IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

Constitutional

Case No. 18/3497 SC/Civil

BETWEEN: **Kilbride Limited**

Applicant

AND: **Republic of Vanuatu**

Respondent

Date:	23 September 2019
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mr M. Hurley for the Applicant
	Mr S. Kalsakau for the Respondent
Date of decision:	18 November 2019

JUDGMENT

A. Introduction

1. Kilbride Limited ("Kilbride") is the lessee of 3 bare parcels of land in Nambatu area, Port Vila, lying to the west of Kumul Highway and running down to the foreshore at Paray Bay looking out towards Iririki Island. The leases are adjacent to each other; and, if amalgamated, they would form a large and very desirable property for waterfront development in the heart of Port Vila.

2. Following Independence in 1980, there have been 3 attempts by the State to compulsorily acquire the lease immediately adjacent to Kumul Highway – the first application in 1992, the second in 2011, and the third which is on-going in late 2018. Only the second and third attempts have involved Kilbride.

3. This case concerns what occurred in the course of the second compulsory acquisition process and the lead up to the third attempt. The State eventually abandoned the second attempt in 2014. However, while the acquisition was still on going, it is alleged that certain steps were taken by the Minister of Lands ("the Minister"), and others at his behest, to improve the State's position before a third attempt was made in 2018. Those steps

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included (i) making substantial legislative amendments to the Land Acquisition Act ("LAA") beneficial to the Government, (ii) not responding to attempts by Kilbride to extend one of the leases from 50 to 75 years, (iii) not responding to Kilbride's attempts to amalgamate the 3 leases to form a single block of commercial land, and (iv) not responding to Kilbride's request for consent to transfer the leases to a new purchaser.

4. As a result, it is said, Kilbride's constitutional rights under Articles 5(1)(d), 5(1)(j), and 5(1)(k) of the Constitution have been breached. Those articles deal with the guarantees of protection of the law, unjust deprivation of property and equal treatment under the law, respectively.

5. Three further causes of action were included in the Claim, namely claims for legitimate expectation, estoppel and contract. However, they are not the subject of this decision. This decision deals solely with the constitutional application.

B. Background

(i) The Leases

6. Kilbride acquired lease 058 in December 1991, lease 063 in February 2002 and lease 048 in March 2005.

7. The 3 leases are respectively, looking from east to west or closest to Kumul Highway to closest to the waterfront, 11/OB24/048, 063 and 058. The present third compulsory acquisition (commenced on 17 October 2018) relates to leases 063 and 048, which if concluded would leave lease 058 landlocked.

(ii) The First Compulsory Acquisition

8. The first attempt to compulsorily acquire lease 048, to turn the land into a park, was made prior to Kilbride's interest in the land – the acquiring body was to be the Port Vila Municipal Council ("PVMC"), but that acquisition never eventuated.

9. When Kilbride was undertaking due diligence in respect of the purchase of that lease in 2004, it obtained Outline Planning Permission from PVMC for a hotel development and additionally sought and obtained consent to convert lease 063 into a commercial lease. A number of Government Departments were involved in these matters and it is said that the Government therefore had knowledge of the likely sale to Kilbride and Kilbride's intended use of the land once purchased.

(iii) The Second Compulsory Acquisition

10. The second attempt in March 2011 to compulsorily acquire lease 048 for "public purposes" was made by the Minister.

11. Kilbride challenged the assessment of compensation proposed by the Valuer General. The issue to be determined, put starkly, was whether or not compensation was to be assessed under the LAA taking into account market value. In 2014, Justice Sey determined that

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challenge in favour of Kilbride. This resulted in the Government being compelled to compensate Kilbride taking market value into account. The Government was to provide a re-assessment of the compensation offer on that enhanced footing within 30 days.

12. The difference in 2011 – 2014 between the Government's offer excluding market price as a valid consideration and valuations taking market price into account is considerable. The Lands Department Valuation Unit assessment resulted in an offer of VT 66.5m; whereas the valuation by Vanuatu Property Valuation Limited was VT 207m and that by Tahi Consultant & Real Estate Services was VT 245.8m.

13. In the aftermath of Justice Sey's determination, the Attorney General wrote to Kilbride on 23 May 2014 advising that the Government had "...re-assessed its policy in acquiring this land" and that it therefore no longer intended to pursue the matter. Further, it was stated: "...the compulsory acquisition falls by the way side and as such we do not contemplate that an insistence for compensation would be a matter of concern as your client will maintain its indefeasible interest over the land".

14. The Attorney General also offered to pay Kilbride's reasonable costs incurred in the legal challenge to the compensation assessment.

15. As a result, Kilbride then withdrew its challenge on payment of its legal costs and there was no re-assessment of the compensation offer taking market value into account.

(iv) Subsequent Steps

(a) By the State

16. On 18 September 2014, the then Minister Mr Ralph Regenvanu directed Parliamentary Counsel to draft the repeal of the very statutory provisions in the LAA which Justice Sey had relied upon to arrive at her decision. The instructions were to remove the aspect of market value from the compensation offer assessment criteria as had previously appeared at section 9(1)(a) of the LAA and replace the criteria with a new regime based on 3 classes of ownerships.

