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

Civil Case No. 105 of 2010

BETWEEN: KWILA LIMITED
Claimant

AND: RONALD JOSEPH
Defendant

Coram: *Justice D. V. Fatiaki*

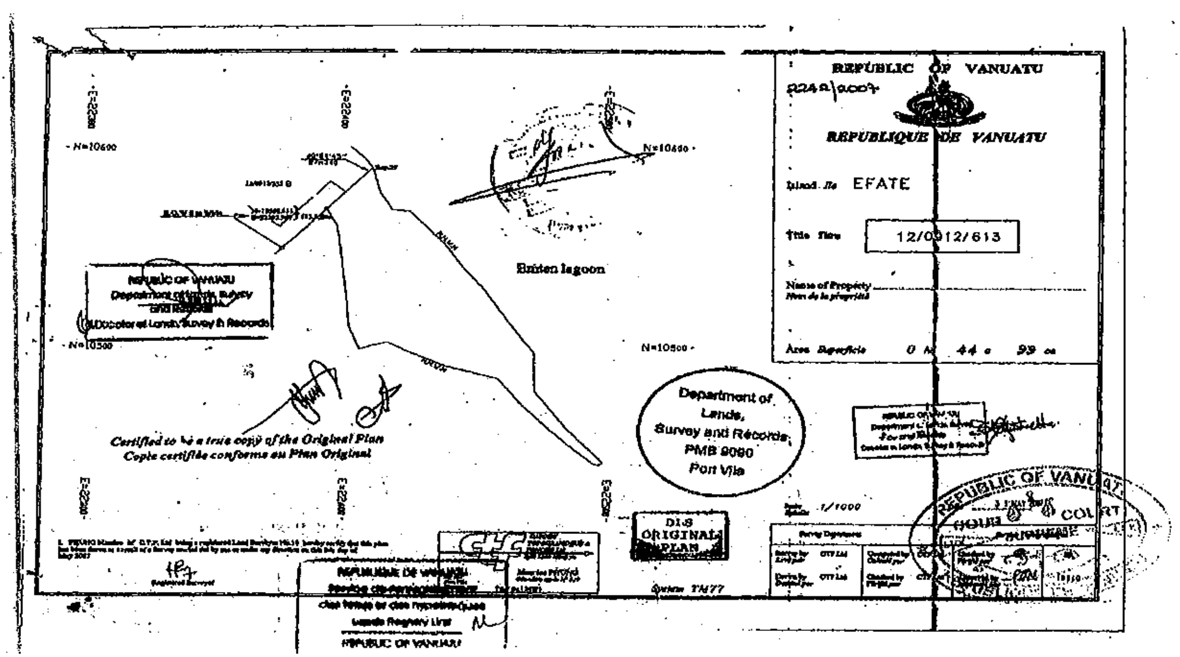
Counsels: *Mr. N. Morrison for the claimant*
Mr. R. T. Kapapa for the defendant

Date of Decision: *14 March 2013.*

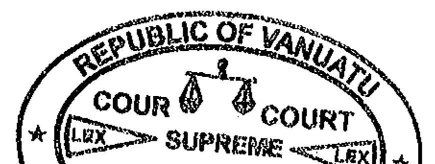
JUDGMENT

1. This case concerns the reclamation and development works undertaken by the claimant to "*re-establish*" what was formerly known as **EWANESU Island** located within **Emten Lagoon** in South Efate.

2. To begin this project the claimant acquired in **August 2007** a registered commercial/tourism lease over the remnants of **EWANESU island** contained within **Lease Title No. 12/0912/613** with a surveyed land area of "*44a 99ca*". The survey plan indicates that the outer boundary of the claimant's land extends to the mean high water mark (MHWM). The survey plan which is dated **31 May 2007** shows:



3. I say "*remnants*" because the registered survey plan of the claimant's leasehold title indicates that what is described as an "*island*" is not as one might expect a land



mass completely surrounded by water but more a peninsula or head land connected to the mainland and protruding slightly out into Emten Lagoon on one side. The survey plan also indicates what appears to be a right of way ("*ROW*") from the mainland onto the claimant's leasehold title which is unusual for an island.

4. Be that as it may I adopt the following extract in the claimant's **EIA** report (p3) under the heading **Foreshore Development and Rehabilitation of Ewanesu Island** which gives a brief history of the "*island*" as follows:

   "*Ewanesu Island was once an island within Emten Lagoon up until 1970s, where the Public Works Department built the Erakor Crossing using coral gravel to bury the causeway preventing the continuous flow of water around the Ewanesu Island leaving the water channel to silt-up and dry over these years. As a result of this, the water channel that flows around Ewanesu Island was stopped and with the help of the mangroves within the area the waterway was silted-up and blocked permanently.*"

   (my underlining)

5. The silting up and permanent blockage of the waterway on the landward side of Ewanesu Island raises some doubt as whether the area which was excavated by the claimant is actual "*foreshore*" as defined in the **Foreshore Development Act** in the following terms:

   "*... land below the mean high water mark and the bed of the sea within the territorial waters of Vanuatu ... and includes land below the mean high water mark in any lagoon having direct access to the open sea.*"

6. The next thing the claimant did was to submit on **3 March 2008**, an application under the **Foreshore Development Act** [CAP. 90] for ministerial consent to undertake the "*Reclamation and Rehabilitation of Ewanesu Island at Emten Lagoon, South Efate*". The application attached a substantial Environmental Impact Assessment Report **(EIA)** prepared by **Eco-Man Consultants Limited** in February 2008. The application reads:

"THE FORESHORE DEVELOPMENT ACT [CAP. 90]
APPLICATION FOR CONSENT

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1. APPLICANT		*2. AGENT/ARCHITECT (IF ANY)*
Name:	***Kwila Ltd.***	*Name: ....*
Address:	***C/- Aku Dinh***	*Address: ....*
	Vanuatu Stick	*...............................*
Tel/Fax:	***42528***	*Tel/Fax: ....*

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3. Description of proposed development (circle where appropriate): Wharf, Jetty, Excavation, Reclamation, Artificial Island, Marina, Others (please state):

Reclamation & Rehabilitation of Ewanesu Island, Emten Lagoon.

