

**BETWEEN:** Stage Four Limited, as Trustee for the Montreal  
Trust

*Applicant*

**AND:** Proprietors of Strata Plan 0011 ( Receivers and  
Managers Appointed)

*First Respondent*

**AND:** Director of Lands

*Second Respondent*

**AND:** Republic of Vanuatu

*Third Respondent*

**Date of Hearing:** 24<sup>th</sup> February 2017

**Before:** Chief Justice V.Lunabek

**Counsel:** Mr Nigel Morrison for the Applicant  
Mr D.Thornburgh for the First Respondent  
Mr H.Tabi for the Second and Third Respondents

**Date of Decision:** 2<sup>nd</sup> August 2022

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## JUDGMENT

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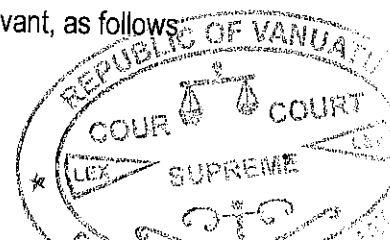
### A. Introduction

1. This Constitutional application challenged the constitutional validity of a 2014 amendment to the Strata Titles Act as the amendment allegedly infringed certain of the applicant's constitutional rights guaranteed by the provisions of the Constitution of the Republic of Vanuatu ("*the Constitution*").

### B. Law

#### (i) Legislation

2. I set out at this point the relevant items of legislation that have application to this case.
3. Article 5(1) of the Constitution of the Republic of Vanuatu reads, so far as relevant, as follows:



**"5. Fundamental rights and freedoms of the individual**

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

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

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

4. The interpretation section, Section 1, of the Strata Titles Act 2001 [Cap 266] (*"the Act"*) must be considered, in respect of the following:

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

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

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

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

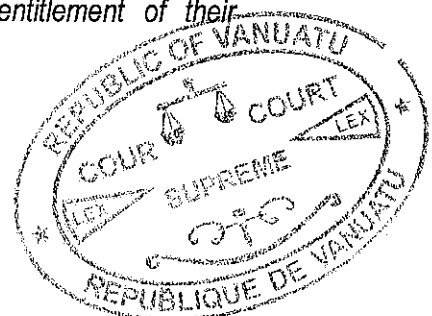
- (a) the votes counted for the motion are more than the votes cast against the motion, and*
- (b) the number of votes counted against the motion is not more than 25% of the number of lots included in the strata plan.*

5. The relevant parts of Sections 10 and 11 of the Act importantly read as follows:

**"10. Common property**

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

**"11. Dealing with common property**



(1) *The proprietors by resolution without dissent may direct the body corporate to grant exclusive use of, to transfer, lease or otherwise dispose of common property, or any part of it.*

(2) *The body corporate must execute the appropriate instrument or lease if it is satisfied that:*

(a) *the resolution was duly passed; and*

(b) *all persons having registered interests in the parcel and all other persons having interests (other than statutory interests) which have been notified to the body corporate have consented in writing to the release of those interests in respect of the land comprised in the proposed disposal or, in the case of a lease, have approved in writing of the execution of the proposed lease."*

6. Section 15 of the Strata Titles (Amendment) Act No 38 of 2014 (*"the amending Act"*) repealed the definition in the Act of *"resolution without dissent"*. In section 11(1), and consequentially in other sections, it was replaced by *"special resolution"*. The amending Act further inserted into section 11(2)(b), and other consequential sections of the Act, after the word *"persons"* the following: *"other than the proprietors"*. Further, a new section 12 was inserted into the legislation as follows:

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

7. Reliance is placed on the provisions of section 11(1)(a) of the Vanuatu Foreign Investment Promotions Act (Cap 248) (*"the VFIP Act"*) which reads as follows:

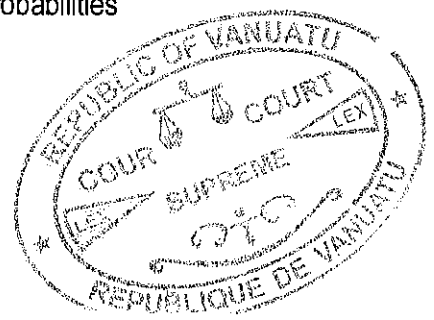
***"11. Security of property***

(1) *For the avoidance of doubt, there is extended to every foreign investor granted an approval certificate under this Act the following guarantees:*

