IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.4 OF 2012

BETWEEN: **TERRA HOLDINGS LIMITED** of Port-Vila
Appellant

AND: **BARAK SOPE**
First Respondent

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

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear

Counsel: *Mr. Nigel Morrison for the Appellant*
Mr. John Malcolm for the First Respondent
Mr. Justin Ngwele for the Second Respondent

Date of hearing: *13th July 2012*
Date of judgment: *19th July 2012*

JUDGMENT

1. This matter came before the Court of Appeal in April 2012 as an appeal by Terra Holdings Limited (Terra Holdings) against an interim injunction granted in the Supreme Court in favour of the First Respondent Barak Sope (Mr Sope) restraining Terra Holdings from developing, reclaiming, building or in any way at all adversely affecting the customary sand, land, beach and water outside, opposite and adjacent to lease 11/OF12/003, and restraining the Second Respondent, the Republic of Vanuatu (the Republic) from issuing a lease over that customary land without the consent of the custom owners.

2. The underlying issue is a grant of approval to Terra Holdings by the Minister of Internal Affairs under the Foreshore Development Act [CAP.90] to carry out a development that includes reclaiming seabed and excavating a channel in part of Kawenu Cove, Fatumaru Bay, Port-Vila. Mr Sope, claiming as a custom owner and representative of other custom owners of seabed to be affected by the proposed development, contends

that the Minister's grant of approval is unlawful as the custom owners had not been consulted and did not consent to the development. He contends that the constitutional rights of the custom owners have been contravened, and if the Foreshore Development Act authorises approval without their consent the Act is constitutionally invalid.

3. The Judge below was satisfied that the alleged unlawfulness of the grant of approval gave rise to a serious question to be tried. Hence the injunction.

4. It seemed to the Court in April 2012 that the important constitutional question raised by Mr Sope would not be resolved by the Appeal if the Court was confined to considering whether the Supreme Court had correctly exercised its discretion to grant the holding injunction pending trial. Accordingly the Court of Appeal stood over the appeal to the present session to enable the Supreme Court to reserve a question of law for consideration of the Court of Appeal, the answer to which would require the determination of the constitutional issue. This has occurred. Pursuant to section 31(5) of the Judicial Services and Courts Act [CAP.270] the Supreme Court has reserved the following question of law for consideration of the Court of Appeal:
On the facts deposed to in the affidavits of Barak Sope sworn on 15 December 2011, of Aku Dinh sworn on 17 January 2012 and of Paul Gambetta sworn on 26 April 2012, did the grant of approval made by the Minister on 1 December 2011 constitute lawful authority for the First Defendant (Terra Holdings) to carry out the proposed development?

5. It is necessary to say more about the factual background of the case. In his affidavit Mr Sope deposed that he brought the proceedings on behalf of his family, a custom owner of land known as Kawenu, and on behalf of six other identified custom land owner families of Kawenu and joining lands. He said that he and his family had given the land known as Kawenu to the Government at Independence for a school, sporting field and public beach without payment or demand. On a plan he identified this land as now included in the Municipality of Port-Vila. The land covers the Malapoa College and extends, in the seaward direction, to include the Malapoa Point road running very near the water line of Kawenu Cove. On the seaward side of that road is a narrow strip of municipal public land between the road and the mean high water mark, and below the mean high water mark is a further strip of municipal public land situated between the mean high and mean low water marks. The beach to which Mr Sope refers is within this latter strip of land. Mr Sope says that the beach is the only public beach available in the whole of the bay of Port-Vila, and it is used for recreation and religious ceremonies as was intended in the gift of the land to the State.

6. The affidavits of Mr Sope and Mr Dinh establish that on 17 February 2011 the Republic as lessor granted to Joshua Tafura Kalsakau as lessee lease 11/OF12/003 over the strip of municipal public land between the road and the mean high water mark

for VT1,175,000. This lease was transferred on 2 August 2011 to Terra Holdings as lessee for VT10,000,000.

