

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

Civil Case No. 171 of 2011

**BETWEEN: WILLIE COMBERA & ORS**  
Claimants

**AND: BARAK SOPE**  
First Defendant

**AND: FRESHWIND LIMITED**  
Second Defendant

**AND: REPUBLIC OF VANUATU**  
Third Defendant

**Hearing:** 18<sup>th</sup> August 2015  
**Before:** Justice Chetwynd  
**Counsel:** Mr G. Boar for the Claimant  
Mr L. Tabi for the 3<sup>rd</sup> Defendant  
No appearances for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

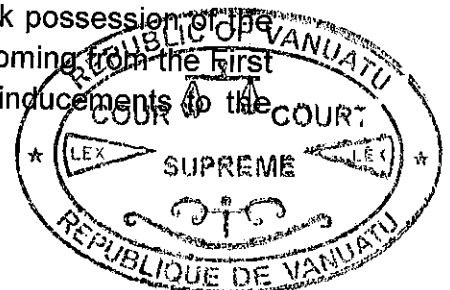
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**JUDGMENT**

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1. On 19<sup>th</sup> June an order was made that this matter be listed for legal arguments on a preliminary issue, namely, what was the effect of the Land Reform (Declaration of Public Land) Order No. 26 of 1981 dated 26<sup>th</sup> January 1981 ? The consensus was a decision on that question would more than likely lead to a resolution of all the legal issues between the parties. Written submissions were received from the Claimants, the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. Mr Morrison was unable to appear at the hearing for the 2<sup>nd</sup> Defendants because of his sudden and unexpected commitments in a criminal matter. I thank Mr Morrison for his courtesy in mentioning the difficulty he faced some days earlier and for his agreement to allow the hearing to proceed without him being present.

2. The latest Claim in this case was filed on 25<sup>th</sup> June 2013. It is an Amended Claim from the original filed in 2011. The Claim concerns land which is commonly known as Ohlen Freshwind and is the land comprised in the old title referenced as I.40. What is said in the Claim is that between 1982 and 1995 the claimants took possession of the land as a result of representations and inducements made by and coming from the First Defendant. The Claim actually attributes the representations and inducements to the



First and Third Defendants but there are no such representations or inducements particularised as being attributed to or emanating from the Third Defendant. The Claim continues with a claim that the Third Defendant entered into an agreement with Second Defendant to sub divide the property and sell the sub divided titles to the public. As a result it is said there has been trespass and a breach of the Claimants' Constitutional rights which protect them from "unjust deprivation of property". The Claimants also say they have over riding interests in the land.

3. It is clear that the success or otherwise of the Claim is dependent upon the effect of Land Reform (Declaration of Public Land) Order No. 26 of 1981. The Order states that it is made in exercise of the power contained in the Land Reform Regulation 1980 by the then Acting Minister of Lands. By paragraph 1:-

*"The shaded areas of land shown of the map attached hereto as Annex 1 shall with effect from the date of commencement of this order be public land"*

Paragraph 2 continues:-

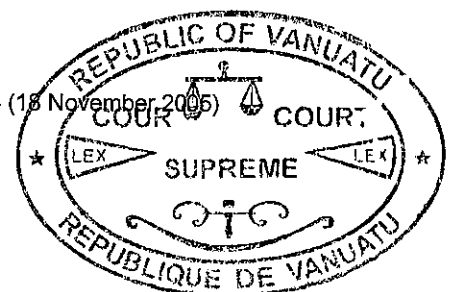
*"The boundaries of those areas, of which a description is attached hereto as Annex 2, shall constitute the urban physical boundaries of Port Vila."*

Whilst it has to be accepted that the plan is not the best or clearest plan ever seen there is no real doubt that the Ohlen Freshwind land is within the boundary of the "shaded land". There does not appear to be a copy of page 1 of Annex 2 with the papers but again there seems to be no real doubt that the Ohlen Freshwind land is within the area of land whose boundaries are set out in Annex 2. Although in submissions it is said by the Claimants that the Court cannot rely on the map because of discrepancies, they have produced no evidence which calls into any real doubt the interpretation set out earlier in this paragraph about the accuracy of the map and the veracity of the description in the Annex 2. The Claimants are required to prove their case on the balance of probabilities and it would have been a simple matter for them to, for example, produce plans or maps showing how their boundaries differ from those put forward by the Second and Third Defendants.

4. Having reached a point where the land can be clearly identified the question as to the effect of Land Reform (Declaration of Public Land) Order No. 26 can be answered quite simply and quickly because the question has been asked of and answered by, the Court of Appeal<sup>1</sup>. In the Kalomtak Wiwi Family case the Court of Appeal said :-

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<sup>1</sup> Kalomtak Wiwi Family v Minister of Lands [2005] VUCA 29; Civil Appeal Case 22 of 2004 (18 November 2005)



*"There is little dispute about the history of this matter. By virtue of the Land Reform (Declaration of Public Land) Order No. 26 of 1981, the Government of Vanuatu declared that all the land within the Urban Physical Planning Boundaries of Port-Vila was public land."*

The Court went on to say:-

*"The former custom owners of the land were deprived of the use of their land by virtue of the said Order and pursuant to the more general powers contained in the Land Reform Act [CAP. 123]"*

Their Lordships were in no doubt:-

*"There cannot be any argument that the Government has the power under Article 75 of the Constitution to acquire land and to hold it in the public interest. This is what occurred in 1981."*

5. What the Court of Appeal found happened next is important in the resolution in this case. It is worth setting it out in detail.

