produced evidence to the FIU 7 days later by its correspondence dated 25 October 2024, including attaching the VFSC's letter dated 24 October 2024 (Exh. C2) that it had resolved the outstanding issues with the VFSC, the FIU was not prepared to reverse its decision to cancel IFTC's conditional registration. Mr Garae asserted that by IFTC's lawyers' correspondence dated 25 October 2024 they were trying to "bypass" the process under s.9(4) of the Act. But, it is an accepted fact that any objective reading of that correspondence shows that assertion is incorrect. That correspondence showed that the two outstanding issues with the VFSC had been resolved. Any fair-minded and reasonable decision-maker should have then reversed its decision. IFTC had done everything that the FIU had requested but the FIU refused to reverse its cancellation decision – that was unreasonable;
- g) the effect of Mr Garae's evidence is that the FIU was not prepared to reverse its cancellation decision because by 25 October 2024, Mr Garae said that IFTC had to comply with the matters in section 9(4) of the Act. However, the FIU's letter dated 13 March 2019 shows that IFTC had complied with s.9(4) and was given conditional registration, subject to satisfaction of the four bullet points in that letter. By 25 October 2024 the irrefutable evidence is that IFTC had complied with all three criteria in s. 9(4). The only outstanding matter arising from FIU's letter dated 13 March 2019 (being "regulatory compliance") had been satisfied by IFTC. In these circumstances, it was an arbitrary and capricious exercise of power for FIU to refuse to reverse its cancellation decision. Also, paragraph 39 of Exh. D1 where Mr Garae deposes that IFTC has never rectified the deficiencies and committed to compliance is incorrect, and contrary to the evidence;
- h) on the facts as accepted so far, the following statements in FIU's correspondence to IFTC's bank, BSP, dated 28 October 2024 that:
 - i. "IFTC continues to have issues with the audit of its trust funds thus not fully complying to its obligations under Part 3 of the CTSPA Act, therefore, the FIU was unable to complete its registration and issue a complete registration confirmation"; and
 - ii. "The FIU may resume its registration process with IFTC if IFTC is deemed compliant to the CTSP Act and if it fully rectifies its outstanding issues with the regulator, the Vanuatu Financial Service Commission ("VFSC")."

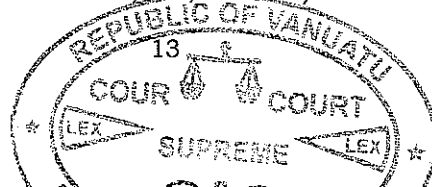
were false and misleading as at 28 October 2024 because the FIU had received Exh. C2 on 25 October 2024, including, the VFSC's letter dated



24 October 2024. Therefore, he FIU must have been known at the time of writing its letter to BSP dated 28 October 2024 that the VFSC was satisfied with IFTC's solvency and that there were no more pending issues with the VFSC. In those circumstances, it was irresponsible and an example of the FIU's bad faith towards IFTC to write in such false and misleading terms to BSP. Nothing that Mr Garae said during cross-examination nor in re-examination alters those facts. The threat by BSP to cancel IFTC's banking facilities as a result of the FIU's correspondence was highly detrimental to IFTC and its clients and necessitated IFTC applying for and obtaining urgent interim relief by Orders dated 5 November 2024;

- i) Mr Garae was aware of Mr Bani's email exchange with Mr Proud on 18 November 2024 (Exh. C3) – he was copied into that email exchange. However, during cross-examination, Mr Garae said that a decision was made by the FIU and after speaking with its lawyers at the Office of the Attorney General soon after the Claim was served that IFTC's resubmitted application for registration as a reporting entity under s. 9(4) of the Act would not be considered, pending a determination of this proceeding. Not only is there no impediment by reason of this proceeding for the FIU to determine that resubmitted application expeditiously, but there is no evidence that the FIU's decision to defer determination of that application has been communicated to IFTC (prior to Mr Garae giving evidence on 28 January 2025). Viewed in that context, Mr Bani's email to Mr Proud was misleading, and it is another example of the FIU's bad faith dealing with IFTC; and
- j) The FIU's then Acting Director, Mr Kuatpen, who signed each of the FIU's letters to IFTC dated 18 October 2024, 29 October 2024 and the letter to BSP dated 28 October 2024 (the subject of the quashing orders IFTC seeks), did not file a sworn statement in this proceeding. The Court is entitled to draw the inference and here, it infers that the uncalled evidence from Mr Kuatpen would not have assisted FIU's case. The case of *Barrett & Sinclair v McCoumack* [1999] VUCA 11 was relevant on this point and supports this proposition where the Court of Appeal stated:

"The unexplained failure by a party to give evidence or to call witnesses may, although not necessarily must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure may also be taken into account in deciding whether to accept any particular evidence that relates to a matter on which the absent witness could have spoken, and entitles the trier of fact the more readily to draw any inference fairly to be drawn from other evidence that could have been explained had the opposing party chosen to do so by calling the absent witness. However, this principle cannot be employed to fill gaps in the evidence (*Jones v Dunkel* [1959] HCA8; (1959) 101 CLR 298 at 308, 312, 320 – 21). In *Fabre v Arenales*



(1992) 27 NSWL 437 at 449 Mahoney JA, with whom the other members of the Court of Appeal of New South Wales agreed, observed:

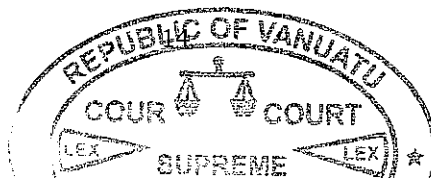
"The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so"

In our opinion the evidence in this case justifies the inference that the appellants chose not to call Mr Barrett and other employees of the appellants because to do so would have been detrimental to their case. Indeed, it is difficult to conceive of any other reason for the failure to call these witnesses."