7. On 27 September 2011 Terra Holdings made application to the Minister of Internal Affairs under the Foreshore Development Act for reclamation of land beyond the boundary of title 11/OF12/003 and for excavation of Kawenu Cove (the proposed development). That application was granted by the Minister on 1 December 2011. The application for approval was supported by an Environment Impact Assessment (EIA) that further describes the proposed development as including the reclamation of an area of approximately 12500 square metres of seabed by land fill contained within a rock armour wall. The area of land to be reclaimed includes the strip of public land between the high and low water marks, being the land in lease 11/OF12/003. This land extends along the coast for more than 200 metres. The area to be reclaimed also extends beyond the low water mark outwards over the seabed for about 50 metres. The EIA does not specify what further development is proposed on the reclaimed land. The EIA says only that the proposal is to "reclaim the coastal area... for future commercial development. This EIA report is prepared solely for the proposed coastal reclamation and any plans for future development on the reclaimed land will be subject to a separate EIA."

8. Mr Sope alleges that the seabed and water below the low water mark boundary of the public land is, pursuant to Article 73 of the Constitution, custom land of the owners he represents. Mr Sope's affidavit does not give information about any particular exercise of customary ownership rights by the custom owners save that he asserts that without the consent of the custom owners Terra Holdings is not entitled to carry out the proposed development on the area in issue and that the Republic is not authorised to agree to it. He asserts that the proposed development would constitute a trespass on the land of the custom owners.

9. Evidence that the general area is a resource used for traditional customary practices is to be found within the EIA. At paragraph 4.7.5 the EIA states:
"4.7.5 Fisheries resources

Fisheries in general are and have always been a main-stay and life-blood for the Vanuatu society and economy. As mentioned above the marine resources of Port Vila itself are still heavily exploited for subsistence fishing and gathering by members of the local community. Species targeted include all edible fish (e.g. grouper family, parrot fish, surgeon fish, rabbit fish and trevally), octopus, lobster and various shellfish. Seasonally (summer months) when in abundance, inshore pelagic species including sardines and mackerels (Selar spp.) are also caught as valuable food fish.

Methods used include fine-mesh nylon set-nets, spearfishing on snorkel — including at night, line-fishing from the shore and from canoes and small vessels, and reef-gleaning — mainly by women — at low tide.

Such fishing has been undertaken as a core traditional activity by ni-Vanuatu

throughout history, and was observed during the EIA site visits. Areas targeted by the villagers include Malapoa Reef that separates Port Vila Bay and Fatumaru Bay, and the fringing reef along Malapoa Point on the north-west coast of the Harbour."

10. Mr Sope's submission assumes that the present title and ownership boundaries will remain in the same positions notwithstanding that the proposed reclamation will move the high and low water marks to the seaward edge of the development. This assumption is correct. Where the water mark slowly and gradually changes through naturally occurring accretion or erosion of sand the boundary will in law continue to run to the relevant water mark even though the actual area of land within the title may increase or decrease. However, where the water mark is altered by artificial means, as would occur here, the boundary does not change. The artificial structure or development which changes the water mark is considered to be an improvement situated on the land within the original boundaries. This doctrine applies equally to State land as to land owned by individuals: **Halsburry's Laws of England**, 4th Ed., Vol.49, para 298.
11. The legal position was clearly stated by the Privy Council in **Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Ltd** [1915] A.C. 599 at 615:
"Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible... becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before..."

12. In **Willie v. Sarginson** [2000] VUSC 20 the Chief Justice held that the doctrine so far as it related to natural accretion and erosion of the coastline applied to a coastal lease registered under the Land Leases Act [CAP.163].

13. In this case if the development were to occur the reclaimed land would be land above the high water mark. The reclamation of the strips of land presently comprising lease 11/OF12/003 and the public land within the municipality would be improvements thereon for the purpose of the Land Leases Act [CAP.163] as that Act defines "improvement" to include the reclaiming of land from the sea. Likewise the reclaimed land beyond the strip of public land would be an improvement on the custom land.

14. Mr Dinh in his affidavit does not adduce any evidence disputing custom ownership by those on whose behalf the proceedings have been brought. Rather, he says "I am not aware of any law that gives custom owners the right to own seabed or anything below mean high water mark or land below mean high water mark".

15. Mr Sope in his affidavit and pleadings alleges that Terra Holdings failed to advertise the application for reclamation in accordance with the Foreshore Development Act; that there had been no proper consultation with the custom owners; that the Minister

failed to properly consider the application or representations made; and that the Minister failed to consider the wishes of the custom owners. These assertions, if correct, could support an application for judicial review of the Minister's decision.