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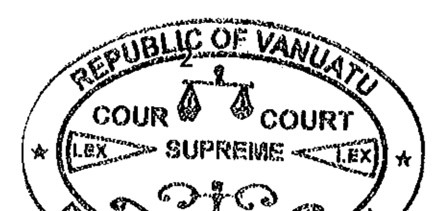
4. Location of proposed development:

Emten Lagoon, South Efate



5. *Is the applicant the owner(s)/leasee(s) of the land adjacent to the proposed site? Yes/No. If no, state the name and address of the owner(s)/leasee(s).*

    Owner of Land Title: 12/0912/631

6. *Is the owner(s)/leasee(s) aware of this proposed development? Yes/No. If yes, state the date of notification given.*

    Yes, by way of Lease Agreement.

7. *Is the Municipal Council or the Provincial Council aware of this proposed development? Yes/No. If yes, provide evidence.*

    Yes

8. *Plot No. (if applicable):*
   Area of proposed site:
   (Attached detail plans for the proposed development plus a location plan)

    Title: 12/0912/631

9. *If this is a large scale proposed development, is there any Environmental Impact Assessment (EIA) being prepared concerning this proposed development? If so, please provide evidence.*

    Attached EIA Report

10. *State the types of machinery/materials to be used (applicable to large scale proposed developments).*

    Digger, Loaders & Dump trucks

11. *Signature of applicant:* ***... for Kwila Ltd.*** *Date:* ***3/03/08***"

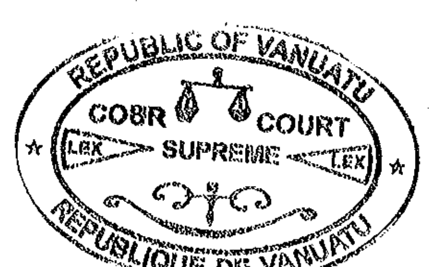
7. Significantly, the application required "*(a) detail plans for the proposed development plus a location plan*" to be attached. No such plan has been produced to the court nor was the claimant's surveyor requested to prepare one as confirmed in his letter of **5 November 2010** to the claimant's solicitor where he writes:

    "5. *To our knowledge Mr. Aku was granted a 'Foreshore development permit' but never produce a proposal plan to my office. We were only asked to survey the progressive work done by Mr. Aku ...*"

8. By letter dated **16 September 2008** the then Minister of Internal Affairs granted approval to the claimant's application under the **Foreshore Development Act** [CAP. 90]. The approval was for the reclamation of land below the HMWM (sic) beyond the claimant's leasehold title No. **12/0912/631**. The approval letter reads:

"*Tuesday, September 16, 2008*

Kwila Limited
C/. Aku Dinh
Vanuatu Stick
PORT VILA



Tel: (678) 7742528

Re: FORESHORE DEVELOPMENT

MINISTERIAL CONSENT FOR THE RECLAMATION BELOW HIGH MEAN WATER MARK (HMWM), LAND TITLE 12/0912/631, EWANESU ISLAND, SOUTH EFATE

In pursuance of the powers granted to me under the Foreshore Development Act [CAP. 90], I am empowered to determine your application dated 03rd March 2008 for the reclamation beyond land title no. 12/0912/631, Ewanesu Island, South Efate.

I have perused your application and after due consideration noted that the application is in itself made on the basis to beautify the shore line as well as develop the area for future commercial purposes. Under the Foreshore Development Act, I do not foresee any difficulties as regard the future potential development provided.

In light of the above I hereby grant you APPROVAL to the application provided that you strictly adhere to the following conditions:

1. *The consent hereby granted shall lapse and be of no effect if the development has not commenced within one (1) year of the date of consent or completed within two (2) years of the date or such extended period as I may specify;*

2. *The development must be carried out strictly and in accordance with the plan;*

3. *The project proponents to cooperatively and collaboratively work with the following authorities, namely: the Physical Planning Unit, the Department of Provincial Affairs, the Department of Geology and Mines, the Department of Ports and Marine, Shefa Provincial Government Council and the Environment Unit to ensure a sustainable development.*

4. *Environmental Management of the area to be exclusively the sole responsibility of the developer and to be kept clean to the satisfaction of the Minister of Internal Affairs in lien whit the Foreshore Development Act as well as the Environmental Management and Conservation Act.*

This consent is made under the Foreshore Development Act [CAP. 90] only and no other enactment, byelaw, order or regulation. Development on the shore or above the High Mean Water Mark (HMWM) will require permission either from Shefa Provincial Government Council under the Physical Planning Act [CAP. 193].
Please acknowledge receipt of this decision within 14 days.

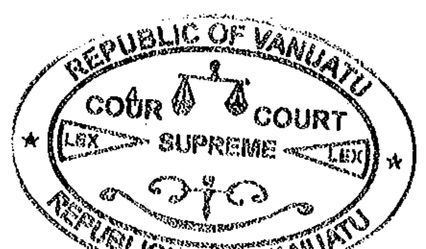
....

IMPORTANT NOTICE
Section 2 of the Foreshore Development Act [CAP. 90] stipulates that:
"NO PERSON SHALL UNDERTAKE OR CAUSE A PERMIT TO BE UNDERTAKEN ON THE FORESHORE OF THE COAST OF ANY ISLAND IN VANUATU WITHOUT HAVING FIRST OBTAINED THE WRITTEN CONSENT OF THE MINISTER TO SUCH DEVELOPMENT".

....

Yours faithfully,
Hon. Joe NATUMAN
Minister of Internal Affairs."

9. On receipt of the approval the claimant commenced reclamation works in late 2008/2009. During the course of the excavation of a 3 – 4 metre deep trench to allow water to flow again around the island, the claimant's workers were stopped by the defendant who claimed that the excavation works illegally intruded onto his leasehold land and constituted a serious trespass.



10. The claimant laid a criminal complaint with the police against the defendant and sought injunctive relief in the Magistrate's Court, for trespass and damages for unlawful interference with the claimant's development/reclamation works at the site. No charges were laid against the defendant and the Magistrate's Court action was eventually dismissed as being beyond the court's jurisdiction and the claim was recommenced in the Supreme Court.