*"The Land Reform (Port-Vila Urban Land Corporation) Order No. 30 of 1981 created a Corporation which had powers with respect to the public land so acquired and, generally to act and liaise in the management of the said land. It had extensive powers over the land and a duty to hold the funds accruing therefrom for the use and benefit of the persons properly entitled thereto.*

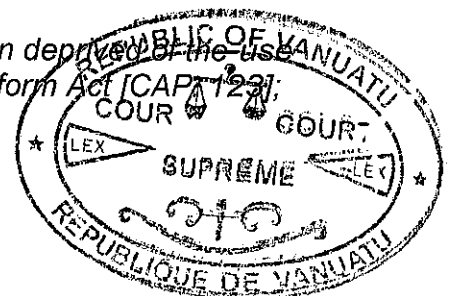
*In 1991 the Government of Vanuatu revoked the Order No. 30 of 1991 so that the Corporation which had been created ceased to exist and its functions were transferred to the Ministry of Lands. The Minister thereafter pursuant to Section 8 of the Land Reform Act executed leases on behalf of custom owners until such time that true custom owners had been determined.*

*On 17 July 1992, an Agreement was entered into between the Government of the Republic of Vanuatu and representatives of the former custom owners of Port-Vila urban land which dealt with compensation payments. .... The operative parts provided:-*

*"A. The Government has by virtue of the Land Reform (Declaration of Public Land) Order No. 26 of 1981 declared all that Land situated within the Urban Physical Planning boundaries for Port-Vila to be Public Land, such Land being delineated and coloured green/yellow on the map contained in the Schedule;"*

This is the same plan put forward in this case by the Third Defendant and the Ohlen Freshwind land is shown coloured green. The Court went on:-

*"The former custom owners of the said Land have now been deprived of the use of the said Land by virtue of the said Order and the Land Reform Act [CAP. 123];"*



*The former custom owners acting through their duly authorized Representatives acknowledge and accept the said declaration and its effect thereof;  
The Government and the former custom owners acting through their duly authorized Representatives are desirous of effecting an agreement for compensation for loss of use of the said Land in accordance with the said Act;*

**NOW THEREFORE IT IS AGREED AS FOLLOWS:-**

*As compensation for the loss of use of the said Land by the former custom owners prior to the signing of this agreement the Government pays and the Representatives accept on behalf of the former custom owners (receipt of which is hereby acknowledged) the sum of VT275,400,000 in final settlement for the said loss, payable as follows”*

The agreement went on to set out certain sums to be paid to various custom owners and then it provided:-

*“The Representative, the custom owners, their issue, successors in title, their personal or legal representatives howsoever appointed or authorized shall indemnify the Government from any claim that the money has not been properly paid out or further claims by others to such payment or to the said Land.”*

6. After arriving at those findings the conclusion reached by the Court of Appeal was that the issue was quite straight forward :-

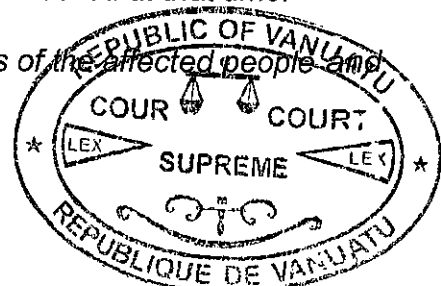
*“The controlling position is really very simple. The Government lawfully took as public land the whole of Port-Vila urban area. It thereafter became the legal owner of it. The custom owners who suffered as a result were entitled to be compensated for their loss.*

*For a period of about 10 years the lands were superintended, controlled and operated by the Corporation. The Corporation no doubt entered into many transactions. All those transactions were between the Corporation on behalf of the Government at that point.*

*At the heart of the Appellant’s claim is the notion that the Corporation was acting for and on behalf of the landowners. That is not the position. There was an unsatisfied right to compensation but the transactions which occurred thereafter were not for and on behalf of the former custom owners but for and on behalf of the Government who had acquired the land.*

*The Corporation was eventually abolished and the tasks which it had been doing were then taken over by the Ministry of Lands. The claim for compensation of the custom land owners by the Government had not been satisfied at that time.*

*In 1992, a deal was done between the representatives of the affected people and the Government.*



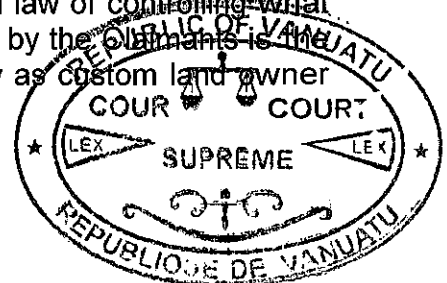
*No one challenged the legality or propriety of that at the time or within permitted limitation periods.*