16. The allegation of lack of consultation gains a measure of support within the EIA which states:

"2.4 Consultation with stakeholders

As part of the consultations and the urgency for the legal process to formalize the requirements for approval, the consultant consulted mainly the lessee and land owner of land title 11/0F121003 and the developer of the proposed area. The consultant was not able to conduct a wider public consultation as required by the Environmental Management and Conservation Act due to reasons beyond the control of the consultant The landowner and the lessee of land title 11/0F121003 has put pressure on the consultant to complete the EIA report within a very limited timeframe as in his view he has the right to decide what he wants to do with his land. The lessee has assisted in consultations by talking to the Shefa Provincial Council (Annex 4) and the Ifira Trust (Annex 5), with whom he has very close association and who have been given letters of support for the project.

Public consultation was not undertaken as part of the EIA process to determine public or community attitudes to the proposed reclamation due to pressure beyond the control of the consultant."

17. On the other hand, the affidavits disclose that a substantial petition in opposition to the proposed development was presented to the Minister and that Mr Sope's opposition to the application for foreshore development was made known both to the directors of Terra Holdings and to the Republic. The allegation of inadequate advertisement and consultation are open to question. Perhaps for that reason counsel for Mr Sope has asked the Court to put aside these allegations for the purposes of considering the question of law reserved for consideration. We note however, that the Amended Statement of Claim does seek review of the Minister's decision on grounds that include inadequate consultation and that claim will remain an issue for the Supreme Court if our answer to the reserved question does not decide that the grant of approval is invalid.

18. Counsel for Mr Sope asks the Court to consider the reserved question on a more fundamental and undisputed fact that custom owners of customary land beyond the low water mark did not consent to it, and to find that this was a contravention of the constitutional rights of the custom owners.

19. The contentions of Terra Holdings join issue on this fundamental question and identify the critical issue between them. Terra Holdings contends that the Foreshore Development Act makes no provisions for the involvement of persons who claim to be custom owners of the foreshore in the approval process. On the contrary, the Act empowers the Minister to authorise foreshore development regardless of the views,

interests and opposition of custom owners and the allegation of potential trespass is misconceived at law as the development would be authorised by the Ministerial approval.

20. The essential question is whether the Minster's approval for foreshore development on custom land can be validly given in the absence of the consent of the custom owners.

21. Before turning to that question we deal with the issue of the standing of Mr Sope to bring these proceedings. In its Amended Defence Terra Holdings denies that Mr Sope is a recognised custom owner of the area in issue, or is an authorised representative of persons who are recognised as custom owners of that area. It is sufficient for the maintenance of the proceedings that Mr Sope is representing at least one custom owner of the area in issue. The undisputed fact that Mr Sope's family gave the land in issue, down to the low water mark, is powerful evidence of his family's interest as a custom owner. On the present state of the evidence this seems beyond question and we propose to consider the question which has been reserved notwithstanding the denial of this fact.

22. If there really is a factual dispute about the standing of Mr Sope it will have to be dealt with by the Supreme Court when the matter is returned with the reasons of this Court on the reserved question. Should it be established that no one within Mr Sope's family and the several other families he represents include a custom owner, the court has power to substitute another person who is a representative of a recognised custom owner to continue the proceeding and overcome what is in substance a technical procedural defect. Moreover, the present proceedings are in the nature of public interest litigation brought to preserve the beach facility for the use of the community. A member of the donor's family should have standing to bring the proceedings quite apart from any interest as a custom owner.

23. In this case the proposed foreshore development runs seaward from public land. The same issue will arise in cases of foreshore developments proposed on the seaward boundary of leasehold land if the custom owners, represented by the lessor, do not give consent. It is an important question.

24. The provisions of the Constitution relied on by Mr Sope are the fundamental rights protection in Article 5(1) and in the land provisions in Chapter 12, and in particular Article 73, 74 and 80.

25. Article 5(1)(j) relevantly provides that all persons are entitled to "protection for the privacy of the home and other property and from unjust deprivation of property". Under Article 73 "All land in the Republic... belongs to the indigenous custom owners..." Rights attaching to land belonging to custom owners are property rights which attract protection under Article 5(1)(j). However, two other matters require discussion. First whether the rights asserted by Mr Sope beyond the low water mark are rights in

respect of 'land' vested in the custom owners under Article 73. Secondly, the protection of fundamental rights afforded under Article 5(1) is not absolute. The rights are qualified by the opening words of Article 5(1). The protection is 'subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health'. Perhaps not in this case, but in others concerning foreshore development, issues of public interest might exist which the Minister must weigh against the rights of individual custom owners. The first issue is discussed at this point, and the second issue later in these reasons.