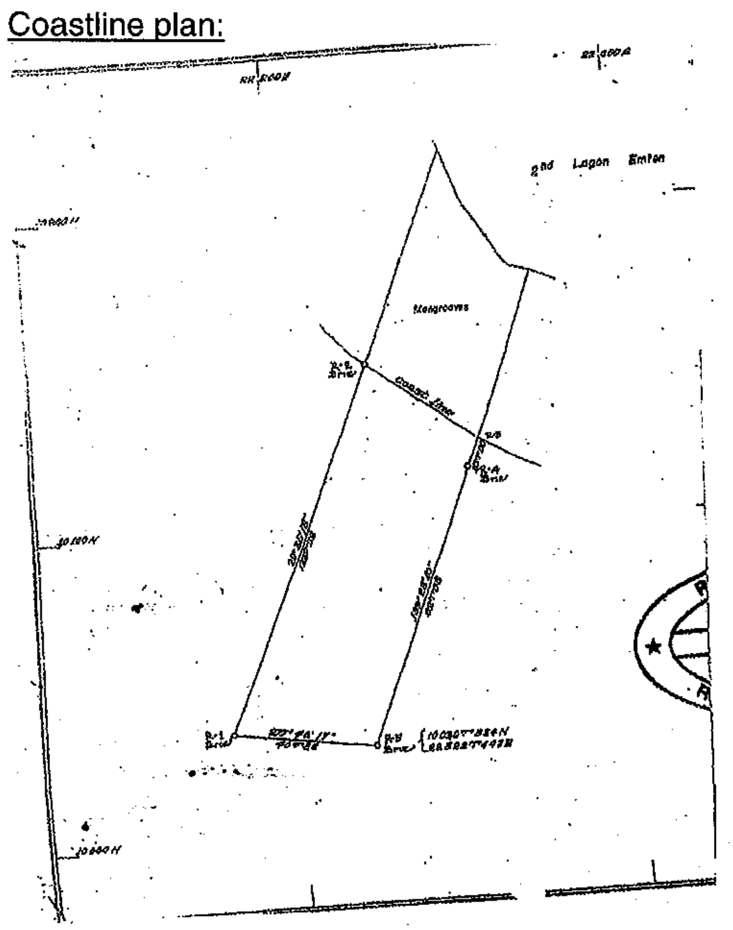
11. The defendant denied any trespass on the claimant's land and counterclaimed for damages for the claimant's alleged trespass onto his leasehold and destruction of mature fruit trees and mangroves as a result of the claimant's excavation works.

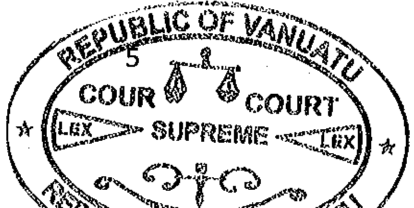
12. The claimant's application for interim injunctive relief was originally refused on the basis of inadequate materials being provided including the absence of any title document which extended to and over the area that was being excavated.

13. There then followed a period of intense activity with both parties filing a number of sworn statements in support of their respective claims to ownership of the excavated land, including on the claimant's part, sworn statements from a registered surveyor and the earlier mentioned **EIA** Report on the claimant's proposed foreshore development and rehabilitation of Ewanesu island.

14. The defendant for his part produced a number of sworn statements from other registered land surveyors including copies of two (2) survey plans of his leasehold title **No. 12/0912/213**. One plan, shows a hand drawn "*coastline*" running across the defendant's leasehold and no road marked on it (the "*coastline plan*").

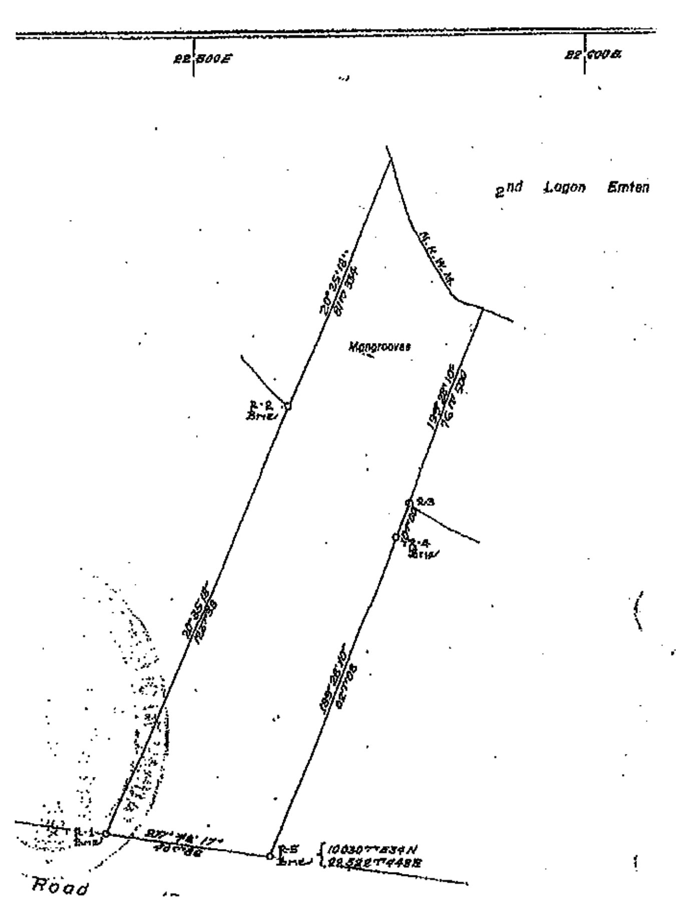
Coastline plan:





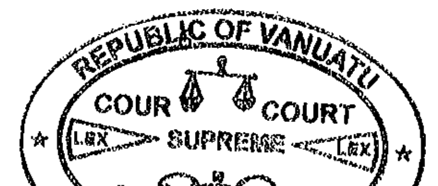
15. The other plan, without the coastline marked shows a "*road*" on the southern boundary and the outer northern boundary is indicated by the letters "*MHWM*" the ("*larger plan*"). The difference in the area of the two (2) plans is about (77 – 43 =) <u>34a</u> comprised of mangrove-covered land.

<u>Larger MHWM plan:</u>



16. Both survey plans showing quite different land areas and features prompted claimant's counsel to submit that the smaller of the two plans with the "*coastline*" marked on it (the "*coastline plan*") accurately delineates the proper boundary limits of the defendant's leasehold, such that, the claimant's excavation works were outside the defendant's leasehold. The defendant maintains however, that his proper leasehold boundaries are shown in the "*larger MHWM plan*" and always included the area of mangroves (which was cut-off by the claimant's excavation works) and extended to the "*MHWM*" at Emten lagoon.

17. In so far as it is necessary to determine this issue, I am satisfied on the evidence including that of the defendant's surveyor, the undisputed confirmation letter of the **Director of Lands**, and his mother-in-law, who is the acknowledged custom owner of the defendant's leasehold land, that the defendant is correct in his assertions and I so find that the defendant's leasehold title **No. 12/0912/213** extends to the "*MHWM*" on Emten lagoon and includes within it, an area of mangroves and part of the claimant's excavations (***<u>i.e.</u>*** the "*larger MHWM plan*"). Needless to say it is common ground that the Emten lagoon waters do not extend, even at high tide, up to the



coastline marked on the "*coastline plan*" which clearly shows the lagoon shoreline beyond the mangroves.

