

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

Civil Appeal
Case No. 22/2375 COA/CIVA

BETWEEN: STAGE FOUR LIMITED as Trustees for the **MONTREAL TRUST**
Appellant

AND: PROPRIETORS OF STRATA PLAN 0011 (Receivers and Managers appointed)
First Respondent

AND: DIRECTOR OF LANDS
Second Respondent

AND: REPUBLIC OF VANUATU
Third Respondent

Date of Hearing: 9 August 2023

Coram: *Hon. Justice JW von Doussa*
Hon. Justice OA Saksak
Hon. Justice R Asher
Hon. Justice D Aru
Hon. Justice VM Trief
Hon Justice EP Goldsbrough

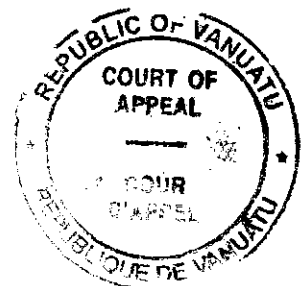
Counsel: *N Morrison for the Appellant*
MJ Hurley for the First Respondent
J Wells for the Second and Third Respondents

Date of Judgment: 18 August 2023

JUDGMENT OF THE COURT

Introduction

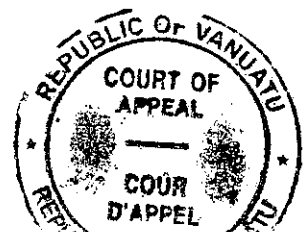
1. This is an appeal against the dismissal of a constitutional petition relating to the validity of an amendment to the Strata Titles Act [Cap 266], (**the Act**). The amendment developed out of a dispute about the correction by boundary change to remedy encroachments that arose during the building of a resort at Pango, Efate. The resort consists of multiple units owned in strata titles, and has been known and operated as "Breakas Beach Resort".



2. The appellant Stage Four Limited (**SFL**), as trustee for the Montreal Trust was the applicant in the constitutional petition, and owns one of the lots, Lot 9, in the resort. The Proprietors of Strata Plan 0011 (receivers and managers appointed) (**the Proprietors**) are the first respondent. Under s 15(1) of the Act they constitute the body corporate, constituted by virtue of the Act upon registration of the strata plan under their name as proprietors. Also as parties, given that this is a constitutional petition against legislation, are the Director of Lands and the Republic of Vanuatu.

Background

3. On 22 December 2006 the company 100% Pur Fun Ltd (**PFL**) obtained lease title no.12/0913/501 over land situated at Pango, Southwest Efate, (**the Lease**). In the same year PFL registered Strata Plan 0011 over the Lease which subdivided it into 68 lots including areas designated as common property.
4. The construction of buildings on the various lots proceeded after the creation of the strata plan and the Body Corporate. The mortgagee of the development was Westpac Banking Corporation Limited (**Westpac**). By error a number of the buildings were in fact not erected within the boundaries of the intended Proprietors' lots, but encroached over the lot boundaries into the common areas of the development.
5. In about 2013 efforts began to correct the encroachments by altering the boundaries of the lots and body corporate areas so that they actually reflected the buildings that were in place. The rectification had the support of Westpac and the large majority of proprietors. These steps were resisted by PFL.
6. On 2 July SFL purchased Lot 9 of SP 0011. An Australian solicitor Robert John Herd is the sole director of SFL. Mr Herd through his legal firm Herdlaw was the legal advisor to PFL in the early days.
7. In or about August 2013 PFL went into receivership, and Receivers and Managers were appointed by Westpac pursuant to a General Security Agreement dated 13 October 2010.
8. As will be explained, under s 11(1) of the Strata Titles Act, if a single lot owner opposed a resolution relating to the common property, that opposition could effectively veto any resolution changing the boundaries. Mr Herd became involved in exchanges with the Proprietors and Westpac whereby he sought a payment for PFL's consent to the title corrections, which started at \$3,000,000 and was subsequently raised to \$4,000,000.
9. Representatives of the Proprietors asked the government to amend the Strata Titles Act to change the provision in the Act giving a single lot owner a veto to stop boundary changes to a common areas owned by the Body Corporate in a strata title situation. As a consequence the Strata Titles (Amendment) Act No. 38 of 2014 (**the Amending Act**) was passed in 2014. The effect of that amendment was to remove the veto, and in particular the words "resolution without



dissent”, and replace it with a provision that allowed re-subdivision of the common property by “special resolution” of the Proprietors.