26. Articles 73, 74 and 80 provide:

*"**LAND BELONGS TO INDIGENOUS CUSTOM OWNERS***

73. All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

BASIS OF OWNERSHIP SHIP AND USE

74. The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu."

*"**GOVERNMENT MAY OWN LAND***

80. Notwithstanding Articles 73 and 74 the Government may own land acquired by it in the public interest."

27. Counsel for the Republic poses for consideration the question, "what is land" within the meaning of Article 73. The question contemplates as one possibility that land means only dry land above the water line, and not land sub-adjacent to the sea.

28. The Court has been referred to many definitions of "land" in the legislation of Vanuatu, including the following:

Land Reform Act [CAP.123]

"land" includes improvements thereon or affixed thereto and land under water including land extending to the seaside of any offshore reef but no further.

Land Leases Act [CAP.163]

"land" includes land above the mean high water mark, all things growing on land and buildings and other things permanently affixed to land but does not include any minerals (including oils and gases) or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working.

Land Acquisition Act [CAP.215]

"land" includes any estate, any interest in or benefit to land, all things growing on land, houses, buildings, improvements and all other things on land, land beneath water, the seabed extending to the sea side of any offshore reef but no further and the subsoil thereof.

Foreshore Development Act [CAP.90]

"Foreshore" is defined to mean the land below mean high water mark and the bed of the sea within the territorial waters of Vanuatu (including the ports and harbours thereof) and includes land below mean high water mark in any lagoon having direct access to the open sea.

Environmental Management and Conservation Act [CAP.283]

"land" includes land covered by water.

Customary Land Tribunal Act [CAP.271]

"This Act extends to the waters within the outer edge of any reef adjacent to customary land."

These definitions, no doubt developed to serve the subject matter of the Acts in which they appear, show the flexibility of meaning which "land" can convey. Several of the above definitions extend to land under water and to the seabed, and show Parliament's understanding that "land" is not confined to dry land above water. However Parliament's understanding expressed in legislation cannot dictate the meaning of "land" in the Constitution which is the primary source governing Parliament's legislative power.

29. The meaning and scope of the expression "land" in the Constitution must be ascertained from sources outside of legislation passed by Parliament, and from the interpretation of the Constitution read as a whole.

30. The Constitution nowhere uses the expression "sea", "seabed", "land under water" or words with similar meanings. Article 16(1) of the Constitution simply empowers Parliament to "make laws for the peace, order and good government of Vanuatu".

31. In construing a constitutional document, the Court is entitled to draw on the historical setting and circumstances in which the Constitution came into being. In this case the setting includes the time honoured customary practices under which the custom owners of seaside land exercised rights of control over access to waters adjoining their land and to harvesting of the produce of the sea. If the expression "land" in Articles 73 and 74 did not extend to land beneath the sea, the Constitution would not acknowledge the historic rights of custom owners and would have inexplicably limited the power of Parliament to make laws about custom ownership in respect of land beyond the foreshore.

32. By 1980 when the Constitution was proclaimed, international law applying to the new nation of Vanuatu, and all nations of the world, was well developed in relation to the law of the sea. Rules thought at one time to confine the territorial limits of a nation to

land above the low water mark had been overtaken by international treaties and practice among nations acknowledging that the territorial boundaries of coastal and island States included territorial seas.

33. For a broad discussion of the historical development of international law on territorial seas, see **New South Wales v. The Commonwealth (the Seas and Submerged Land Case)** [1975] 135 CLR 337; 50 ALJR 218. **The Convention on the Territorial Seas and Contiguous Zone, 1958** sometimes referred to as one of the Geneva Conventions, had come into force on 10 September 1964. Article 1 of Section 1 of the Convention declared that the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast described as the territorial sea. The sovereignty extended to the air space above it as well as to its bed and subsoil (Article 2). The limits of territorial sea were dealt with in s.11 of Part I.