7. The Claimants in this case are in worse position than the Appellants were in the Court of Appeal. Of the Appellants then the Court said:-

*"In law the Government has paid to the Representatives of the people who lost their land in the 1981 acquisition by the 1992 payments. The Appellant is bound by the Agreement which was negotiated by its Representatives. There is no evidence which suggest that its representatives acted without authority."*

Unfortunately the Claimants in this case say they are claiming through the custom owner whom they say is the First Defendant. It is no part of their case that **they** are or were the custom owners of Ohlen Freshwind land. The Claimants can be in no better position than any custom owner and may well be in a far weaker position than the Appellant in the Kalomtak Wiwi Family case. The First Defendant had no right to make any representations about the land or give anyone any permission to go on to it. It is not necessary for me, in this case, to make any finding as to whether or not the First Defendant was a custom owner. Whether or not he was a custom owner is irrelevant in this case. There can be no doubt about that because as pointed out earlier in the Court of Appeal decision it was said, *"The former custom owners of the land were deprived of the use of their land by virtue of the said Order and pursuant to the more general powers contained in the Land Reform Act [CAP. 123]"*. They also said, *"The Government lawfully took as public land the whole of Port-Vila urban area. It thereafter became the legal owner of it"*. There is no evidence the First Defendant initiated any legal challenge to the 1981 Order or 1992 Agreement. Any evidence he did would be contrary to the findings of the Court of Appeal who said in relation to the 1992 Agreement, *"No one challenged the legality or propriety of that."* As the Court also said, any challenge to the deal *"is now statute barred."* I would have to add the Court of Appeal also said, *"The issues have long since been determined."*

8. For the avoidance of any doubt and so that the Claimants are clear as to the effect of the 1981 Order I will repeat what the Court of Appeal has said. As from 26<sup>th</sup> January 1981 the owners of Ohlen Freshwind land have been the Government of Vanuatu. Any former custom land owner, if they had any rights, would only have rights with regard to compensation. As a result of the 1992 "deal" done between representatives of the affected people and the Government the question of compensation has long been settled and dealt with as well. There has been no legal challenge to the 1992 deal and subsequent agreement. The Claimants cannot have been given permission to enter onto or settle on Ohlen Freshwind land by the First Defendant. He ceased to have any authority over the land, if ever he had any in the first place, from 26<sup>th</sup> January 1981. Just because the First Defendant was a Government Minister and MP that did not give him the right to deal with the land. Between 1982 and 1992 the Urban Land Corporation was the only body capable in law of controlling what happened on the land. In any event the only evidence produced by the Claimants is purported actions by the First Defendant in a personal capacity as custom land owner



not as a representative of the Government. The end result is the Claimants have no authority to be on the land, they are squatters.


9. Before I leave the Court of Appeal case of Kalomtak Wiwi Family I have to point out that counsel for the Appellants in that case is counsel for the Claimants in this.

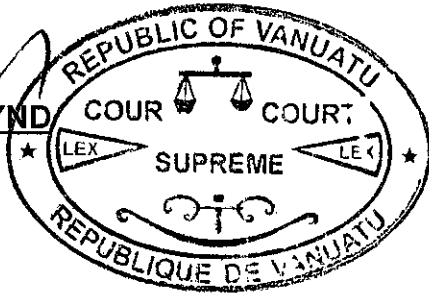
10. Whilst the question set out the preliminary issue has now been dealt with I will turn briefly to the other issue which is argued in aid of the Claimants' case. They say, some of them at least, that because they were in physical possession of the land prior to the creation of the lease to the Second Defendant that they have overriding interests in the land. I have been referred to the case of *William v William*<sup>2</sup>. It is apparent from that case that only rights are protected by section 17(g) of the Land Leases Act [Cap 163]. I have heard no argument so far in connection with section 17(g) rights but I will raise the issue now so that the Claimants can consider their position. I stress again that I have heard no arguments on the issue but it does seem that the Claimants will have an uphill struggle because, on the face of it, they have no lawful authority to be on the land and therefore no rights to be protected. Of course they may have a monetary claim against the First Defendant and they may want to continue their action only against that Defendant. It is something for the Claimants to consider and they should take advice from their legal representative.

11. I will adjourn the case Friday 2<sup>nd</sup> October 2015 at 09:30 in the morning. The adjournment will be to Chambers. I am hoping this will give the Claimants a chance to consider their position. At that hearing I will hear arguments as to why the Claim should not be struck out on the grounds the pleadings disclose no cause of action against the Second and Third Defendants.

DATED at Port Vila this 31<sup>st</sup> day of August 2015

BY THE COURT

  
DAVID CHETWYND  
Judge



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<sup>2</sup> *William v William* [2004] VUCA 16; Civil Appeal Case 21 of 2004 (4 November 2004)