(a) *there will be no compulsory acquisition of the property of the investor in Vanuatu except in accordance with due process of law and upon payment of just compensation;"*

(ii) Onus and Standard of Proof

8. 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

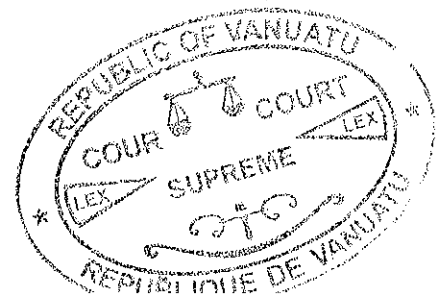


(iii) Jurisdiction

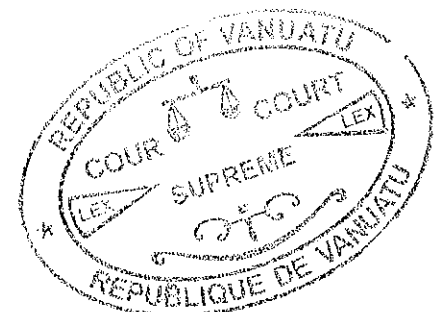
9. A company is not a living being, but it is a legal entity in its own right. Due to this, Stage Four Limited ("SFL") cannot enjoy all the fundamental rights protected under the Constitution as an individual member of the community, for example the right to life, liberty or safety of the person as set out in Articles 5(1)(a), 5(1)(b) and 5(1)(c).
10. Nevertheless, I am satisfied that a company, properly incorporated and registered according to the laws of the Republic 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.
11. The case of *Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu* [2006] VUSC 74 is good authority for that proposition. The Court specifically referred in that case to Articles 5(1) (d), (j) and (k) as being applicable provisions relating to companies. This statement of principle has not been overturned on appeal.
12. 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.
13. 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 establishes a breach of the rights set out in the Constitution, I am satisfied this Court has the jurisdiction to declare as unlawful and invalid any amending legislation which has such effect.
14. I now turn to the factual background in order to explore and flesh out the genesis and nature of the dispute between the parties leading to the Constitutional application.

**C. Factual Background**

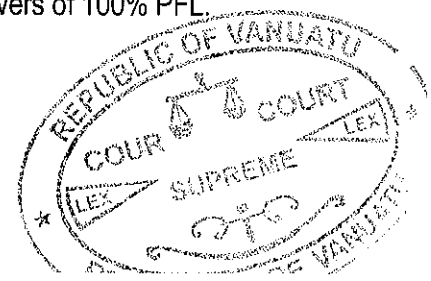
15. In 2006, 100% Pur Fun Limited ("100% PFL") purchased leasehold Title No. 12/0913/501, situated at Pango, Efate.
16. 100% PFL subsequently created a Strata Plan, which was registered in December 2006 as SP 0011. The Strata Plan subdivided that land into 68 strata Lots, and associated "common property". The development is known as Breakas Beach Resort.
17. The legal work on behalf of 100% PFL in relation to the sale of individual Lots to those wishing to invest in the resort project from Australia, was done by Herdlaw Solicitors. The principal of the firm is Mr Robert Herd.
18. In his written evidence, Mr Herd denied Herdlaw was involved in the initial setting up of SP 0011. However, in his oral evidence, Mr Herd stated that he acted for 100% PFL in 2006 - 2008 in relation to establishing Breakas Beach Resort, and subsequently in 2009 in relation to sales of strata Lots in the development. He stated he did not thereafter travel back to Vanuatu for some time.