34. There is no need for the purposes of this case to consider how far offshore the territorial sea could extend at that time, but it should be mentioned that the normal base line for measuring the breadth of the territorial sea was the low water mark along the coast, but in localities where the coast line is deeply indented or there are bays and gulfs a method of straight base line joining appropriate points may be employed from which the territorial sea is measured: (Article 3, 4(1)). Port-Vila, as a bay, under international law would have been part of the internal waters of Vanuatu over which Vanuatu had sovereignty including over the seabed and subsoil.

35. We consider the Constitution should be interpreted so as to encompass Vanuatu's sovereignty over land below water, including below the sea to the territorial limits permitted by international law. So interpreted, the word "land" in the Constitution should be understood to include both inland waters and territorial seas including the seabed.

36. It is the 1958 Convention that stated the international law when Vanuatu was proclaimed. However it should be noted that the **Convention on the Territorial Seas and Contiguous Zone, 1958** and other Geneva Conventions relating to aspects of the sea were replaced by the **United Nations Conventions on the Law of the Sea** done in Geneva on 10 December 1982. That same day the new Convention was signed by Vanuatu. That Convention came into force in 1994 and was formally ratified by Vanuatu in August 1999. The Convention on the Law of Sea confirmed the sovereignty of a coastal State, beyond its land territory and internal waters, to the adjacent territorial sea and that sovereignty extended to the seabed. This Convention also introduced rules extending sovereignty to the archipelagic waters of an archipelagic State like Vanuatu (see: Part IV).

37. While it is the international law that governs the sovereignty of a nation over land beneath the territorial sea, it does not follow that as a matter of municipal or domestic law that these lands are for all purposes in the ownership of the State. Within the sovereign limits of the State, it is for the State to determine how the ownership rights to

land are to be held and managed under domestic law. For example, a State may assign underwater land to individuals or companies for the purposes of mining or the State may licence individuals or companies to harvest the produce of the seabed.

38. In Vanuatu, in so far as land belonging to custom owners includes land beneath the water, Articles 73, 74 and 80 are domestic laws setting rules and regulating the use of these lands. Importantly Articles 73 and 74 vest custom ownership rights to the lands in the custom owners and correspondingly limit the sovereign rights and powers that the State could otherwise exercise over those lands. The protection under Article 5(1)(j) of those individual rights given to custom owners are an important part of the domestic law.

39. Parliament, by enacting in the Law Reform Act the definition of "land" so as to include land under water extending to the sea side of any offshore reef, has recognised that custom ownership rights exist over underwater areas. This is of particular significance as the terms of the Land Reform Act were in a Joint Regulation passed by the New Hebrides Representative Assembly before the Constitution was proclaimed, and are therefore part of the setting against which the Constitution is to be understood. The preamble to the Law Reform Act shows it was enacted for the purpose of implementing Chapter 12 of the Constitution. The case of **Willie v. Sarginson** [2000] VUSC 20 concerned the harvesting of trochas shell on a reef adjacent to the boundary of leased land. The Chief Justice held that the boundary of the custom ownership of the underwater land runs to the offshore reef as provided for in the Land Reform Act.

40. Apart from these acknowledgements that custom land extends to seabed, it was common ground between all parties before this Court that the sea bed beyond the strip of public land included in the proposed development was custom land. The lack of agreement between the parties was as to whether the custom owners included Mr Sope or those he purports to represent. We conclude therefore that "land" within the meaning of Articles 73 and 74 of the Constitution extends to the waters below low water mark and includes seabed.

41. It is necessary now to consider the operation of the Foreshore Development Act and whether the powers exercisable under it do, or may, contravene the protection guaranteed by Article 5(1)(j). Mr Sope's case goes so far as to contend that the powers of the Minister under the Foreshore Development Act undermine the guaranteed protection to such an extent that the Act itself is entirely invalid.

42. The Foreshore Development Act is brief and contains few sections. Section 3 provides that application may be made to the Minister to undertake foreshore "development" as defined in section 1 of the Act. The application has to be advertised in a special edition of the Gazette. The Minister's power in relation to an application is set out in s.4 which reads:

"4. The Minister may, after considering the application and any representation which may have been made to him as a result of the advertisement of the application, grant, refuse, or grant subject to such conditions as he may consider desirable, such application and shall not be required to give any reasons for his decision, which shall be final."