F. The reasons why the relief sought by the IFTC should be granted

60. Based on Wednesbury principles, having regard to the contents of Exh. C1 and the matters conveyed by IFTC to the FIU during the meeting on 25 September 2024, it is a finding and an accepted fact that the FIU did not take into account those matters (even though Mr Garae said that the FIU did) or it failed to give proper weight to those matters before making the decision set out in the FIU's letter to IFTC dated 18 October 2024 to cancel IFTC's conditional registration under the Act.
61. IFTC's conditional registration had been in force since 13 March 2019. Throughout the course of numerous communications in the subsequent period, the FIU had given IFTC the legitimate expectation that it would grant IFTC final (or unconditional) registration if IFTC satisfied the VFSC of the regulatory requirements under the CTSP Act.
62. IFTC informed FIU about the status of negotiations with the VFSC on 17 September 2024 to resolve those matters, and about the Court hearing listed on 30 October 2024.
63. In these circumstances, there was no imperative for the FIU to make its cancellation of conditional registration decision on 18 October 2024.
64. Looking at the legal unreasonableness principles that have been applied post-Wednesbury in the United Kingdom, New Zealand and Australia, I accept the IFTC submission that they should also be applied in Vanuatu. As the Court of Appeal stated in *Swanson v Public Prosecutor* [1998] VUCA9:

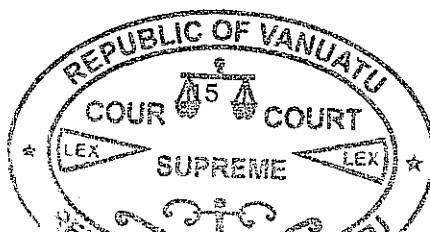
"Vanuatu as a common law country which has the benefit of drawing on the wisdom and jurisprudence from a whole range of common law countries in the search for precedent appropriate to Vanuatu conditions. The common law is constantly developing and any suggestion that it ossified as at the date of independence must be rejected." The *Swanson* case was applied by the Court of Appeal in *Kramer Ausenco (Vanuatu) Ltd v Tidewater Holdings Ltd* [2023] VUCA 13 at [35].



65. The Defence counsel submissions seemed to focus on the existence of the powers of the Director of FIU under the Act (s.9(4)) and the exercise of such powers under the Act in the fulfilment of his functions under the Act and as such, the exercise of the powers by the Director under the Act including the Decisions under challenge in this case were lawful. But, a power under the Act cannot be exercised in a vacuum. The conclusion is that the FIU has done so in this case. The FIU lost sight of the legislative purpose of the powers vested in it to ensure that reporting entities are entered on the register when they meet the criteria under s.9(4) of the Act. By 25 October 2024, the FIU had been informed that IFTC had met all those criteria (especially when read in conjunction with the FIU's letter to IFTC dated 13 March 2019).
66. Put another way, it does not meet the objectives of the powers Parliament had given the FIU for the FIU to make its decision dated 18 October 2024 (given the facts then in its possession) and then to refuse to reverse it by its decision on 28 October 2024 (given the facts then in its possession). They were disproportionate and unreasonable decisions which were not in accordance with the spirit and intent of the FIU's duties under Section 5(2) and the Director's duties under Section 7(2) of the Act.
67. The FIU's decisions under challenge, "*were unreasonable because they lack an evident and intelligible justification*" to serve the purposes of the Act paraphrasing Hayne, Kiefel and Bell JJ at [70] in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332).
68. The FIU's decision to cancel IFTC's conditional registration was a drastic one and should not have been made without giving IFTC a deadline after its receipt of Exh. C1. No such a deadline was given before the FIU's decision dated 18 October 2024 was made, without any prior warning.
69. The consequence for IFTC providing a service or establishing a business relationship with a customer unless it is registered on the register (s.9(2) of the Act) is an offence punishable upon conviction by a fine not exceeding VT125 million.
70. This is not the first time that the Courts have held that the FIU has made unreasonable decision and exceeded its powers under the Act (*Carpenter Motors (Vanuatu) Limited & Anor v F. R. Mera, Director, FIU & Anor*, unreported Decision of Spear J dated 30 June 2023 and Trief J in *Lal v Kuatpen* [2024] VUSC 350). This is another example of the FIU having made decisions that were arbitrary, capricious, done in bad faith, and unreasonable.

G. Conclusion - ORDERS

71. The Court makes the following orders:
- (a) The decision set out in the FIU's letter dated 18 October 2024 to cancel IFTC's conditional registration under the Act, and that decision should be and is quashed;



- (b) The decision set out in the FIU's letter to Hurley Lawyers dated 29 October 2024 requiring IFTC to resubmit its application for registration, that decision was unreasonable because IFTC had satisfied the last two issues of regulatory compliance to fulfil the FIU's requirements as set out in the FIU's letter to IFTC dated 13 October 2019. Therefore, the FIU should have reversed its decision of 18 October 2024 and granted IFTC registration under the Act following its receipt of the VFSC's letter dated 24 October 2024 (Exh. C2). The decision dated 29 October 2024 should be and is quashed; and
- (c) The decision set out in the FIU's correspondence to BSP dated 28 October 2024 should be and is quashed because it contained false and misleading information having regard to the contents of Exh. C2; received by the FIU on 25 October 2024. IFTC had not seen that correspondence until Mr Garae filed his sworn statement (Exh. D1).
- (d) Costs follow the event. The Applicants/Claimants are entitled to costs against the Respondents/Defendants as agreed or assessed by the Master.

DATED at Port Vila, this 4th day of April, 2025.

BY THE COURT

Hon. Chief Justice Vincent Lunabe