18. Even if the defendant's leasehold boundary ended at the so-called "*coastline*", I find that the mangroves and land beyond it to the "*MHWM*" is customary land which did not belong to the claimant and was not authorised or permitted by the custom owner (the defendant's mother-in-law) to be excavated as part of the claimant's development of **Ewanesu island**.

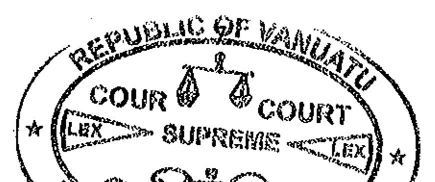
19. At the trial the claimant called 2 witnesses namely:

    (1) **Dinh Van Tu** – the director and proprietor of **Kwila Limted** who produced a sworn statement upon which he was cross-examined;

    (2) **Maurice Phung** – a registered surveyor and proprietor of **CTF Limited** who prepared the registered survey plans of the claimant's leasehold title No. 12/0912/613;

20. I reproduce below claimant counsel's summary of the gist of the claimant's evidence in his written submissions as follows:

> *"3. **Dinh Van Tu** provided evidence of the claimant's ownership of lease title No. 12/0912/613 since in or about July 2007;*
>
> *4. In September 2008 by letter dated 16 September 2008 the then Minister for Internal Affairs provided "Ministerial Consent For the Reclamation Below High Mean Water Mark Land Title 12/0912/631 (sic 613)";*
>
> *5. The Consent provided that the development should be carried out strictly and in accordance with the plan;*
>
> *6. An environmental impact assessment report was prepared in respect to the foreshore development by Eco-man Consultants Limited in February of 2008. It was that plan together with an application for consent which was provided to the Minister in seeking the consent granted. Those were the documents relied on for the granting of the consent by the then Minister;*
>
> *7. The witness described how he found survey pegs on the defendant's land before he commenced any work in accord with his foreshore development consent. He described the survey pegs as being located approximately 5m to the land side of where he dug his trench. The survey pegs were in a consistent line with survey pegs on adjoining properties;*
>
> *8. The next witness for the claimant was **Mr. Maurice Phung.** Mr. Phung reviewed various documents and particularly two different survey plans of the defendant's lease title No. **12/0912/213**. Mr. Maurice Phung completed his searches at the Department of Lands and Surveys and gathered a document "**Calcul des Coordinates**". Those coodinates relate to a land area of 43a 78ca.*
>
> *9. Mr. Phung made observations about two survey plans found at pages 108 and 109 respectively of the Trial Note Book. The plan at page 108 showed an area of 7.768m2 which included an area denoted as mangroves and*



*extending to a line initialled "MHWM". The survey was marked "DLS copy plan" (**the larger MHWM plan**). In all other respects including the stamped date and signature boxes it appeared to be a photocopy of the survey plan found at page 109;*

10. *The survey plan at page 109 was denoted original plan. It was for an area of 4.378m2 which did <u>not</u> include the area denoted as mangroves on the plan at page 108. The plan was drawn in September 1995 ("**the coastline plan**"). Mr. Phung made maps of the area in accord with the coordinates he recovered from the Department and those maps are found at 117, 119 and 120 of the Trial Note Book. Those plans show the trench created by the claimant in the process of his Foreshore Development as going through the area of land described as Mangroves in the Survey Plans and not the area of 4.378m2 which was common to both survey plans;*

11. *Phung's evidence was that if the lease size was changed:*

    (i) *it should receive a new lease number; and*
    (ii) *the co-ordinates at lands and survey would be updated."*

(my underlining and bold insertions in brackets)

21. Before I turn to consider the defendant's evidence I record that I was not impressed with **Mr. Dinh Van Tu** when he gave his evidence. He struck me as being cavalier, evasive, and unconcerned with details surrounding the obtaining of the necessary Ministerial approval under the **Foreshore Development Act** <u>or</u> with the accuracy of the excavation plan <u>or</u> the details in the EIA upon which Ministerial approval was granted.

22. I was left with the distinctly unfavourable impression that once the claimant got Ministerial approval, that was its "*licence*" to excavate, dredge, and reclaim as much land as it desired with little regard to whether or not its excavation followed the original waterway or resulted in the destruction of large tracts of mangrove habitat. Consultation with adjoining land owners did <u>not</u> appear to concern the claimant's principal so long as he excavated outside their boundary pegs.

23. I say this from my observations of Mr. Dinh's demeanour under cross examination and also his answers. Indeed he accepted that the **EIA** report he submitted for approval did <u>not</u> contain a survey plan or a detailed description of what was entailed in the proposed development works for the reinstatement of Ewanesu Island.

24. In my view, in the absence of a detailed survey plan and calculations of the claimant's proposed reclamation/excavation works, generalised descriptions in the **EIA** such as:

> *"... to recreate the water channel that used to flow around Ewanesu island by dredging the old water channel and using the backfill to recreate the island and allow the water to flow around the island as normally as possible by deepening the water channels up to 3 – 4 meters. <u>and</u>*
>
> *The overall foreshore development and rehabilitation will also involve the removal of the existing mangrove strands along the water channel to allow for maximum depth of the water to flow normally as well as removing the sediments and sills from within the lagoon." <u>or</u>*

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are of little assistance in assessing the precise limits, magnitude, and potential impact of the proposed developments on the environment and adjoining leaseholders. I note that no attempt has been made in the **EIA** to detail or identify, with precision, where exactly "*the old water channel*" flowed yet that was allegedly what was being dredged.

25. In the present case matters are made worse because of a complete lack of consultation with adjoining land owners including the defendant who are long-term residents in the area of the proposed development. This is aggravated when one considers that there are **not** one (1) but two (2) quite different proposed excavation/dredging plans disclosed in the claimant's papers placed before the court.

26. One plan, shows the proposed dredging (excavation) pathway (*see*: **Figures 1 and 2 in the EIA**) as closely following the existing surveyed boundaries of the claimant's leasehold title (the '*conservative plan*').