17. The new legislation, assented to December 2014 and with effect from 15 January 2015, differentiates between land which is the subject of a lease and land which is not. For land not the subject of a lease, market value remains a relevant factor in assessing the appropriate compensation to be made to the custom owners. For land that is not the subject of a lease, compensation due to lessees is to be assessed differently to the compensation payable to lessors. A lessee's interest in the land was now to be assessed taking into account the value of: (i) profit rent for the remaining term of the lease, and (ii) buildings/housing or improvements made to the lease. On the other hand, a lessor's interest in the land was the value of (i) the contract rent for the remaining term of the lease and (ii) of the reversion to perpetual ownership when the head lease expired, or the full rental value in perpetuity.

18. In 2017 there were further amendments to the LAA which affected the assessment of compensation, making it clear (if there was any doubt) that only the stated matters as set out in the 2014 amendments were to be taken into account, while also significantly

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broadening the definition of "public purpose" and reducing the bases on which compensation offer assessments by the Valuer General could be challenged.

(b) By Kilbride

19. From 23 June 2015 onwards, Kilbride attempted to extend the term of lease 048 from 50 to 75 years, thereby equalising the terms of all 3 leases to 75 years. That request was re-lodged on 25 February 2016, and followed up by an e-mail of 13 April 2016 and by letters of 1 November 2016 and 10 January 2017. No formal response to these communications was received, as laid out as part of Kilbride's case. There was however verbal communication between Mr Patterson for Kilbride and various Government officials in an attempt to progress these matters, all of which failed to give Kilbride any satisfaction.

20. Subsequently, Mr Patterson wrote to the Minister on 2 February 2017, enclosing copies of the previous communications and asking why no substantive responses had been forthcoming. He also did not receive a reply from the Minister to that enquiry.

21. Further, Kilbride took steps to ease the way to developing the 3 leases as a hotel site, or as Mr Patterson put it, to try to alleviate the damage done to the value of its leasehold titles by the two aborted compulsory acquisition attempts. The following are said to evidence that:

- 9 July 2015 PVMC approved planning permission (again) for a commercial development on site;

- 29 October 2015 letter by Minister giving Kilbride 3-years protection from forfeiture of leases;

- 4 February 2016 PVMC approved development outline for proposed hotel on site;

- 4 April 2018 letter from CEO Vanuatu Tourism Office supporting proposed hotel development;

- 27 April 2018 letter from Minister of Tourism supporting proposed hotel development; and

- 16 August 2018, request to PVMC for interim planning permission to establish a handicraft village on site, which was approved on 4 October 2018 with the Permit following on 12 December 2018.

22. Kilbride also took a number of steps to attempt to achieve amalgamation of the 3 leases into one title. The application was lodged on 16 November 2017, and approval was recommended by the Land Management and Planning Committee Chair on 3 January 2018. Formal approval was given on 20 June 2018. In order to achieve amalgamation, the 3 leases had to be surrendered in order that a new amalgamated lease could be issued. The Minister was required to consent to that, and this was obtained from the then Minister Mr Alfred Maoh for all 3 leases on 26, 27 September 2018 and 2 October 2018.

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23. On 11 October 2018, Kilbride entered into an agreement for the sale and purchase of the 3 leases to Yang Huanduo. The purchase price was US$7.5m, with settlement due on 12 December 2018. Kilbride sought consent to transfer the leases to the named purchaser by letter to the Ministry of Lands on 15 October 2018. There has been no response to that application.

(v) The Third Compulsory Acquisition

24. The third attempt to compulsorily acquire, this time leases 048 and 063, was conveyed to Kilbride on 17 October 2018 by means of an Acquisition Notice. The purchase was for "public purposes", specifically for green space for the communities in Port Vila.

25. By letter dated 18 October 2018 Kilbride objected to the proposed compulsory acquisition and submitted that instead the sale to Yang Huanduo be permitted to be completed. The Attorney General responded that the compulsory acquisition would proceed.

C. The Law

(i) Onus and Standard of Proof

26. This is a civil proceeding, as opposed to a criminal matter. Accordingly the onus of proof lies on the Applicant, and the standard of proof is on the balance of probabilities – namely, are the Applicant's contentions more likely than not to be correct?

(ii) Jurisdiction

27. A company is not a living being, but it is a legal entity in its own right. Due to this, Kilbride cannot enjoy all the fundamental rights protected under the Constitution as an individual member of the community, for example 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). Nevertheless I am satisfied that a company, properly incorporated and registered according to the laws of Vanuatu, can enjoy some of the protections afforded by the safeguards set out in the Constitution, including those claimed to have been breached in this case.

28. The case of *Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu* [2006] VUSC 74 is good authority for that proposition. The learned Chief Justice specifically referred in that case to Articles 5(1)(d), (j) and (k) as being applicable provisions relating to companies. With respect, I agree with that exposition of the law.