10. The consequence was that one shareholder could not hold the balance of shareholders to ransom as the price of consent to remedying encroachments to the common benefit of other owners. This was good for the Proprietors who had incorrect titles, as it enabled them to own and transfer lots that reflected their occupied unit, but bad for SFL which has lost its effective veto. It was this amendment which led to SFL’s constitutional petition alleging that the enactment of the Amending Act was in breach of the Constitution and invalid.
11. It is not the place of this Court to consider the moral implications of SFL’s opposition to the title changes. They are irrelevant to the issues before us. The challenged amendment is either a breach of the Constitution or it is not, irrespective of the motives behind the challenge.

Jurisdictional issues

12. The appellant SFL is a company. It is not a living being, but it is a legal entity in its own right. As the Chief Justice commented, companies do not enjoy all the fundamental rights protected under the Constitution as an individual member of the community. For example companies do not have the right to life, liberty or safety of the person as set out in Articles 5(1)(a), 5(1)(b) and 5(1)(c).
13. However a company, properly incorporated and registered according to the laws of the Republic of Vanuatu can enjoy some of the benefit of some of the safeguards set out in the Constitution, including those claimed to have been breached in this case. The 2006 case of *Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu*¹ is good authority for that proposition. In that case, the Court specifically referred to Articles 5(1) (d), (j) and (k) as being applicable provisions relating to companies.
14. As has been frequently stated, the Supreme Court has the authority to strike down as invalid any legislation infringing the Constitution.² We accept that a fair, large and liberal interpretation is to be given to the Articles in the Constitution. If the evidence establishes a breach of relevant rights set out in the Constitution, the Court has the jurisdiction to declare as unlawful and invalid any amending legislation which has such effect.

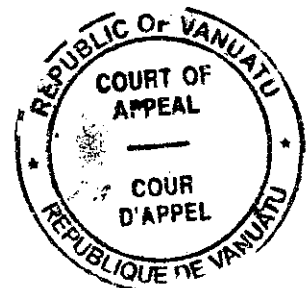
The relevant legislation

The Constitution

15. Article 5(1) of the Constitution of the Republic of Vanuatu reads, so far as relevant, as follows:

¹ [2006] VUSC 74.

² *AG v Jimmy* [1996] VUCA 1.



5. Fundamental rights and freedoms of the individual

- (1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, *all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination.... but subject to respect for the rights and freedoms of others* and to the legitimate public interest in defence, safety, public order, welfare and health –

(d) protection of the law;.....

(j) *protection for the privacy of the home and other property and from unjust deprivation of property;*

[Emphasis added]

16. This is a key article of the Constitution and applies to the interpretation of the Amending Act.
17. Under Article 6 of the Constitution all persons have the right to enforce these fundamental rights.

The Strata Titles Act

18. The interpretation section of the Act in question, the Strata Titles Act (s 1), relevantly provides:

"common property" which means so much of the land for the time being comprised in a strata plan as is not comprised in any lot shown in such plan, and includes utility infrastructure located within that land, other than excluded utility infrastructure;

...

"proprietor" which means the proprietor for the time being of a lot;

...

"resolution without dissent" which means a motion passed at a general meeting of the body corporate where no vote is cast against the motion;

...

"special resolution" which means a motion passed at a general meeting of the body corporate whereby:

(a) the votes counted for the motion are more than the votes cast against the motion, and

(b) the number of votes counted against the motion is not more than 25% of the number of lots included in the strata plan.

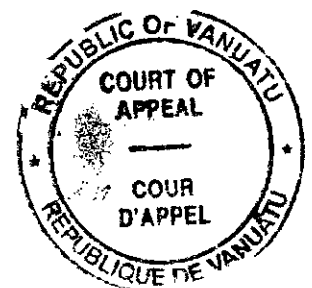
[Emphasis added]

19. Section 2(2)(b) provides that the Director of the relevant Department must issue a separate certificate of title for each Lot and for the common property.
20. The relevant parts of ss 10 and 11 of the Act prior to the amendment read as follows:

10. Common property

- (1) The common property is to be held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective lots.