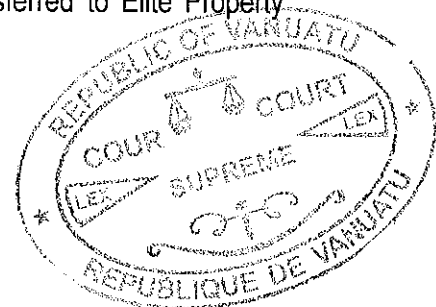
19. Herdlaw prepared a Management Agreement which it was intended individual strata Lot purchasers would enter into as part of their investment, and many did. The Agreement, among other things, assigned individual strata Lot owner's voting rights to 100% PFL as the appointed manager of the resort.
20. A number of the strata Lots have been developed by the construction of residential fares which were let out on a commercial basis when not occupied by the owners. For reasons that are not explained, a number of such developments did not respect the strata Lot boundary lines. Accordingly, there has been encroachment onto common property areas, with the result that parts of numerous fares were not truly owned by the individual strata Lot proprietor. Other parts of the common property had been utilised by 100% PFL to set up and operate a pool complex, and an accompanying bar and restaurant.
21. Pursuant to section 10(1) of the Act, the owner of each strata Lot is entitled entirely to the area of land circumscribed by the strata Lot boundaries, as well as a proportionate share of the common property area with other strata Lot owners as tenants-in-common. This had further impact on the position as to who was the actual property owner where encroachment had occurred.
22. The Act enabled SP 0011 to hold a First General Meeting, at which bespoke house-keeping matters could be promulgated, such as electing officers, adopting suitable by-laws, setting up insurance regimes, opening of bank accounts and dealing with other financial operational aspects. However, SP 0011 did not hold such a First General Meeting in the first several years of its existence. Accordingly, the statutorily imposed by-laws, as set out in Regulation 29 and Schedule 1 of the Strata Titles Regulations, applied to SP 0011 unaltered.
23. The statutorily imposed by-laws were able to be amended at a General Meeting. In particular, Section 11 of the Act permitted changes in relation to common property areas where the individual strata Lot owners passed a resolution to that effect "*without dissent*"; and, pursuant to section 11(2) of the Act, where all the individual strata Lot owners gave written consent.
24. On 20 June 2013, Mr Herd, as solicitor acting for 100% PFL, sent an e-mail to Mr Lee of Westpac Banking Corporation ("*Westpac*"), which dealt largely with the encroachment over Lot boundary lines issue. He advised that he had been preparing documents on behalf of 100% PFL for an initial SP 0011 general meeting, at which 100% PFL proposed to put a motion to "... *correct the plan*", which Mr Herd indicated would have the additional effect of perfecting the bank's security. Westpac was interested in protecting its security as 100% PFL was then in arrears with loan repayments.
25. Mr Herd pointed out that all bar 3 of the strata Lot proprietors had signed the pro forma Management Agreement, thereby giving 100% PFL control of their votes at the proposed general meeting. He pointed out however that not all the 3 remaining Lot owners might agree with altering Lot boundaries, as the proposal adversely would affect their share of the common property – and if such disagreement occurred, he considered it would be "... *catastrophic*" for both 100% PFL and Westpac. Appended to the e-mail was a Notice of annual general meeting for the proprietors of SP 0011, with an agenda and details relating to voting and providing a proxy form. The date of the scheduled meeting was 30 July 2013.