Conservative plan:

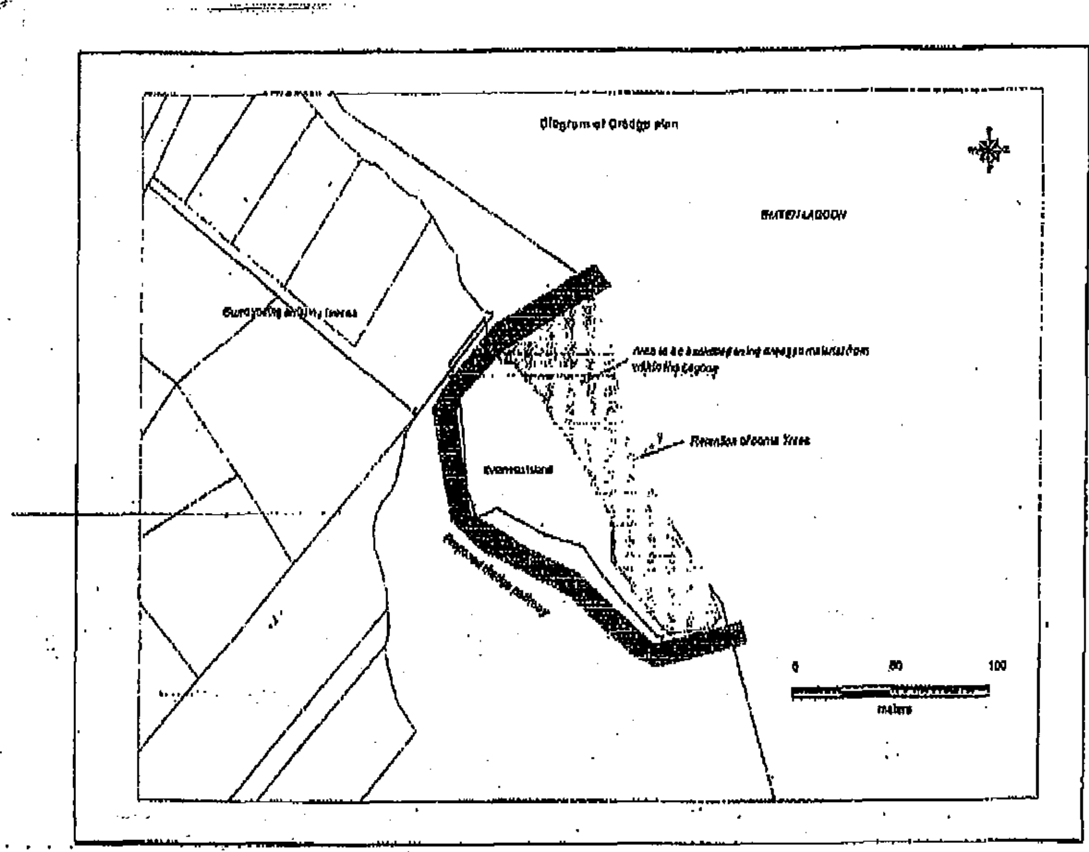
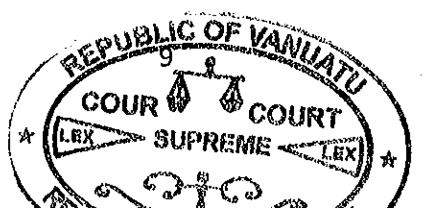


Figure: 1 Diagram of Dredge Plan around Ewanesu Island. Land Title: 12/0912/613. Source: Esrorn, February 2008.

27. The other, which I shall call the '*actual excavation*', (*see*: **Figures 1** and **2** at **pages 32** and **33** of the claimant's bundle of documents and at **pages 121** and **122** of the defendant's bundle of documents) shows a proposed dredge pathway which is quite unrelated to the boundaries of the claimant's leasehold title and instead follows the



alleged "*survey pegs*" of neighbouring properties including the defendant's leasehold title.

<u>Actual excavation:</u>

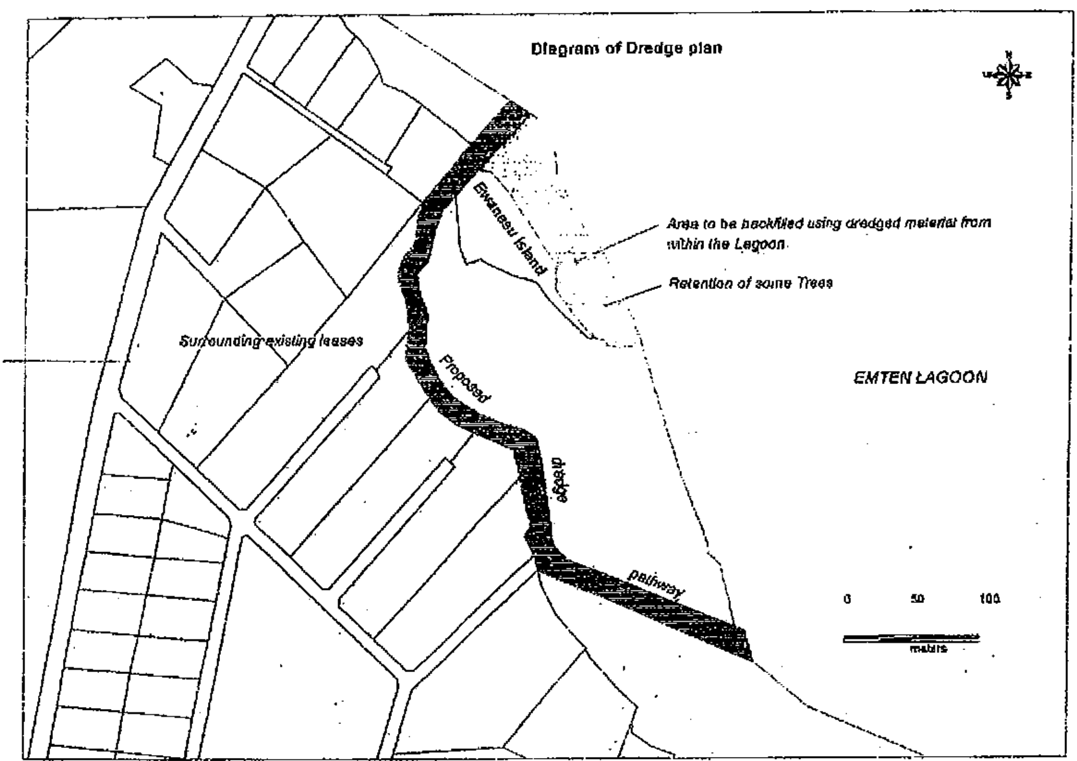


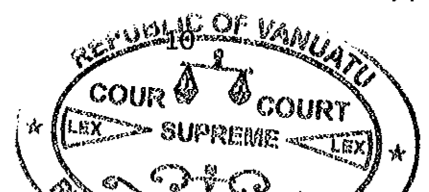
Figure: 1 Diagram of Dredge Plan around Ewanesu Island. Land Tide; 1210912/613. Source: Estoril, February 2008.

