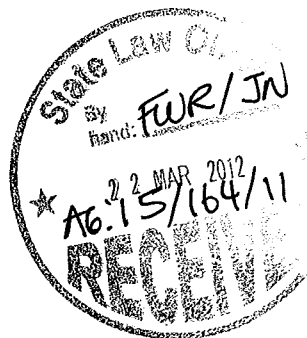


**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 242 of 2011



BETWEEN : BARAK SOPE

Claimant

AND: TERRA HOLDINGS LIMITED

First Defendant

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

Second Defendant

Coram: Justice Aru

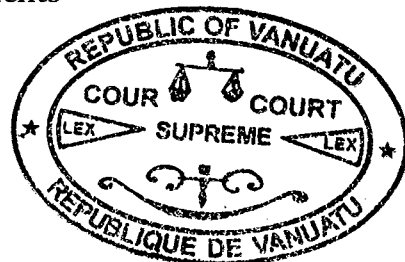
Counsel: Mr. J. Malcolm for the Claimant
Mr. G. Blake for the First Defendant
Ms C Lahua & Mr. J. Ngwele for the Second Defendant

REASONS

APPLICATION FOR INTERIM INJUNCTION

Background

1. Before the court proceeded to hear the Claimant's Application, Mr Malcolm informed the Court that the parties by consent agreed that Messrs Dinh Van Tu and Joshua Kalsakau respectively be dismissed from the proceedings with costs of VT 30,000.
2. The Court then proceeded with only three parties. The Claimant in his application sought an injunction of an interim nature to prevent any development of land outside of lease title 11/OF12/003 at kawenu beach and outside the municipal boundary. The purpose being to maintain a status quo pending determination of their substantive Claim as the Defendant had begun developing its leased land and had begun reclamation works outside of the leased title and into the water to which the claimants say is customary land for which they were not consulted as such.
3. The Claimants in support of their claim filed the following documents -



1. An Application
 2. Sworn statement of Barak Sope
 3. Undertaking as to Damages
 4. Supreme Court Claim
 5. A Sworn statement of Proof of Service
 6. Written submissions
4. The First Defendant filed a Response to the Application for injunction, a Defence, two sworn statements of Mr. Dinh and a Synopsis of submissions. The Second Defendant filed a response disputing the claim and a Defence.
5. Following the hearing of the Application the court issued an interim injunction on the 16 January 2012 in the following terms:

“ORDER

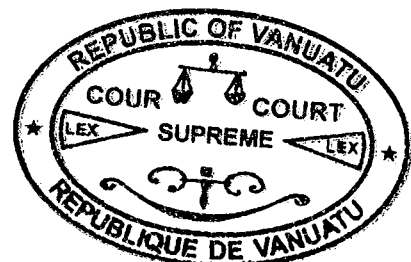
ON HEARING THE PARTIES it is ordered

1. *AN interim injunction*
 - a) *AN injunction prohibiting the first, second and third defendants developing, reclaiming building using or in any way at all adversely affecting the customary sand, land, beach and water outside, opposite and adjacent lease 11/OF12/003;*
 - b) *Not to deposit any rock or material on the land referred to 1 a) hereof;*
 - c) *AN Order prohibit the 4th defendant from issuing any lease over the customary land, sand water and area outside opposite and adjacent to lease 11/OF12/003 without the consent of the customers.*

Pending further order of the Court and further pending resolution of customary owners,
2. *RETURN date on the 13th day of February 2012 at 9.00 am.*
3. *COSTS reserved.”*

6. These are the reasons for the issuing of those orders.

Issue



7. The issue before the court was whether the court in light of the circumstances should issue an interim injunction.

Law

(i) Civil Procedure rules

Rule 7.5 of the Civil Procedure Rules sets out the requirements for an application for an interlocutory order before a proceeding has started and rule 7.5 (1) a) and b) requires that the applicant :

- must have a serious question to be tried ; and
- the Applicant would be seriously disadvantaged if the order is not granted .

Rule 7.5 (3) provides that the court may make the order if it is satisfied that –

- a) the Applicant has a serious question to be tried and if the evidence brought by the Applicant remains as it is the Applicant is likely to succeed ; and
- b) the Applicant would be seriously disadvantaged if the order is not made

(ii) Constitution

Article 73 of the constitution stipulates that-

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

(iii) Land Reform Act [CAP 123] (“the Land Reform Act”)

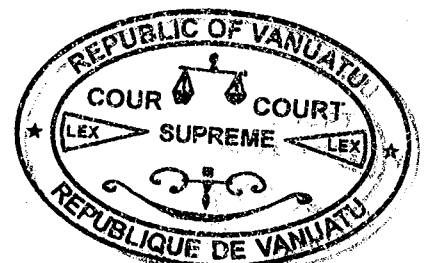
Under the Land reform Act [CAP 123] land -

“Includes improvements thereon or affixed thereto and land under water including land extending to the seaside of any offshore reef but no further”;

(iv) Land Leases Act [CAP 163] (“the Land Leases Act”)

Under the Land Leases Act land is defined as-

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



(iv) Land Acquisition Act [CAP 215]