26. On 2 July 2013, Lot 9 of SP 0011 was transferred to SFL. SFL was able to purchase Lot 9 as it held Certificate 989, issued by the Vanuatu Investment Promotion Authority ("VIPA"), which permitted such investment in property in Vanuatu. The principal behind SFL is the same Mr Robert Herd.
27. The previous owners of Lot 9, and SFL, did not enter into the pro forma Management Agreement, and accordingly, Lot 9's voting rights remained with the owner.
28. Mr Herd's written submissions contend he only became aware of the encroachment issue in or about June 2013, and not before. It is of significance therefore that in his oral evidence, Mr Herd expressly and repeatedly emphasised, that he was unaware of the encroachment issue until a month after he had, utilising SFL as his investment entity, purchased Lot 9. Given his e-mail to Mr Lee of Westpac of 20 June 2013, that is clearly incorrect.
29. On 18 July 2013, Mr Herd sent an e-mail to Mr Pawson at Westpac, expressing his particular displeasure at Westpac's handling of its attempted debt-collection. He pointed out that appointing a Receiver would not assist Westpac. He further pointed out, in no uncertain terms, that according to the Act, Westpac required his [actually SFL's] consent as owner of Lot 9 to any transfer of common property, and that such consent "... will now be extraordinarily expensive". He went on to advise it would cost Westpac "... in excess of \$3 million". The e-mail ended with Mr Herd urging "... meaningful and sensible dialogue", otherwise, in his view, the problem would only get worse.
30. The change in position adopted by Mr Herd between 20 June 2013, when he was still acting for 100% PFL, and his attitude as expressed in the 18 July 2013 e-mail to Mr Pawson as proprietor of one of the strata Lots, is breath-taking. He initially appears to have been working towards achieving a change in the Lot boundaries, to subsequently being intractably opposed to the same, unless exorbitantly compensated. There is no apparent explanation to explain this change of attitude away, and no evidence was led on this to assist the Court. The Court has little option but to consider that Mr Herd ceased to be interested in obtaining legal fees, and concentrated instead on maximising his personal interests by dint of his unique position of being able to thwart the wishes of the other strata Lot owners.
31. On 31 July 2013, Mr Herd sent an e-mail to Mr Hurley, counsel then acting for Westpac. He objected to 100% PFL continuing to be the trading entity operating Breakas Beach Resort, as he alleged that would it be trading while insolvent. He recited that Westpac had purported to adjourn the first management meeting the day before, and he challenged Westpac's authority to do so. He suggested that doing so was tantamount to a fraud on the minority. He indicated that he intended to apply for the appointment of a Receiver to the Body Corporate, as provided for in section 24 of the Act, unless certain undertakings were given.
32. Mr Herd also referred to sections 10 and 11 of the Act. He asserted that all revenue derived from the use of SP 0011's common property since inception had to be accounted for to the strata Lot owners, as tenants in common, including himself. Further, he gave notice that 100% PFL did not have his [actually SFL's] consent to further use the common property, and that such practice was to immediately stop.
33. On 9 August 2013, Mr M. Stafford and Mr A. Sinclair were appointed receivers of 100% PFL.



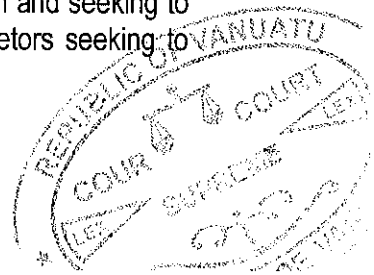
34. On 16 August 2013, the Supreme Court of Vanuatu, on the application of Westpac, appointed receivers and managers to oversee all the operations of SP 0011. Westpac was able to do this as it held a first mortgage over the 52 strata Lots which were owned by 100% PFL. The Court orders, among other things, required those appointed to address the issue of encroachment over strata Lot boundaries.
35. Although SFL contended that the receivers did little/nothing in relation to the encroachment issue, there is clear evidence that the views of the strata Lot owners were canvassed. There was unanimity, save for the views of Mr Herd/SFL, that the issue required rectification.
36. On 30 August 2013, Mr Herd submitted his views to the receivers relating to what was to be done regarding the encroachments. He set out that it was his view that Lot 9 had an entitlement of 1 out of 68 unit entitlements, and that he was therefore entitled to all of Lot 9 and a 1/68 share (as tenant in common) of the SP 0011's common property. He indicated that he was prepared to allow amendments to the scheme on receipt of what he regarded as suitable compensation. Mr Herd pointed to a lack of consent by the Body Corporate by way of a resolution without dissent, and a lack of written consent of all the lot owners – both being requirements set out in the Act. He indicated that without his {SFL's} consent, it was illegal to alter the scheme.
37. Mr Herd contended that despite demands, there had been a refusal or failure to account by 100% PFL to the strata Lot owners for rents received and other money derived from the use of what was described as "unauthorised improvements on common property" – including income derived from the restaurant and bar. Mr Herd wanted this addressed.
38. However, it is clear that Mr Herd's submissions to the receivers gained no or but little traction.
39. In May 2014, Mr Stafford sent an e-mail to all SP 0011 proprietors. He referred in his sworn statement to "... *the vast majority*" of strata Lot owners wanting to redefine the Lot boundaries, such that each fare was fully within their Lot boundary, and no longer occupied part of the common property. However, to do that, would affect the common property area, and accordingly, an amendment to SP 0011's by-laws was required. Mr Herd alleges that this e-mail was not sent to him/SFL, and that this omission was deliberate.
40. On 25 August 2014, Mr Stafford wrote to the Minister of Lands, requesting an amendment to the Act, so that the proprietors of SP 0011 could amend the boundaries of the strata Lots, so that fares were no longer encroaching into common property. He contended the existing legislation was prohibitive and accordingly required amendment.
41. On 4 October 2014, Mr Herd expressed his disapproval to Mr Stafford (he recorded being "... *sick and tied [sic] of the dishonest and treacherous conduct*") regarding the alleged removal of a water heater from his fare on Lot 9. He indicated that, if requested, he [SFL] would now only consent to changes to SP 0011's internal boundaries for \$4 million compensation, plus the resignation of two named persons.
42. In December 2014, Westpac exercised its power of sale over the 52 strata Lots provided as security for its advances. Those properties were subsequently transferred to Elite Property Limited and Sandcastle Holdings Limited.
43. On 15 January 2015, the amending Act commenced in operation.



44. On 7 July 2015, Mr Harrison sent an e-mail to all SP 0011 proprietors. Mr Herd alleges that this e-mail was also not sent to him/SFL, and that this omission was deliberate. Mr Harrison was acting on behalf of the majority of the strata Lot owners and he appended a Notice of a General meeting scheduled to be held on 8 October 2015.
45. In oral evidence, Mr Herd accepted he was aware of the meeting, but did not attend, nor send a proxy. He contended that the notice was not compliant with the Act. He further asserted that he had caused a caution to be lodged against the property Title preventing any future dealings with the land in SP 0011.
46. On 17 August 2015, Mr Herd, through SFL, filed this Constitutional application and he further sought urgent interlocutory orders. He had learnt of the scheduled meeting and was seeking to preserve his position.
47. On 8 October 2015, SP 0011 held its First General Meeting. A number of motions were passed, including the imposition of an annual strata fee and the appointment of officers of the Body Corporate. An amended Strata Plan was put to the meeting, which alleviated the numerous examples of fares built over Lot boundaries by moving the Lot boundaries to encompass the fares built, and that was accepted by those present, namely all the owners of strata Lots, bar SFL.
48. Mr Herd objects to the validity of the meeting, contending it was improperly arranged; and he also objects to all the decisions taken at the meeting on the basis of non-compliance with the then applicable legislation.
49. On 5 November 2016, SP 0011 held its second General Meeting.

**D. The Constitutional Application**

50. By virtue of the amending Act, SFL contends that SP 0011 is now able to dispose of common property without SPL's knowledge and/or consent, and without any compensation.
51. The contention is that the amending Act is inconsistent with section 11(1) (a) of the Vanuatu Foreign Investment Promotion Act ("*the VIPF Act*").
52. That inconsistency is submitted to infringe SFL's constitutional rights under Articles 5(1) (d) and 5(1)(j) of the Constitution. Accordingly, this Court is invited to;
- (i) Declare that SFL's constitutional rights have been infringed;
  - (ii) Declare the amending Act invalid, void and of no effect; and
  - (iii) Impose costs against the proprietors of SP 0011, and the Republic of Vanuatu.
53. As well, restraining orders were sought pending the outcome of this application and seeking to restrain SP 0011 from (i) putting a resolution to a general meeting of proprietors seeking to





subdivide and/or dispose of any of the Scheme's common property or take any action to do so; and (ii) registering any dealings with the title to the common property.

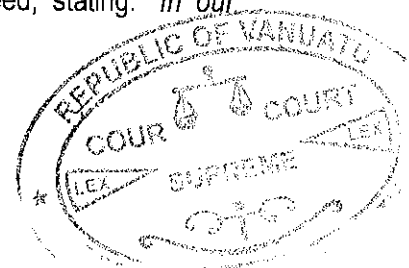
54. In a sense the second interlocutory relief sought has no utility, as Mr Herd has caused a caution to be lodged against SP 0011's property, which has the effect of preventing further dealings being registered against the property.

**E. Evidence**

55. There were a number of sworn statements filed, both in support, and in opposition, to the application. Only Mr Herd was called to give viva voce evidence.
56. As indicated in the background above, there were significant inconsistencies, both within Mr Herd's evidence, and when comparing his evidence with the sworn statements made by other witnesses. Clearly, he was advancing his cause rather than doing his best to assist the Court with an accurate or complete account of what had transpired. That had the effect of undermining his credibility.
57. Where Mr Herd's evidence differed from that of other witnesses, I preferred the accounts of the other witnesses, as being the more likely to be accurate and correct.

**F. Discussion and Application of Law**

58. SFL's position is that by amending the Act as it has, the Republic of Vanuatu, with the assistance/connivance of the proprietors of SP 011 and the Director of Lands, has breached SFL's constitutional rights. SFL's unique position, of being able to effectively block the wishes of all the other Breakas Beach Resort strata Lot owners unless compensated, has been completely eroded. That is because instead of the strata Lot owners having to all agree and vote in favour of altering the scheme, once the amending Act came into force, SFL's opposition was no longer material, and the change could be completed without any notice or compensation.
59. The force of the argument is considerable, in so far as the consequences flowing from the amending Act are correctly perceived. However, that does not necessarily ground a constitutional application.
60. The start point must be that the Government of the Republic of Vanuatu has the ability to pass amending legislation – this is incontrovertible: see Article 16 of the Constitution.
61. 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".*

62. 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 ..."*

63. 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."*

64. In these circumstances the Court must be slow to strike down legislation passed by Parliament. The infringement of any claimed constitutional right must be clearly demonstrated. The hurdle is a high threshold.

65. The Minister for Lands at the time of the passing of the amending Act, Mr R. Regenvanu, filed a sworn statement. His evidence was that the amending legislation better provided for the situation where one strata Lot proprietor could hold the remaining proprietors to ransom by removing the notion of *"without dissent"* provision and substituting *"by special resolution"*. He considered that such amendment was warranted to encourage further investment in Vanuatu. I accept this evidence. The contention by Mr Herd/SFL that the legislation was enacted to disadvantage him or SFL is not accepted.

66. Article 5 (1) of the Constitution has an important qualification, namely:

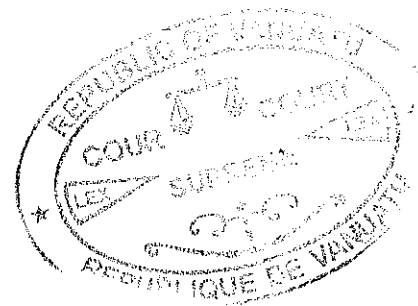
*"...subject to respect for the rights and freedoms of others and to the legitimate public interest...."*

67. As stated in *Terra Holdings Ltd v Sope* [2012] VUCA 16, this is not a trifling consideration:

*"the protection of fundamental rights afforded under Article 5(1) is not absolute. The rights are qualified by the opening words of Article 5(1). The protection is subject to respect of the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health."*

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

69. Accordingly, Mr Herd's evidence of being solely affected is not accepted.



70. The VFIP Act provides a guarantee against compulsory acquisition. However, in the present case there is no compulsory acquisition. The amending Act merely makes it possible, if the majority of Lot proprietors agree, for each of them to vote for a re-drawing of the Lot boundaries. Further, the removal from the common property of some areas does not constitute compulsory acquisition.
71. The provisions in Vanuatu's laws dealing with compulsory acquisition enable the Republic of Vanuatu to compulsorily acquire land subject to various restrictions and conditions. There is nothing in the amending Act which results in compulsory acquisition of SFL's property by the Republic of Vanuatu.

**G. Result**

72. For the various reasons discussed above, the constitutional application is dismissed.

**H. Costs**

73. Costs are to follow the event. The costs are set at VT 150,000, and are to be paid by SFL within 21 days.

**Dated at Port Vila this 2<sup>nd</sup> day of August 2022**

**BY THE COURT**



Chief Justice V. Lunabek