43. Neither section 4 nor any other provision of the Act require consultation with any interested group, nor does it require the consent of any person whose property interests may be affected. The consent of custom owners where custom land is affected is not a requirement for the exercise of the power to grant approval. It has not been suggested in argument that it is possible to imply such a requirement from the provisions of the Act or otherwise. The Act, according to its terms, gives the Minister the power to approve a foreshore development which encroaches onto custom land without the consent of, and even contrary to the wishes of, the custom owners.

44. We consider Mr Sope's submissions that the Foreshore Development Act is in its entirety invalid cannot be sustained. As will appear below, we consider a particular grant of approval, depending on the circumstances of the case, may infringe the protection guaranteed by the Constitution. However, this is not necessarily so. For example if a foreshore development approved by the Minister were to take place only on public land, or if the custom owners of adjoining leasehold land consented, the development would not infringe the custom owners' rights and no constitutional issue would arise. However, in other circumstances, such as those now before the Court, a grant of approval might contravene the constitutional protection. In this event, the Act would remain a valid enactment but the particular exercise of power could be invalidated.

45. We therefore decide the reserved question by considering the circumstances of the particular Ministerial decision under attack. Is this decision of the Minister, made under a valid Act, in the circumstances of this case, invalid because it contravenes a protection guaranteed by Article 5(1)(j)?

46. Whether a particular foreshore development authorised without the consent of the custom owners contravenes the fundamental rights guaranteed by Article 5(1)(j) will involve questions both of law and fact. The question of law concerns the scope of the guaranteed protection. The question of fact involves an assessment of all the circumstances of the particular case, and in situations where the guarantee is not clearly contravened, may involve questions of degree.

47. On the question of law, the protection guaranteed by Article 5(1)(j) is "protection for the privacy of the home and other property and from unjust deprivation of property". As a matter of interpretation the "protection for privacy" attaches both to "the home" and to "other property". The guarantee is for the protection of the privacy of the home and for the protection of the privacy of other property. "*Other property*" could include things

such as personal photographs, computer files, and personal diaries. It is hard to see how in the circumstances of the present case issues of privacy arise, and we shall assume they do not.

48. The second limb of Article 5(1)(j) is protection "*from unjust deprivation of property*". This Court in **Groupe Nairobi (Vanuatu) v. the Government of the Republic of Vanuatu** [2009] VUCA 35 considered that Australian decisions on s.51(xxxi) of the Australian Constitution dealing with the acquisition of property on just terms are unlikely to be of assistance in considering the fundamental protection guaranteed by Article 5(1)(j) which is concerned with the different concept of "*unjust deprivation of property*". In Vanuatu the constitutional protection is more akin to the protection afforded by Article 1 of the **European Convention on Human Rights** which protects the "*peaceful enjoyment of... possessions*". Both the relevant provisions of Article 5 of the Vanuatu Constitution and those of the European Convention on Human Rights have their genesis in the **Universal Declaration of Human Rights**.

49. In Vanuatu the protection is premised on the concept of "*property*". The meaning of "property" is broadly defined in the Schedule 2 of the Interpretation Act [CAP.132] to include:

> *"(a) money, goods, choses in action and land; and*
> *(b) obligations, easements and every description of estate, interest and profit, present or future, arising out of or incident to property as defined in paragraph (a)."*

This definition reflects the ordinary concept in law of property, and we consider the same broad meaning must be applied in the application of Article 5(1)(j).

50. Where a development will take place on custom land without the consent of the custom owners, it is necessary to consider whether the consequent impact of the development on the exercise of their rights and enjoyment as custom owners is materially affected to the extent that it can fairly be said that the authorisation of the development amounted to a deprivation of their property, and, if so, whether that deprivation was unjust.

51. In this case the proposed development extended over a very substantial area of custom land below low water mark; it involved dumping thousand of tonnes of rubble on the seabed; the resulting reclamation would change the physical characteristics of the land from natural seabed and sandy beach to level dry land; the natural marine biodiversity and fisheries resources would be destroyed; and the development would be a permanent feature that could not be reversed. The rights of custom owners to maintain traditional customary practices on and over the seabed would be permanently extinguished. The development would also change the legal character of the land. The foreshore water line would be changed so that land hitherto seabed would now constitute dry "*land*" within the meaning of the Land Leases Act and be

capable of being leased and put to non-traditional commercial use. The proposed excavation to cut the channel through the adjoining reef would also irreversibly extinguish seabed rights.