11. Dealing with common property



- (1) The proprietors by resolution *without dissent may direct the body corporate* to grant exclusive use of, *to transfer*, lease or otherwise dispose of common property, or any part of it.
- (2) The body corporate must execute the appropriate instrument or lease if it is satisfied that:
 - (a) the resolution was duly passed; and
 - (b) all persons having registered interests in the parcel and all other persons having interests (other than statutory interests) which have been notified to the body corporate have consented in writing to the release of those interests in respect of the land comprised in the proposed disposal or, in the case of a lease, have approved in writing of the execution of the proposed lease.

[Emphasis added]

- 21. The formation and nature of the Body Corporate is set out in s 15 of the Act. Section 16 sets out the duties. The Proprietors of Strata Plan 0011 are bound like all proprietors, by by-laws, a set of which are at Schedule 1 of the Strata Title Regulations 2003. It is stated at paragraph 2(a) of the applicable by-laws that the body corporate must "...control, manage and administer the common property for the benefit of *all proprietors...*", [emphasis added].

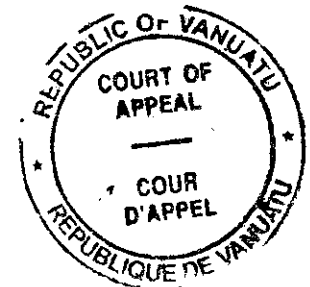
The Amending Act

- 22. Then, as indicated above, the Amending Act repealed the provision by s 11(1) requiring a "resolution without dissent". A new section 12 was inserted into the legislation as follows:

(12) The proprietors *by special resolution* may create and register a strata plan of re-subdivision in respect of common property to create a new lot or lots and to change the common property.
[Emphasis added]

- 23. As can be seen the phrase "without dissent" was replaced for the purposes of by "special resolution". The Amending Act further inserted into s 11(2)(b), and other consequential sections of the Act, after the word "persons (first occurring)" the following: "other than the proprietors". There were other amendments which it is not necessary to traverse.
- 24. This meant that a single lot owner could not prevent a majority of lot owners from changes to the boundaries of the common property. A bare majority could prevail, providing, (under the definition of "*special resolution*"), not more than 25% of lot owners voted against the motion.
- 25. By virtue of the amending Act, SFL contends that SP 0011 is now able by special resolution to alter the strata plan and create new lots and change the boundaries of common property without SFL's agreement. SFL lost its ability to on its own stop the necessary corrections to the boundary.

The appellant's position



26. The contention of SFL is that the amending Act is inconsistent with section 11(1)(a) of the Vanuatu Foreign Investment Promotion Act (“the VIPF Act”) in that it permits the deprivation of the property of a Lot owner by the vote of the other owners.
27. That inconsistency is submitted to infringe SFL’s constitutional rights under Articles 5(1)(d) and 5(1)(j) of the Constitution. Accordingly, this Court is invited to:
 - (a) Declare that SFL’s constitutional rights have been infringed;
 - (b) Declare the amending Act invalid, void and of no effect; and
 - (c) Impose costs against the proprietors of SP 0011, and the Republic of Vanuatu.
28. The Supreme Court judgment is said to be wrong on multiple counts. It fails to consider the deprivation of the property rights of SFL, and whether there was any public interest in depriving the minority owners of its rights. Those property rights of the minority owners were not properly taken into account, leaving minority owners without recourse against the will of the majority. They could be deprived without compensation.
29. It is also argued that the common property is like land held by tenants in common and that no single tenant in common can be forced to sell at common law.

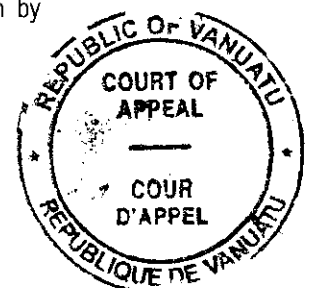
Discussion

30. The first point that must be made is that Article 5(1)(j) refers to the deprivation of property. Section 15 of the Amending Act does not deprive a lot owner of anything. It is a section that states the means by which changes to lots and strata plans can be voted. It is not a situation of seizure or confiscation by government action, as has been said to be the purpose of the protection in the Article. The Court of Appeal said in *Francois v Ozols*:³

The purpose of Article 5 is to protect the individual against arbitrary or unjust treatment by the organs of government through which the affairs of the Republic are administered. The protection of private rights between individuals, as opposed to the protection of rights between the individual and the Republic, is ensured by other provisions of the Constitution, namely the provisions of Chapter 4 that establish Parliament to make laws for the peace, order and good government of Vanuatu, the provisions of Chapter 7 that establish the Executive to implement those laws, and the provisions of Chapter 8 which establish the Judiciary to enable individuals to enforce them.