28. The difference between the plans is not only visually obvious on a comparison but also the "*actual excavation*" had the dramatic effect of "*quadrupling*" the area of the claimant's leasehold title as confirmed by its surveyor in his evidence.

29. The significance of the existence of the different proposed dredging/excavation plans cannot be ignored or diminished because, if the Ministerial approval under the **Foreshore Development Act** was given to the "*conservative plan*" as opposed to the "*actual excavation*" then plainly, the claimant was <u>**not**</u> authorised to excavate the area that he did and the excavation would be illegal *per se* and that would be the end of the matter.

30. If however, the Ministerial approval was given to the "*actual excavation*", (upon which I entertain considerable doubt), the court would still have to consider whether or not the Minister's approval involved an unjust deprivation of part of the defendant's leasehold land <u>or</u> of customary land which belonged to the defendant's mother-in-law.

31. In this latter regard in a recent case concerning the reclamation of customary land on the foreshore of **Kawenu Cove** and **Fatumaru Bay**, **Port Vila** pursuant to a ministerial approval also granted under the **Foreshore Development Act**, in **Terra Holdings Ltd. v. Sope** [2012] VUCA 16 the Court of Appeal relevantly observed:



"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. .... 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 <u>Foreshore Development Act</u> and whether the powers exercisable under it do, or may, contravene the protection guaranteed by Article 5(1)(j) ......

42. The <u>Foreshore Development Act</u> 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 <u>Foreshore Development Act</u> is in its entirety invalid cannot be sustained. .... 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. ...

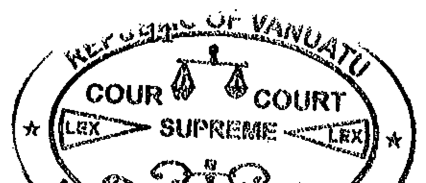
46. Whether a particular foreshore development authorised without the consent of the custom owners contravenes the fundamental rights guaranteed by Article 5(1)(j) will involve questions both of law and fact. The question of law concerns the scope of the guaranteed protection. The question of fact involves 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. ...

48. ...

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 <u>Interpretation Act</u> [CAP.132] to include:

> *"(a) money, goods, choses in action and land; and."*



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. .....*

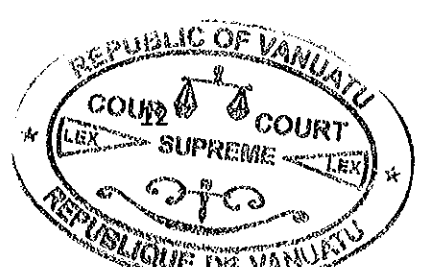
55. *The Court of Appeal set out a lengthy passage from a decision of the European Court which discussed issues relevant to the assessment of public interest, and then continued:*

> *"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 .....*

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, ...*

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" ....*



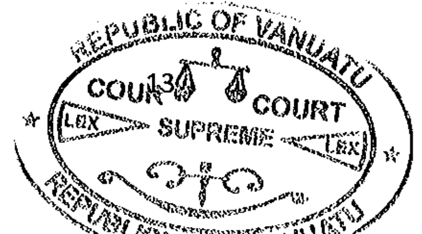
> 59. *The consideration of issues of public interest, justice and fair dealing raise similar issues to those which arise under the proviso to the guarantees of protection under Article 5 of the Constitution which makes those guarantees "subject to respect for the rights and freedoms of others and to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

32. I say relevantly advisedly because any excavation, dredging and reclamation works undertaken in the claimant's development works occurred outside the surveyed boundaries of its registered leasehold title and necessarily involved customary land or registered leaseholds of adjoining leaseholders and, in the defendant's case, significantly altered the "*MHWM*" line that formed the outer boundary of his leasehold title.

33. Needless to say if the claimant had conducted its excavations in accordance with the "*conservative plan*" as he should have done, it would not have impacted upon adjoining leaseholders including the defendant and would have still achieved the same result by creating a man-made water way on the landward boundary of the claimant's leasehold.

34. Furthermore there is no serious suggestion that consultations had taken place with the relevant custom owners of the land or with adjoining leaseholders by either the Minister who approved the claimant's foreshore development or the claimant company, before the grant of permission or during actual excavation works.

35. For his part the defendant gave evidence and called three (3) other witnesses:



(1) **Jerry Moli** – a surveyor who testified about the defendant's leasehold title **No. 12/0912/213**. The witness, on being shown the two (2) survey plans of the defendant's leasehold title testified, in preferring the "*larger MHWM plan*" which extends the defendant's leasehold to the "*MHWM*", that:

> "*In surveying normally we don't have a closed line where there are mangroves, normally we have it opened ... and the closing line is (at) the end of the mangroves which means it is closed by the coastline.*".

He was unable to say which of the survey plans of the defendant's leasehold had been registered but he was adamant, that the "*MHWM*" on the landward side of the claimant's trench shown on the most recent survey plan he prepared for the case came into existence after the claimant had excavated the trench to allow water from the lagoon to flow into the defendant's leasehold.

(2) **Winnie Taurua Lalie** – the defendant's mother-in-law and customary owner of the land who gave the land to the defendant and her daughter to live on; <u>and</u>

(3) **Sompert Gereva** – a Fisheries biologist with the Fisheries Department who conducted a survey and provided a report on the environmental damage cause to the marine resources and mangroves by the claimant's reclamation and the excavation works around, on, and near the defendant's leasehold.