52. We consider that in the circumstances of this case the proposed development amounts to a deprivation of property of the custom owners, within the meaning of Article 5(1)(j).

53. The question whether the deprivation is "unjust" raises further issues. Both Terra Holdings and the Republic have argued that if there is a deprivation of property within the meaning of Article 5, it is not an unjust deprivation.

54. Counsel for Terra Holdings relies on passages from the judgment of this Court in **Groupe Nairobi (Vanuatu) v. the Government of the Republic of Vanuatu** [2009] VUCA 35. In that decision the Court noted similarities in the concepts between Article 5(1)(j) and Article 1 of the First Protocol to the **European Convention on Human Rights** (ECHR), and observed that Article 1 is in substance a protection against unjust deprivation of property. The Court of Appeal went on to say:
"... we consider the principles developed by the European Court under Article 1 of the First Protocol to the ECHR are instructive. Once a deprivation of property is found to have occurred it is necessary to examine whether the deprivation was lawful, whether it was in the public interest, and whether a reasonable and fair balance was struck between the public interest and individual rights.... Whether the deprivation is lawful turns on whether it has occurred in accordance with the substantive and procedural of requirements of the law."

55. The Court of Appeal set out a lengthy passage from a decision of the European Court which discussed issues relevant to the assessment of public interest, and then continued:
"In our opinion the notion of "unjust deprivation" in Article 5(1)(j) is not confined solely to whether the deprivation occurred in accordance with law, and in that sense was not arbitrary. The notion also incorporates consideration of whether the act which effects the deprivation can be justified in the public interest having regard to the considerations discussed by the European Court."

56. Terra Holdings argued that in this case the alleged deprivation of property was lawful because it was made in accordance with a lawful act, it serves the public interest as it was said to be made in the interest of tourism and was not contrary to principles of international law. The reference to the principles of international law is not relevant in this case. Compliance with those principles is an express requirement under the First Protocol but concerns only cases where property of a non-national has been taken: See "Human Rights, the 1998 Act and the European Convention" Grosz, Beatson and Duffy 2000 at pg. 347.

57. In the present case we have already observed that the Act under which the Minister granted approval is not itself ultra vires the Constitution, and that we are considering the reserved question of law on the assumption that due processes were followed under the Act (although it would remain open for the processes to be attacked at trial if this Court answers the reserved question in favour of Terra Holdings).

58. The question whether the deprivation of property is unjust therefore turns not on those questions but on whether the deprivation can be justified in the public interest, and whether it accords with accepted principles of justice and fair dealing. The formulation of the question in this way accords with the dictionary definition of "unjust" (see Shorter English Oxford Dictionary), a meaning that was applied in **Kempthorne v. Prosser & Co** [1964] NZLR 49 at 52 to decide whether a refusal to supply goods was unjust and therefore unjustifiable. **Kempthorne v. Prosser & Co.** was cited with approval by Chief Justice Vaudin d'Imécourt in **re the Constitution, Timakata v. Attorney-General** [1992] VUSC 9 at [10].

59. The consideration of issues of public interest, justice and fair dealing raise similar issues to those which arise under the proviso to the guarantees of protection under Article 5 of the Constitution which makes those guarantees *"subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health."*

60. The public interest argument in our opinion, lacks substance in this case. At first sight, whatever weight could be attached to the benefit of advancing tourism, that benefit would seem to dwarf against the benefit of maintaining public access to the beach area which was given for the very purpose of allowing community use. Moreover, as was pointed out by counsel in the course of argument, there are numerous other coastline areas in the general vicinity where tourism developments could be promoted. We acknowledge that a degree of latitude must be allowed to the Government to decide what is in the public interest. However, under Article 5 the public interest to be considered must come within the term of the proviso. We do not think tourism in the context of this case could be justified as a public interest in defence, safety, public order, welfare and health.

61. In any event, a deprivation of property of the magnitude in this case, save in extreme situations such as in an urgent defence matter, could not be justified as being in the public interest without the Government first obtaining lawful title to the land from the custom owners through the due processes of the law. This would require the Government to go through the steps of compulsorily acquiring the affected land and paying compensation in accordance with the requirements of the Land Acquisition Act [CAP.215]. That did not occur in this case.

62. For similar reasons the deprivation of property in this case occurred in circumstances which do not accord with accepted principles of justice and fair dealing.