For example, the protection afforded by Article 5(1)(f) against "unjust deprivation of property" is a protection against seizure or confiscation by government action. The general law already provides a comprehensive package of rules to protect against the invasion of commercial, economic or proprietary interests of one person by

³ [1998] VUCA 5

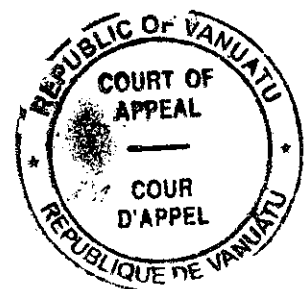


another person. Such rights are protected by the criminal law, and by civil laws such as the laws of contract and torts. In one sense if one person steals the goods of another, the victim of the theft has suffered an "unjust deprivation of property", but that injustice is not one that finds protection in Article 5. The injustice would be met by prosecution of the offender under the criminal law, and by civil action under the general law by the victim against the thief to recover the goods or their value.

31. Based on this reasoning it is not clear to us that the new section can be said of itself to have deprived SFL of any property. That section in the Amending Act changed the mechanics of changing the boundaries of lots and common property. It enabled a majority of proprietors by a majority vote with no more than 25% opposing, to change the boundaries of common property in which they, like the other proprietors, had a beneficial interest. But in itself the new section did not do this, and take away any property from any person. It just changed the number of votes required to change the strata plan.
32. It must be observed immediately that any changes to the common area are likely to concern all the voting proprietors, who are unlikely to agree to reductions or changes to the common area without at least turning their minds to the issue of compensation. While it is possible that a majority of owners might gang up on a single proprietor or minority, the democratic majority vote process that applies should ameliorate that danger. The new amended section does not perpetrate any deprivation or unfairness. It sets up a process which on the face of it is sensible when there are multiple proprietors who have to co-exist and may have to adjust boundaries.
33. However we did not have argument on the point of whether a direct deprivation or a deprivation by the government were necessary to invoke the constitutional protection, and do not decide the appeal on that basis.
34. We turn to the exact words of Article 5(1) of the Constitution. The Republic of Vanuatu recognises that all persons are entitled to the stated fundamental rights and freedoms of the individual without discrimination and to the legitimate public interest in the protection of the law, and importantly "the protection of property and the unjust deprivation of property". This, however, is stated to be "... subject to respect for the rights and freedoms of others".
35. These words mean that the right to the protection of property and the unjust deprivation of property is not absolute. The right is "... subject to respect for the rights and freedoms of others".
36. The meaning and application of Article 5 was considered in the Court of Appeal decision of *Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu*,⁴ a case relied on in the Supreme Court judgment.⁵ It was said in that case:

⁴ [2009] VUCA 35.

⁵ Paragraph [61].



Again, we consider the principles developed by the European Court under Article 1 of the First Protocol of the UCHR 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 (see Human Rights at 343). Whether the deprivation is lawful turns on whether it has occurred in accordance with the substantive and procedural requirements of the law.

37. The judgment then goes on to quote from the European Court case of *James v United Kingdom*.⁶ It is then stated:

In our opinion the notion of "unjust deprivation" in Article 5(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 affects the deprivation can be justified in the public interest having regard to the considerations discussed in the European Court.

In considering the public interest the Supreme Court, as the body with responsibility for determining constitutional rights in Vanuatu, must allow Parliament a wide margin of appreciation in determining where the public interest lies. This will be particularly so where the register of provisions concerning the allocation are public resources, as is the case with taxation and welfare laws concerning the allocation ...

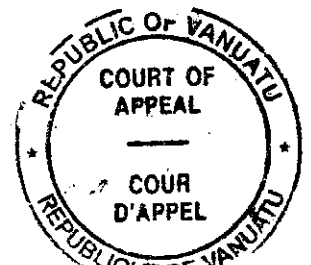
38. These comments show what is inherent in Article 5: an individual's right to have their property protected is not absolute. It is necessary to balance this right of the individual with the "public interest", or, in the specific words that apply in Vanuatu, "...the rights and freedoms of others and the legitimate public interest in ... public order". We do not think that the application of these statements to this situation is weakened by the fact that *Groupe Nairobi* was a tax case. The statements have general application.