29. In support of the proposition that the Supreme Court has the authority, and indeed duty, to strike down as invalid any legislation infringing the Constitution, the cases of *AG v Jimmy* [1996] VUCA 1, and *Republic of Vanuatu v Carcasses* [2009] VUCA 34 are apposite and binding on this Court.

(iii) Interpretation

30. I accept that a fair, large and liberal interpretation is to be given to the Articles in the Constitution. On that basis, if the evidence established unconstitutionality, I am satisfied

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this Court has the jurisdiction to declare as unlawful and invalid those parts of the 2014 LAA amendments which remove, and the 2017 LAA amendments which reinforce the removal of, consideration of market value as one of the factors that must be taken into account when assessing compensation where a lease is in existence.

(iv) Authorities

31. I note that the LAA was first debated at Bill stage - a Constitutional challenge was made by the President of the Republic of Vanuatu who queried if the Bill was in breach of the Constitution in *Timakata v Attorney General* [1992] VU Law Rp 9. The then Chief Justice determined that the Bill was within the terms of the Constitution, and accordingly the President subsequently assented to it. The submissions that the Bill would result in (i) unjust deprivation of property, (ii) unequal treatment under the law or (iii) interference with the protection of the law were rejected. However, at that time section 9 of the LAA spelt out that market price was a factor to consider in assessing the appropriate compensation payable. I must consider the same issues, but in quite a different scenario. This authority is therefore of only limited assistance.

32. A fundamental submission by the Claimant is that in compulsory acquisition cases, compensation must include consideration of the market value of the property. It is argued that to not take that into account is an "unjust deprivation" of property. In support of this submission it is contended that in almost every overseas jurisdiction market value is taken into account. In particular, the law in Australia was pointed to as instructive, namely section 51(xxxi) of the Australian Constitution where provision is made for compensation to be made on "just terms". This was described by Mr Hurley as the opposite side of the same coin as the Vanuatu term "unjust deprivation".

33. Mr Hurley advanced the proposition that the issue for determination would benefit from an analysis similar to that undertaken in several cases in Australia, where Article 51(xxxi) of the Commonwealth Constitution was discussed and in particular the term "just compensation". Not only did he refer to the text *Constitutional Law in Australia 2nd Ed* by Peter Hanks, but he referred also to numerous statements in *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 which were said to be of assistance in terms of the interpretation of the Constitution and how widely "property" might be interpreted. In that case Dixon J considered that the term "property" should not be pedantically confined to the taking of title but "...extend to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control...".

34. Mr Hurley also referred to *The Minister of State for the Army* (1943-4) 68 CLR 261 where it was held that the taking by the Commonwealth for an indefinite period of the exclusive possession of property constituted an acquisition of property.

35. However, as initially attractive as those submissions are, the reality is that the system of laws relating to property in Vanuatu is nothing like that prevailing in Australia or New Zealand or elsewhere – while it might be described more akin to other Pacific Islands such as Solomon Islands and Papua New Guinea, it is in actuality quite unique. Ownership of all land is in the hands of (i) either custom owners, with secondary rights of use reserved in many instances, or (ii) the Government. Any ordinary disposition of land is only by way of the sale of leasehold interests, except when land is compulsorily purchased by the

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Government, which process also ends all secondary rights. Due to the unique regime that exists in Vanuatu, I am less enthusiastic than Mr Hurley about the instructive nature of what occurs in other jurisdictions.

36. Nor in my analysis are the Constitutions of different countries really comparable – each should be regarded in its own right taking into account historical and other inherently distinctive differences.

37. The Court of Appeal considered likewise in *Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu* [2009] VUCA 35 stating, in relation to applying to Vanuatu the rationales of decisions pertaining to section 51(xxxi) of the Australian Constitution: "Considerable caution must be exercised in the use of Australian cases."

38. In the *Groupe Nairobi* case a constitutional challenge was founded on a Supreme Court decision to not set aside a disallowance by the authorities to allow a VAT refund. That was said to be an unjust deprivation of property, and therefore in breach of the Constitution. One of the relevant comments by the primary judge records: "As the amending Act had been duly passed by Parliament the fact that the statutory change may have had an unfortunate effect on an individual does not make the legislation contrary to justice". As therefore any deprivation could not be said to be "unjust", the primary judge did not go on [to consider] whether the amending legislation constituted "property". The Court of Appeal agreed, stating: "In our opinion the Government's decision to amend the legislation by changing the definition of second-hand goods was a matter for the Government to decide".

39. The Court of Appeal further stated: "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..."

40. The Court of Appeal continued: "In considering the public interest, the Supreme Court, as the body with the 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 legislative provisions concerned the allocation of public resources....In considering whether a fair balance has been struck issues of compensation may in some cases be a relevant consideration".

D. The Evidence

(i) For Kilbride

41. Mr Patterson (x3) and Ms Harry have produced sworn statements. The statements append relevant documentary exhibits which support their evidence. Mr Kalsakau did not cross-examine them. In the circumstances, it is difficult not to accept as correct their contentions in terms of times and events.