36. As with the claimant, I reproduce below, parts of defence counsel's summary of the defendant's evidence as follows:

> "*........ The land was given to defendant's family to reside on by the defendant's spouse (wife) mother. That was the land owned by Winnie Taurua Lalie who gave the land to the defendant and his wife. Furthermore the defendant provides a full report of damages clearly identifying the damages and the MHWM of his property. Such report was prepared by the Fisheries Department officers. His further evidence was confirming his title. His title was not 12/0912/219 but 12/0912/213. The survey plan was also provided in relation to his title 12/09/213 and as provided for in his sworn statement of 7th October.*
>
> *The land department through **Markin Sokamanu** (Exhibit D1C, Annexure 'RJA') also confirms the changes of title 12/0912/219 which 12/0912/213. ....*
>
> *.... the defendant also in his evidence provides a confirmation statement from the Director of Lands. **Mr. Jean Marc Pierre**, the Director of Lands confirming that the foreshore development which was supposed to take place has been extended to Mr. Ronald's family's property. <u>The director's letter confirms that the claimant has encroached and dug through leases including the defendant's family property. The claimant did not challenge the statement of the director during trial.</u> .... The defendant further evidence was the letter from the lands tribunal confirming that the leasehold title No. 12/0912/213 is situated on a land that is not disputed. ..... The landowner has confirmed that the lease 12/0912/213 belongs to the defendant and his wife. The chiefs of Erakor has also confirmed the ownership of land covering the title 12/0912/213 which is endorsed by the lands tribunal letter in the defendant's sworn statement.*
>
> *It is therefore very clear that the defendant and his wife has and through his evidence have a registered lease since 1998. Its title was wrongly issue and later rectify by the Land Department with proper survey plan as 12/0912/213.*

Its evidence shows that the claimant has dug up trees, like coconuts, namambe and mangroves through his registered leased land. The evidence has shown that the defendant his wife and the children have been living in the land for over 20 years and that was the only land they have. They have had access to the land since its registration in 1998 to date. ...."

(my underlining)

37. At the end of the trial counsels agreed the following issues required determination namely:

    (1) Has the claimant exceeded the permission granted in its foreshore development consent and entered the defendant's lease title?

    (2) Does the defendant's lease title include the mangroves area beyond the claimant's excavated trench?

    (3) Where does the "*MHWM*" lie in respect to the dispute between the parties and their respective titles?

    (4) In the event the claimant has entered into the defendant's lease title, what are the damages resultant?

38. Although not raised as an issue either in the pleadings or in counsels' submissions, in my view the silting up and permanent blockage of the waterway on the landward side of Ewanesu Island could raise a question about whether the mangrove covered swampy area that resulted from the blockage constituted an "*accretion*" to the leaseholders whose land originally bordered the blocked waterway.

39. In this regard the judgment of the **Privy Council** in **Southern Centre of Theosophy v. South Australia** (1982) AC 706 is instructive, where it **<u>held</u>**:

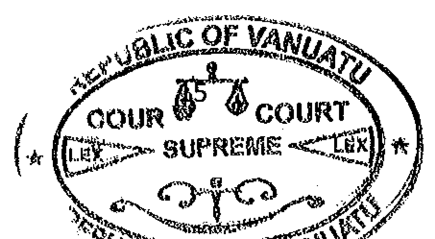
    "*(1) that where land was conveyed with a water boundary including the boundary of an inland lake, the title of the grantee extended to land added to it by accretion unless the doctrine of accretion was plainly excluded; <u>that the doctrine was not excluded merely because the original boundary could be identified, and, therefore, the doctrine was capable of applying notwithstanding that the conveyance was accompanied by a map showing the boundary or by a parcel clause stating the area of the land</u>* (<u>cf:</u> claimant counsel's arguments in support of the "*coastline*" plan);

    (2) ...

    (3) That in the case of the alteration of a land/water boundary the doctrine of accretion was capable of applying to an increase in the area of land caused solely by windblown sand and it was <u>unnecessary to distinguish between that part of the accretion of land that had occurred mainly by the action of the water of the lake and that which had occurred by the deposit of windblown sand</u>; (<u>cf:</u> growing mangrove trees)

    (4) That before the doctrine of accretion could apply, it was essential that the accretion should have been both gradual and imperceptible ..."

(my underlining and addition)



40. In the present case it is common ground that the silting and complete blockage of the waterway on the landward side of Ewanesu Island occurred as a result of the gradual deposit of soil and sand over a period of 30 years caused by tidal action, longshore drift, and the settling and growth of mangrove trees after the waterway had silted up and become more or less stagnant water.

41. Be that as it may in light of my earlier discussions of the evidence and findings in the case my clear answer to **issues (1) and (2)** above is "***YES***". Given that answer, it is unnecessary to determine **issue (3)** which was not pressed. The claimant's claim is accordingly dismissed and the defendant's counterclaim is upheld.

42. I turn finally to consider the more difficult **issue (4)** which relates to the damages to be awarded to the defendant. In this regard, the defendant gave evidence supported by his surveyor **Jerry Moli** who conducted a recent survey of the defendant's land showing the claimant's excavated trench cutting across the defendant's leasehold title and resulting in the total loss of direct pedestrian access to the mangrove-covered area on the defendant's leasehold as well as direct/unlimited access to Emten lagoon which the defendant and his family previously enjoyed for the past 20 years. Where once the defendant could have walked directly to Emten lagoon, now, the only access is either by boat <u>or</u> by swimming <u>or</u> going through a neighbour's property. The defendant has also lost a large quantity of soil which was excavated during the claimant's dredging works and which is now replaced by a waterway.

43. The defendant also produced a report entitled: <u>Resource Assessment on Mr. Ronald Joseph's Lagoon Front</u> which was produced in court by its co-author **Sompert Gereva**, who also produced a <u>Valuation Report</u> he also co-authored on the "<u>*Invertebrate Species and Mangroves Affected in the lagoon front*</u>". The witness was cross-examined on both reports.

44. Claimant's counsel was particularly critical about the various basis for Mr. Gereva's evidence and the extrapolcations he made in valuing the loss to the defendant. I too, confess to some difficulty in understanding Mr. Gereva's <u>Valuation Report</u>.

45. Having said that, the claimant's own **EIA** Report confirms that the claimant's foreshore development will have both short and long term implications in particular:

> "*... the most immediate and short term impacts ... are the removal of the existing mangrove strends ... (which) ... will for the short term affect these resources which are dependant on by the local communities as they are an important marine habitat and breeding grounds for marine and coastal fisheries ...*" **(p10)**.

46. And later (at **p. 36**):

> "*Mangroves are resourceful trees within Vanuatu in terms of fisheries resources and should always be protected at all levels to ensure their sustainability into the future. Mangroves also support a diverse invertebrate and fish species including numerous species of mollucus, crustraceans, poly chaetes and fin fish. Mangrove trees also provide important building source for carving, medicine and fuel wood for the squatters within the lagoon.*"

47. Finally under the sub-heading "***Sensitive ecosystem***" (at **p. 38**) the author of the **EIA** writes:

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> "*The Kwila Limited foreshore development and related developments will impact directly on the mangrove resources as large areas will be cleared for reclamation during construction phases of the development some debris and sediments will flow into the lagoon*".