39. This position was fully understood by the Supreme Court in the judgment under appeal. It was stated there in the central passage:

[68] This present case revolves around a strata title, where all the proprietors have an equal undivided share of the common property, over and above their individual rights attaching to their respective Lots. It must logically follow, that the amending legislation affects not only the proprietor of Lot 9, but also all the other proprietors, in the same way. Looked at in this light it cannot be said that SFL's individual constitutional rights have been breached, for to come to such conclusion would be to consider SFL's position in isolation, without regard to the rights, freedoms and interests of the other Lot proprietors whose interest in the common property is as tenants in common.

40. We agree that the "public interest", or the "rights and freedoms of others", involves consideration of the right of the Proprietors collectively as well as individually, and the obligation to advance their interests fairly and to have balance among the Proprietors in relation to the common

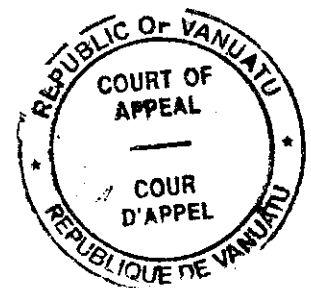
⁶ [1986] UCHR 2.



property. Multiple proprietors in the common property will often have conflicting interests in that property. In relation to a part of common property it will often be impossible to please all Proprietors. The Amendment Act recognised this. It can be seen as in the public interest to get rid of the ability of one proprietor or a minority generally, to defeat the wishes of the majority, to avoid a tyranny by minority.

41. Obviously that does not leave the minority without protection. The Proprietors of Strata Plan 0011 are bound like all proprietors, by by-laws. It is stated at paragraph 2(a) of the applicable by-laws that the body corporate must "...control, manage and administer the common property for the benefit of *all proprietors...*", [emphasis added]. As this appeal demonstrates, there will be times when "the benefit of all proprietors" requires one or a minority to compromise their own best interests for the greater benefit of all proprietors. We do not see the common law principles applying to tenancies in common as applicable in this new statutory regime of strata titles. "Common property" is a new concept governed by the provisions of the Act and the rules applying to tenancies in common do not have direct application.
42. It can be assumed that Parliament did consider the deprivation of the property rights of a single unit owner, and whether there was any public interest in depriving the minority owners of their rights. It decided that it was in the public interest that the fairest way of determining competing views among proprietors as to the way to deal with the boundaries of the strata plan was to apply a majority rule, while giving the power of a minority of over 25% to stop a change.
43. As was stated in the *Groupe Nairobi* case, Parliament must be allowed a "*wide margin of appreciation in determining where the public interest lies*".
44. It can be seen that Parliament must have decided that it was to the benefit of all proprietors and in the public interest to be able to determine without unfair impasses, the functional boundaries for the common area. The rights, freedoms and interests of the lot proprietors are protected from a dictatorship of the minority. Guaranteeing that the will of the considerable majority of other owners will overcome the wishes of a minority is in the public interest. There is a public interest in ensuring that one owner of a lot cannot by resisting action which is plainly in the interests of the majority of proprietors, force all the other common owners to pay a windfall amount to buy its vote.
45. It is to be noted also that Article 7(f) imposes a fundamental duty on persons referred to as to "himself and his descendants":

To respect the rights and freedoms of others and to cooperate fully with others in the interests of interdependence and solidarity



46. We see this duty as consistent with the amendment. It will prevent a minority of strata title owners from stopping the changes to the strata title boundaries that the majority wish to implement. This ability, created by the amendment, for the will of most of the owners to prevail to make changes for what they all see as the common good is consistent with the Constitutional duty of cooperation and the concept of interdependence in the Republic.
47. We do not consider that the enactment should be held to be in breach of the Constitution because it has retrospective effect. It takes nothing away from past actions of the proprietors, but rather alters for the future the way resolutions can be passed to alter the boundaries of lots and common properties. Apart from the appellant there has been no suggestion by any person that this is unjust.
48. For all the above reasons we are satisfied that there has been no breach of SFL's rights under Article 5(j) of the Constitution. The amendment by Parliament, created a workable mechanism for the majority of proprietors to change the lot and common area boundaries. This is particularly so as the power of the majority is ameliorated by the ability of 25% of proprietors to stop the change.

Result

49. The appeal is dismissed.
50. The appellant is to pay two separate sets of costs to the first respondent and the second and third respondents on the standard basis to be agreed or taxed by the Master.

DATED at Port Vila, this 18th day of August 2023

BY THE COURT



Justice John W. von DOUSSA