42. Mr Patterson set out in his evidence the background, which I have summarised earlier in this decision, and he provided copies of the correspondence and documents he referred to including copies of the 3 leases and Justice Sey's 2014 decision. The vast preponderance of that evidence is unchallenged.

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43. However, Mr Patterson went further and provided his interpretation of several aspects of the matter, and they do require careful scrutiny and a determination as to the accuracy and reliability of those opinions. For example, Mr Patterson points out that the amendments to the LAA, while being worked on within the machinery of Government, were not notified to Kilbride in any way. He clearly considers the Government was under an obligation to give notice to Kilbride of its intention to amend the LAA – his opinion as to that and the other aspects of his evidence will receive later scrutiny.

44. Mr Patterson gave evidence that in his view the Attorney General, by his letter of 23 May 2014 in relation to the second compulsory acquisition, offered to settle the legal dispute between Kilbride and the State on the basis that the Minister would withdraw the compulsory acquisition and pay Kilbride's costs *conditional upon* Kilbride withdrawing the claim for compensation (my emphasis).

45. Further, Mr Patterson stated that the Minister's withdrawal was not only a term of the agreement reached but also "...constituted a representation to Kilbride on behalf of the Government, the Republic and the Minister of Lands ...that if Kilbride withdrew any claim for compensation that Kilbride will retain its indefeasible interest in the land in Lease 048".

46. Mr Patterson stated that the representation "...meant that neither [the Minister] or the Republic would take steps to compulsorily acquire Lease 048 in the future or interfere with Lease 048's rights and obligations unless some very compelling reason arose and Kilbride was consulted before any future compulsory acquisition steps were taken". He maintains that however regarded, it equated to a representation Kilbride was entitled to rely on that there would be no further compulsory acquisition of lease 048 in future. It was on that basis, he says, that Kilbride withdrew its claim for compensation, despite the damage suffered to Kilbride's interests.

47. Mr Patterson alleged that the third attempt to compulsorily acquire Lease 048 is a resiling by the Minister from his position leading to the settlement of the second attempt - which Kilbride had legitimately expected would preclude any further acquisition attempts. Further, in the interim and in bad faith, the Minister had set about amending the LAA by removing the aspect of market value without notice to Kilbride, prior to commencing the third compulsory acquisition. That conduct is said to be illustrative of the Minister's lack of intent to withdraw the second compulsory acquisition and demonstrates the Minister's true intent was to compulsorily acquire Lease 048 without adequately compensating Kilbride.

48. Mr Patterson stated that he views the lack of official response to the steps taken by Kilbride to enlarge the term of Lease 048 as further indication of the improper purposes and bad faith on the part of the Government, in particular the Minister. It is evidence, in Mr Patterson's opinion, of a lack of genuine intention to permit Kilbride to enjoy peacefully the indefeasibility of its title. Mr Patterson stated that somewhat unusually the wording of Lease 048 enables Kilbride to simply exercise a right to enlarge the term of the lease at any time between 1 year and 4 years prior to the lease expiry date – without the need for a premium to be paid.

49. Mr Patterson is of the view that the Government's determination to proceed with the third acquisition is a reneging of the settlement achieved to end the second acquisition attempt. It is said to be a material breach of the previous settlement, which Kilbride was only

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prepared to enter into due to the legitimate expectation that Lease 048 was safe from future acquisition attempts.

50. Mr Patterson stated that he received notification of all new legislation electronically. He said he was unconcerned at learning of the LAA amendments as "...the Government had confirmed in writing ...that the Minister of Lands would not be using the 2014 and, also the 2107 Land Acquisition Amendment Acts to repeat the 2011 compulsory acquisition process".

51. Mr Patterson went on to say that the LAA amendments "...eliminate the right of Kilbride to claim compensation because the three leases 048, 058 and 063 are bare land". He considered the steps taken to achieve by Government this demonstrated breaches of natural justice, protection of the law, unjust deprivation of property and absence of equal treatment under administrative law.

52. Mr Patterson's third statement appends a number of documents obtained from the State Law Office by way of disclosure. He made the point that these documents were ordered to be disclosed by the Court and is critical of the need for that. The reality is that the State Law Office has an obligation to protect clients' legal interests, and that is what it did in relation to these documents. This ordered disclosure does not in any way bolster Kilbride's claims.

53. Included in the documents are the following:

- E-mail trail between Mr Regenvanu and Ms Dovo and Mr Kalsakau and others, and copied to others on 12 May 2014. Mr Regenvanu wrote: "The recent decision in the Kilbride v Govt is not favourable to the Government in terms of acquiring land in the public interest. We definitely want to acquire land based on "lease value" NOT "market value", however this case is now decided in favour of acquiring land based on "market value". Accordingly, I wish to consider amending... to change "market value" to "lease value". There is concern, however, that if we do not properly compensate people for the value of the lease interest they will have an action under the Constitution." Mr Regenvanu sought the opinions of others and concluded with his concern for the enormous cost to Government, "...especially for the Port Vila waterfront titles required for the beautification project."