63. In our opinion the grant of approval to Terra Holdings for Foreshore Development purported to authorise an unjust deprivation of property; the custom owners guaranteed protection under Article 5 would be contravened by the development, and the grant of approval is for this reason invalid.

64. The answer to the reserved question must therefore be "no".

65. There remain two matters that were discussed during argument upon which we should comment.

66. The first arises from Terra Holdings assertion that there is a dispute as to who is the true custom owner of the area in issue. Assuming that assertion to be correct, it was suggested that the Minister of Lands (who was not the Minister who granted the Foreshore Development Approval) could grant consent to the development on behalf of the custom owners pursuant to section 8 of the Land Reform Act.

67. Section 8 provides:

> ***"PART 5 – MANAGEMENT OF LAND***
>
> ***8. Minister to have general management and control of certain land***
>
> *(1) The Minister shall have general management and control over all land –*
>
> *(a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or*
>
> *(b) not occupied by an alienator but where ownership is disputed; or*
>
> *(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.*
>
> *(2) Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –*
>
> *(a) consent to a substitution of one alienator for another;*
>
> *(b) conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;*
>
> *(c) take all necessary measures to conserve and protect the land on behalf of the custom owners."*

68. Whilst under s.8(1)(b) the Minister is given general management and control over land where custom ownership is disputed, the Minister must act in accordance with subsection (2). The need for the Minister to consult with custom owners was discussed by this Court in **Turquoise Ltd v. Kalsuak** [2008] VUCA 21.

69. In a case such as this, where the proposed dealing will lead to major changes in the physical and legal characteristics of the land, the Minister has an added responsibility under s.8(2)(c) to take <u>all</u> necessary measures to conserve and protect the land on behalf of the custom owners. The Minister's paramount legal duty must be to respect

the requirements of Article 73 of the Constitution and to conserve and protect the land both for the custom owners and for their descendants, whoever they may turn out to be when the dispute is resolved. To consent to radical change to the character of a custom land without the consent of every disputant could hardly be said to be consistent with the obligation to preserve and protect the land.

70. The second matter concerns the transfer of ownership of the former public land now forming lease 11/OF12/003 first to Joshua Tafura Kalsakau and then to Terra Holdings.

71. This Court sought information from the Minister, through the Republic's counsel, about the basis of his opinion to approve the transfers in case this information might better inform the Court on the public interest consideration we have previously discussed. We are grateful to counsel for the information which was supplied, but unfortunately it did not add to our understanding of the public interest question.

72. In summary, we consider that the answer "no" should be given to the question of law reserved for the consideration of this Court.

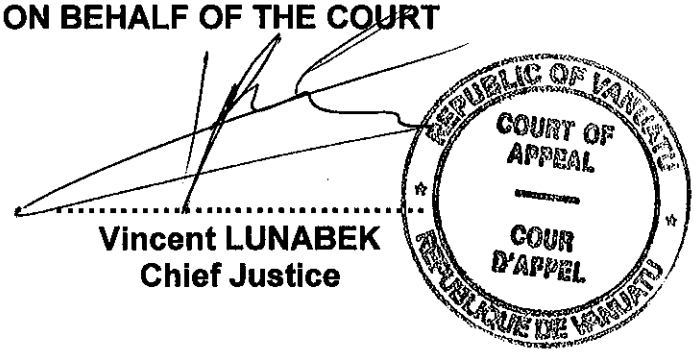
73. As to the appeal against the interlocutory injunction, we consider the injunction should remain in place until the matter is finally disposed of by the trial judge. The trial judge must act in accordance with this Court's answer to the reserved question, and it can be anticipated that the answer will lead to the grant of a permanent injunction.

74. The Republic submits that the injunction should be limited to land beyond the boundary of the public land. This contention cannot be accepted. The grant of approval cannot be dissected so as to allow approval for part only of the development. The application for the proposed development was a composite one extending over all the land in issue, as was the grant of approval. For the reasons given the grant of approval in its entirety is invalid. Nothing remains that could authorise any part of the foreshore development.

75. The First Respondent, Mr Sope is entitled to his costs of this appeal to be paid on the standard basis by the Appellant and the Second Respondent.

DATED at Port-Vila this 19th day of July 2012

ON BEHALF OF THE COURT



Vincent LUNABEK
Chief Justice