Under the Land Acquisition Act [CAP 215] land -

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

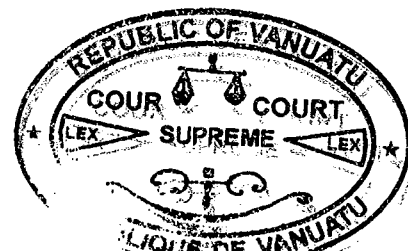
(v) Foreshore Development Act [CAP 90] (“the Foreshore Development Act”)

Under the Foreshore Development Act foreshore means-

“the land below mean high water mark and the bed of the sea within the territorial waters of Vanuatu (including the ports and harbours thereof) and includes land below mean high water mark in any lagoon having direct access to the open sea;”

Submissions

8. In brief, the First Defendant’s submissions were that the foreshore as defined by the foreshore Development Act is subject to the control and power of the Minister of Town and Country Planning and only the Minister pursuant to section 2 of the Act can authorize any development on the foreshore, not custom owners.
9. Therefore custom owners do not have the standing to claim their customary rights and interest over the foreshore. Further, they argue that even if they have customary rights, the Act does not permit the Minister to consult them in any way prior to granting a permit for developments on a foreshore.
10. The submissions put forward by the Second Defendant were that the foreshore is government land and that is clear from the definition of foreshore in the Foreshore development Act. If the Claimants were not happy, then they should challenge the decision of the Minister for granting a permit to develop the foreshore. There is no such application before the court and the granting of the application for injunction is premature.
11. The Claimants in their submissions admitted that they have no standing to challenge the lease and they are not seeking to injunct any developments on the lease. Their application is for an interim injunction to stop developments on custom land which is land outside the First Defendant’s lease title and as they are the purported custom



owners they have the standing to apply for an interim injunction to stop the development on custom land until the status of the land is resolved as once the reclamation is complete, it would be impossible to reinstate it to its original position. The claimants relied on the Sworn Statement of Barak Sope.

Application of Law

Under Rules 7.5 (3) the court may make the interlocutory order if it is satisfied that –

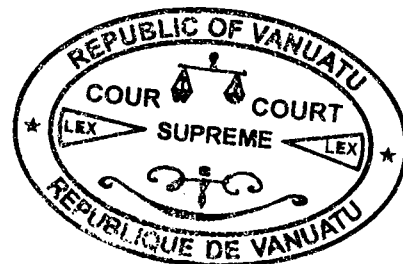
- a) the Applicant has a serious question to be tried and if the evidence brought by the Applicant remains as it is the Applicant is likely to succeed ; and
- b) the Applicant would be seriously disadvantaged if the order is not made

The Claimant referred the court to the house of lords decision in *American Cyanamid Co v Ethicon Ltd [1975] AC 396* where the same principles are set out in relation to deciding applications for interim injunctions . The first is whether there is a serious question to be tried and the second question is whether the balance of convenience lays in favour of granting or refusing the interlocutory relief that is sought.

Serious Question to be tried

12. Mr. Sope in his sworn statement in support of the Claimants case stated at paragraph 5 that he and his parents and family gave the land known as kawenu to the Government at independence for a school, sport field and public beach without payment or demand. This is the part that is shown as the municipal boundary on the map annexed to his sworn statement as Annexure "C". Further he says that beyond that boundary is custom land which the Government is not authorized by the custom owners to develop.
13. The land in question is the land underwater adjacent to the First Defendants lease. The Claimants relied on the decision of this court in *Willie v Sarginson & ors [2000] VUSC 20* where the Chief Justice dealt with a dispute concerning leased land adjacent to the sea and held that –

"land under water or recovered by water at the high water flow of the tide belongs to custom owners and does not form part of the demised land lease title No 314."



14. For the purposes of the Land Leases Act, land that can be leased is land above the mean high water mark, all things growing on land and buildings and other things permanently affixed to land.
15. On the other hand under the Land Reform Act land as defined includes land under water including land extending to the seaside of any offshore reef but no further and under the Land Acquisition Act land as defined includes land beneath water, the seabed extending to the sea side of any offshore reef but no further and the subsoil thereof. Similarly, under the Foreshore Development Act the Foreshore is land below mean high water mark and the bed of the sea within the territorial waters of Vanuatu (including the ports and harbours thereof) and includes land below mean high water mark in any lagoon having direct access to the open sea;”
16. This analysis highlights the different definitions of land but the Constitution as the supreme law of the land provides that all land belongs to the indigenous custom owners. If custom land is needed by the government then the land Acquisition Act provides the mechanism to achieve that purpose. Similarly for individuals the process is specified by the Land Reform Act. Neither of these has happened.
17. Accordingly I am satisfied that there is a serious question to be tried.

Serious Disadvantage /Balance of Convenience

18. I am satisfied that the Claimants will be seriously disadvantaged and damages will not be an adequate remedy in this case as the First Defendant aims to reclaim land under water which if the interim injunction is not granted and the Claimant is successful at trial it would be impossible to reinstate the land to its original state .

Conclusion

It is for these reasons that an interim injunction was issued on of 16 January 2012.

DATED at Port Vila this 22nd day of March, 2012.

BY THE COURT

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D. ARU
Judge