  Mr Samuel responded that the law as it stands was unfair, as in the case of a customary land acquisition the lessee would be offered market value leaving the customary owners out of pocket. He questioned if that was the true intent behind the LAA. Mr Regenvanu thanked him and asked Mr Samuel to give consideration to how both matters might be addressed.

- Email trail between Mr Regenvanu and Ms Dovo and Mr Kalsakau, copied to others and running from 16 May 2014 to 27 June 2014. On 16 May 2014 Mr Regenvanu instructed Parliamentary Counsel to meet and facilitate preparation to make amendments to the LAA, including "...to deal with the judgment in the Kilbride v Republic case, to allow government to compulsorily acquire urban land at lease value..."

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- Letter of 18 September 2014 from Mr Regenvanu as Minister of Lands to Mr Kalsakau as Attorney General. The letter attaches a COM decision authorising amendments to the LAA and others Acts. COM's authority is extended to include any other amendments as deemed appropriate to achieve the objectives desired by Government. One such outcome was stated to be:

  "That for leases that need to be acquired in the public interest, the State shall only compensate the Lessee holding the land for:

  A) Total actual costs already paid by the Lessee for the land (including premium, land rent, stamp duty etc). In other words, the State shall reimburse the Lessee for all their expenses in relation to the lease and that this payment shall be adjusted for inflation based on the CPI; and

  B) Reasonable compensation for improvements constructed on the land (reimbursement of the Lessee for all their expenses in any improvements on the land, adjusted for inflation)."

- Letter of 26 September 2014 from Mr Samuel as Valuer General to Mr Regenvanu as Minister of Lands. Mr Samuel points out in the letter that the instructions received propose a compensation regime based on costs not market value. Mr Samuel's comments: "It appears to be overwhelmingly influenced by the intention of the government to repossess some 30 to 40 leases which have been registered in the names of staff of the Department of Lands." Mr Samuel continues to point out that as is the practice in many countries, compensation value must be left to the market to determine the value of the asset not its historical costs. He comments that that the regime proposed not only ignores the market but also the particular legal interests, rights, profits, and enjoyment conveyed on lessees for a definite period. Mr Samuel put forward an alternative proposal, before concluding that: "It has always been held in Courts in other jurisdiction[s] that the compensation value should be the value to the owner not the acquisition authority. I am afraid your proposed compensation is not conducive to private sector investment and could be easily politicised."

- Email trail between Mr Regenvanu and Ms Dovo, Mr Loughman and others and copied to others on 11 and 12 May 2017. Mr Regenvanu stressed the urgency of having the amendments drafted, in view of the Malvatumauri meeting to be held on 22 May 2017 when the amending Bills would be discussed.

- Letter of 12 May 2017 from Mr Regenvanu as Minister of Lands to Mr Loughman as Attorney General. This set out formally the instructions for what amendments are required to several Acts, including the LAA, as set out in the text of the COM Decision 32 of 2016. The amendments are said to provide for greater involvement of the Valuer General and to counter the effect of the judgment in Civil Appeal Case No. 05 of 2014 – a decision of Justice Fatiaki. As well, as a matter of policy, the instruction was to provide for the quantum determination of the Valuer General to be final and to only permit appeals on points of law.

54. The further documents provided to the Court by Mr Patterson, do not, in my view, advance his case. Hence I have not discussed them.

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55. Ms Harry has supported the evidence of Mr Patterson as to the steps taken by Kilbride to improve the marketability of the 3 leases by attempted amalgamation, and applying to extend the life of a lease. She produced file notes in relation to the steps taken by her, which include some patently hearsay material of statements made to her by others, in particular Mr Peter Pata and Mr Darren Fatu. If anything, those statements made to Ms Harry should have put Mr Patterson and Kilbride on notice that far from the Government having lost interest in the land, it was again contemplating acquisition or had never truly abandoned that intent.

56. Ms Harry was also involved in Kilbride's alternative proposal for use of the land, namely the establishing of a Handicraft Village. In the course of her endeavours relating to this she also made a file note recording a further hearsay comment by Mr Kuautonga as to the Government's intentions relating to the land.

(ii) For the State

57. Mr Samuel, Ms Dovo and Mr Gilu have provided sworn statements. Mr Hurley did not cross-examine them. Their statements are factual in nature, and it is difficult not to accept their evidence as being correct. In fact much of what they say dovetails with the Applicant's evidence.

58. Mr Samuel was the Valuer General. He was well aware of Justice Sey's decision in 2014 and the effects of it. He clearly stated, from a position of close involvement in the process, that the subsequent amendments to the LAA were not driven by Government's desire to "deprive" Kilbride or other landowners in a similar position of the proper compensation. He considered Justice Sey's decision highlighted a problem with the LAA as it was then, in that it did not differentiate between the interests of the lessee and the lessor. The amendment was implemented to deal with that, in order that the acquisition of land by Government was both practical and not excessively expensive.

59. Mr Samuel went on to explain that the 2017 amendments to the LAA were brought about as a response to the Court's decision in *Molbarav v Adams* [2017] VUSC 13 which was quite unconnected to Kilbride.

60. Ms Dovo was part of a team at State Law Office which provided legal drafting services to the Government. Her evidence dealt with the usual procedures involved in preparing amending legislation, and she confirmed that these had occurred in respect of the amendments to the LAA. The instructions to attend to the amendments came from the Minister, the Valuer General and the Director of the Department of Lands, after the Council of Ministers ("COM") had approved the desirability of such amendments. COM approved of the amendments before they were passed by Parliament and then the legislation was subsequently assented to by the President. There was nothing extra-ordinary or unusual in the process.

61. Mr Gilu described Mr Patterson's understanding of the 24 May 2014 letter from the Attorney General to Kilbride as "...entirely wrong and misconceived". He pointed to the actual wording of the letter as permitting no other interpretation than that which he advanced – that the State had reconsidered its decision to acquire lease 048 and that it would agree to settle Kilbride's costs.

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62. Further to that, Mr Gilu appended a letter from Mr Hurley in which it was proposed that Kilbride would forgo its costs if the Government entered a Settlement Deed which included provision for some protection to avoid the possibility of the Government again changing its position. The proposed Deed was to bind all future Governments and officials and it recited that "...the Republic hereby agrees that it shall not now or at any time in the future purport to take any steps to acquire the land...". The Deed was also intended to complete the amalgamation of the 3 leases and extend the term of lease 048 to 75 years. The response from the Government was to decline the invitation – the letter records "...the State is not in unison with the Claimant in regards to the terms of the proposed deed."

E. Submissions

(i) For Kilbride

63. Mr Hurley pointed to the "massive" difference between what was offered by the Valuer General to Kilbride in 2011 (VT 66.5m) as opposed to what the independent valuers considered the compensation offer should have reflected taking market price into account (VT 207m and VT 245.8m). In 2018 Kilbride was offered US$ 7.5m for the 3 leases. Thus, it was submitted, even though the terms of the leases had reduced, the market value of the property had not. Taking a conversion rate of US$ 1: VT118, the purchase price agreed to in 2018 is over VT 885m.

64. The Government in delaying and ultimately abandoning the 2011 attempted acquisition, by thwarting Kilbride's ambitions through the several "administrative failures" referred to, and by amending the LAA in the Government's favour, has in effect enabled it to move to compulsorily acquire Kilbride's 3 lease titles for a fraction of its true worth. The submission was that this is manifestly unjust and amounts to an unjust deprivation of property in breach of the Constitution.

65. Mr Hurley further submitted that the Minister's conduct following Justice Sey's decision, as outlined earlier, amounted to bad faith and exhibited improper motives on the part of the Minister in his dealings with Kilbride. This was submitted to be evidence of unequal treatment under the law towards Kilbride.

(ii) For the State

66. Mr Kalsakau concentrated on three aspects of the case. Firstly he addressed the issue of Article 5(1)(j). He submitted that rather than the removal of market value when calculating the appropriate compensation for compulsory acquisitions being contrary to Article 5(1)(j), the real protection afforded by this Articles of the Constitution to Kilbride is from arbitrary expropriation of its property, except in accordance with the law. He cited *Terra Holdings Ltd v Sope* [2012] VUCA 16 as supportive of that submission.

67. Mr Kalsakau further submitted that Article 5(1)(j) does not guarantee the protection of the right to market value compensation, as it was concerned not with compensation but with the deprivation of property. He elaborated on that by submitting that Kilbride, in order to succeed, had to demonstrate that the amendments to the LAA had deprived Kilbride of property. He considered that Kilbride had failed in that as it retained ownership of the

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leases in question; and that if the only right affected was the right to market value in assessing compensation then such an expectation could not be considered "property".

68. He went on to submit that if that submission was incorrect, a finding of deprivation of property would still be insufficient. He reasoned that what Kilbride had to establish in order to succeed was an "unjust deprivation of property. Mr Kalsakau submitted there was no evidence of this.

69. Mr Kalsakau pointed to Article 77 of the Constitution as being relevant to the present case. It states: "Parliament shall prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate to persons whose interests are adversely affected by legislation under this Chapter". He accepted that the LAA was legislation under the Chapter. Accordingly, he submitted it was for Parliament, not this or any other Court, to settle the criteria for the assessment of compensation.

70. Mr Kalsakau submitted that Parliament had considered it appropriate to amend the LAA to differentiate between land not subject to a lease - in which case the compensation to the custom owners should include the market value of the land as one of the criteria; and land where there was a lease in which instance compensation for the lessor's and lessee's interest were to be considered by taking into account different matters. In this way, Parliament had struck a balance, which Mr Kalsakau submitted was both fair and just.

71. Mr Kalsakau's second point related to Article 5(1)(d). He submitted that there was no evidence produced to support the contention that there was a breach of natural justice in failing to give Kilbride notice of Parliament's intention to amend the LAA. He cited *Government of the Republic of Vanuatu v The President of the Republic of Vanuatu* [201] VUSC 109, where it was stated: "...under the Constitution, there is no duty or requirement for Parliament to consult before it enacts a bill...". A similar statement is to be found in President v Speaker [2009] VUSC 25. Mr Kalsakau submitted there were sound policy considerations for the Courts to only interfere with Parliament's sovereign powers in the event of a breach of the Constitution.

72. Further, Mr Kalsakau objected to Kilbride's statements to the effect that, in settling the second compulsory purchase following Sey J's decision, the State had agreed in any way not to exercise its powers in the future to make a further compulsory acquisition attempt of Kilbride's land. He submitted that was an incorrect statement of the position when considering the effect of the correspondence between the parties at the time; and, further had been contemplated, this would have been wrong in law and unenforceable: *Clunies-Ross v Commonwealth* [1984] HCA 65.

73. The third issue addressed by Mr Kalsakau related to Article 5(1)(k). In that regard, Mr Kalsakau cited as helpful the decision in *Timakata v Attorney General* [1992] VU Law Rp 9. There the Chief Justice cited with approval the statement: "Distinctions made in legislation are not discriminatory and do not violate s.15 [or....] unless (i) they discriminate against groups or individuals who are "similarly situated" in a non-arbitrary manner relevant to the purpose of the law; and (2) the resultant distinction adversely affects them and is unfair and unreasonable or impacts upon them in a constitutionally relevant sense. Both these tests must be met before s.15 is violated."

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74. Mr Kalsakau submitted the distinctions in the amended LAA do not fit within either test. Accordingly, he submitted there was no unequal treatment under the law evidenced in this matter.

75. In oral supplementary submissions Mr Kalsakau also advanced the position that, in respect of the so-called administrative failings relied on by Mr Hurley as individual breaches of the Constitution as well as evidencing *mala fides* on the part of the State in its dealings with Kilbride and the land in question, Kilbride had other remedies open to it, such as Judicial Review proceedings. If correct, Mr Kalsakau argued the Court should not grant the Constitutional application in respect of those failings. In support of this argument the various statements in *Republic of Vanuatu v Bohn* [2008] VUCA 6; *Nari v Republic of Vanuatu* [2015] VUSC 132; and the particularly strong advice of the Privy Council in *Jaroo v AG of Trinidad and Tobago* [2002] 1 AC 871 are often cited.

F. Discussion

76. At first glance one might think that there is an obvious breach of the Constitution in terms of deprivation of property where a compulsory acquisition by Government is commenced. However, the Constitution males express provision for the Government to own land, and for the Government to acquire land in that fashion, provided there is a regime in place dealing with compensation to the former land owners. The LAA establishes precisely such a regime. It is important therefore to concentrate on exactly what is the constitutional challenge in this case.

77. The principal ground is whether amending the LAA and removing market value from the assessment of compensation for those in Kilbride's situation can not only be considered to be a "deprivation of property", but further, an "just deprivation of property". The two other bases for this constitutional application are secondary in my assessment.

78. There are a number of considerations to be taken into account in determining the application.

79. There is an obvious difference between the second and third compulsory acquisition attempts. The second attempt dealt solely with Lease 048; the third attempt deals with Leases 048 and 063. That factor alone undermines Kilbride's allegations of bad faith and improper motive on the part of the Minister. The third attempt is of a different nature, and cannot be said to be continuation on of the second attempt.

80. There is no merit in Kilbride's view that the Government had an implied obligation to advise Kilbride of the intention to amend the LAA. I also see little turning on the difficulty Kilbride experienced in attempting to extend the term of Lease 048, as Mr Patterson explained that in any event the Lease document itself made provision for such extension towards the end of the term of the lease.

81. Kilbride is rightly aggrieved at the numerous failures of Government Departments and staff in not dealing with Kilbride's applications/requests in a timely fashion or in fact at all. The lack of efficiency is deplorable, and it must have promoted an on-going dissatisfaction with the manner in which these matters were dealt with. It could be considered rude and disrespectful. However, I do not see such conduct as being a proper basis to found a

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constitutional application. I accept also that the proper remedy to alleviate such concerns is by something other than a constitutional application.

82. Kilbride has over-stated the position in submitting that the settlement of the second attempted compulsory acquisition was conditional upon Kilbride withdrawing the challenge to the Supreme Court as to the appropriate level of compensation. The correspondence from the Attorney General simply cannot be read in that way. Further, that correspondence did not indicate that the Government would, forever thereafter, lose interest in acquiring the land in question and not attempt again to acquire it. Definite and specific language would be required before such inferences could properly be drawn.

83. Kilbride's submissions to the effect that the Government resiled from or reneged on the agreement which ended the second acquisition attempt is simply incorrect. I am satisfied that once the second attempt was concluded, that there was a subsequent move by the Government to acquire not just Lease 048 but also Lease 063. This was a separate endeavour. Mr Patterson was critical of the Minister's "true intent", but this was conjecture on Mr Patterson's part. I reject the suggestions of bad faith and improper intent made against Minister Regenvanu as unsubstantiated.

84. Kilbride was properly advised that the Government would not proceed with the second acquisition. It was also subsequently properly notified of the Government's third attempt to acquire. Prior to that notification, Kilbride was made aware of what the Minister had been contemplating in relation to Kilbride land. Ms Harry and Mr Samuel had given very specific indications of what might be about to occur, such that when the third acquisition notice was served on Kilbride, it could not have been surprised. The way the case was presented by Kilbride was that the notification was effectively an unexpected shock. I do not accept that. Kilbride may well have been frustrated, especially in light of the very recent agreement to sell its interest in all 3 leases, but anything other than such a description is an over-statement.

85. The Government, through the Minister, was obviously concerned of the effects of Justice Sey's judgment on future acquisition attempts. Given that public resources fund such acquisitions it must be accepted that was clearly within the Minister's purview. The LAA, with section 9(1) requiring market value to be taken into account as confirmed by Sey J., was therefore of interest to the Minister. There was discussion with Parliamentary Counsel and draftsmen as to how this area of the law might be improved, from the Government's perspective but respecting the interests of the other parties involved. I cannot conceive of the situation where the legislation would be amended so that only the Government was advantaged to the detriment of all the other parties involved..

86. Kilbride is of the view that this was done in a discriminatory manner, focussing solely or mainly on its position. The State's position is quite to the contrary. The amendments to the LAA are said to be logical in, subsequent to the amendments, properly differentiating between the interests of customs owners, lessors and lessees. I agree with the latter proposition.

87. I accept that there was no specific focus on Kilbride's position. Indeed the evidence of the Attorney General's communication to the Minister deals with a decision by Justice Fatiaki, which is unrelated to Kilbride. As well, there was conjecture that the Minister intended to rescind some 30 – 40 leases improperly gifted to Ministry staff by a previous Minister.

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There is nothing in the evidence to demonstrate that the amendments were generated to deprive Kilbride of property.

88. Mr Patterson also essentially suggested that Minister Regenvanu was off on a frolic of his own, of an almost personal vendetta against him/Kilbride. That simply cannot have been the case. The amendments to the LAA were discussed with staff, as already mentioned. Once the amending Bill had been prepared, there were then discussions and improvements suggested by officials. The Council of Ministers were also involved and had a say in whether the amendments were appropriate or not. Next, the Malvatumauri was consulted. This was before the Bill was debated in the House, where it was passed with sufficient support for the legislation to be approved. Finally, the President impliedly also approved of it as there was no challenge by him as to the constitutionality of the amending legislation. Kilbride's case rests to a large degree on the submission that it was singled out and deprived of what it was legitimately owed. However, the fact that the amending legislation went through so many checks and balances, and was supported as being appropriate every step of the way, undermines that claim.

89. I accept further that this Court must allow the Government to make laws in the public interest – it is not the Court's function to interfere in that unless there is a breach of the Constitution involved. The Government is in a far better place to determine what is in the public interest, and indeed this responsibility is part of Government's mandate.

90. Kilbride's claim that the Minister and/or the Attorney General has effectively guaranteed Kilbride there would be no further compulsory acquisition attempt in future is demonstrably incorrect when taking into account Kilbride's attempts to have the Government sign a Deed of Settlement. The Deed certainly promised exactly that. However, there was no uptake by the Government. The correspondence makes plain that the Government did not agree to such a curtailment of its rights. The mere fact that the Deed was prepared by Kilbride's counsel is sufficient to persuade me of the lack of veracity on Mr Patterson's claim in this respect.

91. I conclude that Kilbride has not made out that it has been treated unequally under the law, or that it has been deprived of the protection of the law.

92. I conclude further, that Kilbride has not made out that the LAA amendments can properly be said to involve the deprivation of property let alone an unjust deprivation of property.

G. Result

93. The constitutional application fails and is dismissed.

94. Costs should follow the event. Kilbride is to pay the costs on the standard basis agreed between counsel or if not agreed as taxed by the Master. Payment of those costs, once determined, is to be made within 21 days.

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H. Directions

95. The next part of the case is now able to be dealt with.

96. In order to achieve that, the claimant is to file and serve any further evidence it seeks to rely on by 4 pm 6 December 2019; and the State is to do likewise by 4 pm on 31 January 2020.

97. There will be a conference at 8 am on 28 February 2020, to ensure that all is ready for trial.

98. The trial is scheduled to take 2 days and is to commence at 9 am on 30 March 2020 at Dumbea.

99. If either counsel is of the view that more than 2 days will be required to complete the hearing, they should notify the Court of their estimate as to likely duration within 7 days so that the Court diary can be promptly adjusted.

Dated at Port Vila this 18th day of November 2019
BY THE COURT

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Justice G.A. Andrée Wiltens