48. All of the above are confirmed to a greater or lesser degree in Mr. Gereva's Resource Assessment Report dated **7 September 2010** which also noted:

> "*The channel created also allowed for salt to intrude further inland contaminating the fresh water pore (sic) holes that were once used for cooking, washing and bathing.*"

49. In short, the claimant opposes the award of any damages on the basis that the defendant's evidence "*has not established sufficient causal link between the damage and the assessment of damages made in high monetary figures*".

50. In order to better appreciate the case and with a view to assessing damages, the Court visited **Ewanesu island** and the defendant's leasehold where the Court had the opportunity to view the nature and extent of the claimant's excavation and reclamation and its effect on the claimant's and the defendant's respective leaseholds. The Court was accompanied by both counsels as well as **Mr. Aku Dinh** and **Mr. Ronald Joseph**.

51. The very first observation I make from having visited the sites is that **Ewanesu island** is readily accessible by vehicular traffic without the need to cross a bridge or drive through any water crossing. In other words the so-called "*island*" remains firmly connected to and is very much part of the mainland.

52. The claimant's excavated channel has an approximate width of **25 metres**, a total length of **100 metres** with a depth of **3 – 7 metres**. It is filled with water and effectively and completely separates the properties on the land-ward side of the channel from the claimant's reclamation. In other words, it provides a man-made moat-like barrier between the claimant's reclaimed land and the neighbouring properties including the defendant's leasehold.

53. The reclamation works along the excavated channel has also raised the level of the claimant's land by a height of about **2 metres** above the water level of the channel and destroyed a very large area of mature mangroves that previously grew where the water-filled channel now flows.

54. Significantly, the claimant's excavated channel has a single entrance and exit to Emten lagoon located roughly opposite the defendant's leasehold. In other words the channel does not completely separate the claimant's leasehold from the mainland nor does it allow "*... water to flow or circulate around the island again to its past status ...*" as claimed in the EIA report submitted for ministerial approval.

55. The claimant's excavated channel and reclamation has very considerably increased the size of the claimant's dry useable land far beyond the claimant's original leasehold boundary and includes within it, the large mangrove covered area that once formed part of the defendant's leasehold.

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56. The claimant's excavated trench does however provide a sheltered mooring for boats and easy boat access to Emten lagoon for leaseholders whose properties border the excavated channel including the defendant's. This has also resulted in saline lagoon water entering to within 50 metres of the defendant's residence where once it was over 150 metres distant.

57. Returning to the defendant's counterclaim that the claimant trespassed on his land and "*destroy all trees, plants such as coconut, mangroves and other fruit tress totally, using heavy machines*" and "*destroying of the land area through digging and creating of the trench*" (30 metres wide by 100 metres towards the MHWM) the defendant's estimated losses are given as "*around VT150,000,000.*"

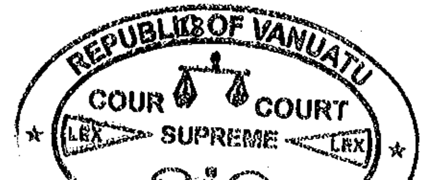
58. <u>No</u> evidence has been provided as to the number and age of coconut trees and other fruit trees allegedly destroyed <u>or</u> any value of the same as was intimated in the defendant's counterclaim. <u>Nor</u> is there any evidence of the volume (as opposed to the area) of the defendant's soil lost as a result of the claimant's excavation <u>or</u> the value of replacing it. Indeed, the defendant's valuation evidence of loss was principally confined to loss of mangroves and invertebrate species and the replanting of mangrove plants over a period of 5 years. There is no existing valuation of the defendant's leasehold.

59. I accept that the defendant's <u>Resource Assessment</u> Report dated 7 September 2010 clearly reveals a significant difference in the type, abundance and distribution of marine species and organisms studied in the excavated area and in the natural undisturbed area with a total of **5** live organisms being collected from the excavated sites as compared to **110** organisms collected from the undisturbed transected sites that were examined. I am not so sure however that those findings can be simply extrapolated to arrive at a monthly or annual loss and valuation extended over 75 years.

60. Similarly after having visited the site, I do not accept that reinstatement is now either possible or economically feasible and I adopt the following extract from **<u>McGregor on Damages</u>** (17th edn) as providing the proper basis for awarding damages in this case at **para 34 – 003** where the learned author writes:

> "*It was for long said that the normal measure of damages was the amount of the diminution of the value of the land, a proposition based on what was generally considered to be the leading, but somewhat ancient, case of Jones v. Gooday, where the alternative measure of costs of replacement or repair, i.e. the sum which it would take to restore the land to its original state, was rejected. The facts of the case were that the defendant had cut a ditch in the claimant's field and carried away the soil. Lord Abinger C.B. said he could not assent to the proposition that the claimant whose soil had been taken away was entitled to the "amount which would be required to restore the land to its original condition. All that he is entitled to is to be compensated for the damage he has actually sustained". And Alderson B. said that, if the claimant was right, one who let sea in on land worth £20 would have to pay for excluding it by expensive engineering operations.*"

61. I am not unmindful that the defendant has sustained loss in two respects, by having had the value of his land diminished, but also, he has permanently loss the use and enjoyment of what was mangrove covered land which has now become incorporated



in the claimant's extended leasehold as a result of its reclamation and development works around Ewanesu island.

62. Given the paucity of the defendant's evidence in support of his claim for damages and doing the best that I can in the circumstances I award the defendant the following sums:

		VT
(1)	For the initial trespass and loss of the soil excavated in the claimant's trench crossing the defendant's leasehold	- 2,000,000
(2)	For the diminution in the value of the defendant's leasehold occasioned by the complete severance of the mangrove covered area of more than **3000 square metres** bordering Emten lagoon	- 8,000,000
(3)	For permanent loss of mature mangrove trees, coconuts and other fruit trees growing within the defendant's leasehold and destroyed in the claimant's works	- 4,500,000
(4)	For permanent loss of fisheries resources and loss of enjoyment of the defendant's leasehold due to saline contamination of the defendant's borehole water	- 2,000,000
	TOTAL	**VT16,500,000**

63. On the total sum awarded I order the payment of interest at the rate of **5% per annum** with effect from the date of the filing of the defendant's counterclaim **i.e.** 21 September 2010.

64. The defendant is also awarded costs to be taxed if not agreed.

DATED at Port Vila, this 14th day of March, 2013.

BY THE COURT

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REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge.