IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE NO. 16/2211 COA/CIVA

BETWEEN: WILLIE COMBERA and 177 OTHERS
Appellant

AND: BARAK SOPE
First Respondent

AND: FRESH WIND LIMITED
Second Respondent

AND: REPUBLIC OF VANUATU
Third Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon Justice John von Doussa*** ***Hon Justice John Mansfield*** ***Hon Justice Daniel Fatiaki*** ***Hon Justice Paul Geoghegan***
Counsel:	*George Boar for Appellant* *No appearance for 1st Respondent* *Nigel Morrison for Freshwind Limited* *Hardison Tabi for Republic of Vanuatu*
Date of Hearing:	*9th November 2016*
Date of Judgment:	*18th November 2016*

JUDGMENT

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1. This is an appeal against the dismissal of the claims by the appellants by Chetwynd J. in the Supreme Court. The appellants had sought orders restraining the respondents from subdividing land commonly known as Ohlen Freshwind. They were in occupation of parts of that land and claimed to have enforceable interests in respect of it.

2. The following background is helpfully summarised in the submissions of the Republic:

> *"1. On 15 November 1929, Mr Henri Ohlen, a French citizen of Port Vila having on the 25th October 1929 applied to the Court in conformity with Article 29, paragraph 1(B) of the Convention to be substituted for the Société Française des Nouvelle Hebrides in respect of a parcel of land of 21 hectares 40 acres situated*

at Port Vila which by deed of 29th September 1929 he acquired the said company (Société Française des Nouvelle Hebrides), was granted with the judgment made in his favour by the Joint Court of the New Hebrides concerning the New Hebrides Registry of Land Titles Registration No. 40.

2. *After Independence, Henri Ohlen was entitled to remain on the land subject of this matter until such time when custom owners pay for improvements on that land pursuant to section 3 of the Land Reform Act [CAP 123] which commenced on 30 July 1980.*

3. *By Land Reform (Declaration of Public Land) Order No.26 of 1981 dated 26 January 1981, the land area covered by the New Hebrides Registry of Land Titles registration No.40 was declared public land and became part of the Urban Physical Planning Boundary of Port Vila.*

4. *Between the period of 1982-1985 the Claimants settled onto the part of the land declared as public land of Order No. 26 of 1981 at Ohlen Freshwind with knowledge and consent of the Third Defendant.*

5. *On 12 January 1995 lease title 11/0133/008 ("lease 008") was registered for 50 years between the Minister of Lands (lessor) and Freshwind Limited (lessee).*

   a. *Lease 008 covers the land area of Ohlen Freshwind which was formerly the New Hebrides Registry of Land Titles registration No.40 and it is an urban land pursuant to the Land Reform (Declaration of Public) Order No.26 of 1981.*

   b. *On 28 April 1997, lease 008 was surrendered for the purpose of subdivision.*

   c. *Following the Surrender of lease 008, derivative lease titles were created."*

3. The appellants claim was dismissed in two stages. The notice of appeal challenges the decision given at the second stage on 10 June 2016. In the short judgment of that date Chetwynd J. said inter alia:

"As I indicated in my decision on the preliminary issue, all that was left was a claim that the Claimants had overriding interests pursuant to s. 17(g) of the Land Leases Act. The argument was they were in actual possession of the land when the lease to the Second Defendant was created. As I pointed out, the case of William v William would defeat that argument. The evidence in this case was the earliest that some of the Claimants went onto the land was 1982. That was after the Land Reform (Declaration of Public Land) Order No. 26 of 1981 dated 26th January 1981 came into effect. If they had been on the land prior to that they may have been able to have invoked the protection of s. 17(g) but all the evidence pointed to actual occupation from 1982 (sic) onwards. That, in simple terms, meant they went onto the land as squatters and their status remains as squatters. They had no rights which could be protected by s. 17(g). That is what William v William says."

4. Almost a year earlier on 18th August 2015 Chetwynd J delivered a longer judgment determining a preliminary issue against the appellants as to: "***the*** *(legal)* ***effect of Land Reform (Declaration of Public Land) Order No. 28 of 1981 dated 26th January 1981***".

5. In his judgment Chetwynd J. quoted extensively from the judgment of this Court in Kalomtak Wiwi Family v. Minister of Lands [2005] VUCA 29 which he summarised in the following passage:

"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 26th 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 26th 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 even the only evidence produced by the Claimants is the 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."

6. The appellant's principal grounds of appeal are as follows:

"1. The learned trial judge erred in law and or facts by holding that old title 1.40 (now lease title 11/0131/008) was contained within the Third Respondent's map (not an original 1981 Port Vila Urban Land Business Boundaries map) purporting to be the Land Reform (Declaration of Public land) Order No.26 of 1981 demarcating Port Vila Urban Boundaries without giving weight to the Appellants' contention and could not therefore be part of Port Vila Urban Boundaries as per Land Reform (Declaration of Public Land) Order No.26 of 1981 since as at 1980, the colonial Government never managed and control this 1.40 land and further by 1982, this 1.40 land was still a farm land with coconut plantations and cattle ranch and that on the advise of the First Defendant who was a Government Minister at the relevant time, the Appellants moved in and cleared the land and made their living thereon.

2. *In dismissing the Appellants' claim, the learned trial judge erred in law by failing to provide the Appellants opportunity and or to consider the Appellants' evidence regarding damage to the Appellants' properties and livelihood following the Second and Third Defendants' creation of Residential Lease over old title 1.40 (now title 11/0131/008) on 12 October, 1995 and later creating land subdivision which commenced on 28th April, 1997 resulting in damage to the Appellants' properties and livelihood, and to order the Second and Third Respondents to pay compensation.*

3. *The Learned Trial Judge erred in law by failing to hear the Appellants' Application to restrain, and to order that the Second Respondent pays the sum of VT 67,462,490 into the Supreme Court Trust Account pending the final determination of this matter."*

7. The lengthy first ground of appeal is not easy to understand. As was made clear in the appellant's submissions it is based on two propositions.
First, that the land area in dispute was not included within the boundaries of the land declared to be public land; and
Secondly, the land area in dispute was never "*State Land*" and accordingly could not be public land. Significant is the complete absence of any reference to the provisions of Section 12 of the Land Reform Act which we later set out below.

8. In essence, the appellant's substantive claim in the Supreme Court and on appeal was to the effect that *"Ohlen Freshwind"* was alienated land prior to independence and never vested as "*State Land*" after independence in terms of the Land Reform Act. The land was formerly a privately owned cattle ranch and coconut planation and remained after independence as such and never became land "... *owned in freehold or perpetual ownership by the British or French Governments or the Condominium or a Municipality*" in terms of the definition of "*State Land*" under the Land Reform Act and counsel refers to the definition of "*State land*" and the provisions of sections 9, 10, and 11 of the Land Reform Act in support of his submissions.

9. We deal with the first ground of appeal. We note at the outset that the relevant: **Land Reform Act (Chapter 123)** commenced on 30th July 1980 and is contained within the 1988 volumes of the Vanuatu Consolidated Legislation. Furthermore there is no definition of "*public land*" in the Act.

10. The relevant provisions are contained within **PART VI** headed "STATE LAND". There are 4 sections in **PART VI** numbered 9 to 13 with relevant sub-headings as follows:

VESTING OF STATE LAND

*9. (1) **on the Day of Independence all state land shall vest in the Government and be public land and be held by it for the benefit of the Republic of Vanuatu** and section 11 shall apply to such of that land as is not included in an Order under subsection (2) of this section as if a notice under section 11(1) had been given by the Minister 6 months before Day of Independence.*

(2) The Minister, on the advice of the Council of Ministers, may by Order declare that any land described in the Order ceases to be public land.

(3) In accordance with Article 81 of the Constitution the Minister may, on the advice of the Council of Ministers, by Order vest any public land in indigenous citizen or communities referred to in the Order for such payment by them and on such terms and conditions as may be referred to in the Order.

(4) When an Order is made under subsection (3) it shall provide for payment of compensation to the custom owners by the Government and amount of such compensation shall be set out in the Order.

USE OF PUBLIC LAND BY CUSTOM OWNERS

10. *Until such time as the Government may require to use undeveloped land for development or other public purposes* ***the land may be used by the custom owners*** *for any purpose except that the consent of the Minister shall be required for-*

    a. *The construction of any building;*
    b. *The planting of any crops not requiring annual replanting; or*
    c. *any other improvements of a permanent nature.*

NOTICE BY MINISTER OF USE OF LAND

11. (1) *The Minister shall give the custom owners not less than 6 months notice of the intention of the Government to use public land described in the notice for development or public purposes.*

    (2) ***the Government shall agree compensation with the custom owners for the use of the land and loss of any improvements thereon*** *which, depending on the nature of the intended use of the land, may be in the form of-*

        a. *a lump sum of payment which may be paid in instalments over not more than 30 years;*
        b. *the transfer to them of other public land;*
        c. *the provisions of free services at specially agreed rates by the Government, public utilities or municipalities;*
        d. *Shares in a company established by the Government alone or with other persons for developing the land;*
        e. *An agreed share of net income received by the Government from the land.*

    (3) *In addition to the compensation referred to in subsection (2) the Government may give the custom owners such minority representation on bodies that may manage the land as shall be agreed.*

    (4) *if the Government and the custom owners fail to reach an agreement under subsection (2) either party may refer the matter to the Lands Referee for settlement. The decision of the Lands Referee shall be final.*

    (5) *the Government may at any time pay a sum to custom owners in commutation of the custom owners share of income under subsection (2) (e).*

DECLARATIONOF LAND AS PUBLIC LAND

12. The Minister may at anytime on the advice of the Council of Ministers and after consultation with the custom owners declare any land to be public land.

RIGHT OF ALIENATOR TO REMAIN IN OCCUPATION OF LAND

13. *Every alienator occupying public land shall have a right to remain in occupation of that land from the time it becomes public land until he enters into a lease of the land or a part thereof with the Government or he receives payment for improvements to or on the land."*

(our highlighting)

10. Section 9(1) vests all "*State Land*" as defined, in the Government and constitutes such vested lands as "*public land*". Subsection (2) empowers the Minister of Lands on the advice of the Cabinet to undeclared "*public land*". By subsection (3) the Minister may redistribute "*public land*" to indigenous citizens or communities on such terms as to payment etc as are set out in the vesting order and by subsection (4) if land is acquired for the purpose of redistribution the Government shall provide for payment of compensation to the custom owners of the acquired land.

11. In terms of section 10 so long as "*public land*" remains undeveloped it may be "*used by custom owners*" for any purpose until Government requires such land for development or other public purpose.

12. The intention and purpose of section 10 is clear in that undeveloped "*public land*" will continue to be available for non-permanent uses "... *by the custom owners*" until such time as the land is required by Government for its own purposes and section 11 provides the mechanism for Government to retake undeveloped public land by giving custom owners not less than 6 months notice and agreeing compensation for any improvement made to the retaken land. We highlight under both sections that they apply only to "*the custom owners*" of the land in question and not to squatters or occupiers who are not "*custom owners*".

13. As already set out above section 12 is a "*stand alone*" provision which empowers the Minister of Lands on the advice of Cabinet and after consultation with the custom land owners, to "*declare any land to be public land*". Such a declaration may be made: "*at any time*" and relate to "*any land*". The declaration is therefore unlimited as to the time when it can be made and unrestricted as to the type of land that may be declared "*public land*". It can extend to "*alienated land*", "*customary land*" and even "*lease land*" and once made, covers improvements affixed to the land and extends to land under water up to the sea side of any offshore reef.

14. Section 13 extends the benefits of sections 10 and 11 to an alienator who occupies land before it becomes "*public land*".

15. We set out Land Reform (Declaration of Public Land) Order No.26 of 1981 ("*the 1981 Order*") which states:

REPUBLIC OF VANUATU

Land Reform (Declaration of Public Land) Order No. 26 of 1981

To provide for the Declaration of certain land situated within the Urban Physical Planning Boundaries of Port Vila and Luganville to be public land.

IN EXERCISE of the power contained in section 12 of the Land Reform Regulation 1980, I hereby make the following order:

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

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

3. *The shaded areas of land shown on the map attached hereto as Annex 3 shall with effect from the date of commencement of this Order be public land.*

4. *The boundaries of those areas, of which a description is attached here to as Annex 4, shall constitute the urban physical planning boundaries of Luganville.*

5. *This Order shall come into force on the date of signature.*

MADE at Port Vila the 26th day of Jan.1981

(Signed)
T.Reuben
Acting Minister of Lands".

16. It is plain on the face of the "*1981 Order*" that it had attached to it a map with shaded areas of land and a narrative description of the boundaries comprised within the shaded areas described in the "*1981 Orders*" as "*Annex 1*" and "*Annex 2*" respectively. Furthermore the "*1981 Order*" is made in exercise of the power contained in section 12 of the Land Reform Regulation (sic) 1980.

17. From the foregoing we are satisfied that the appellants submission concerning the "*1981 Order*" is based on a misconception and is unsound. "*State land*" is not the same as "*public land*". By definition "*State land*" existed prior to independence whereas "*public land*" is created after independence pursuant to section 12 of the Land Reform Act which in terms of section 9 (1) vested and renamed "*State Land*" as "*public land*".

18. In our view whatever may have been the difference between "*State Land*" and "*alienated land*" before and after independence in this case it ceased to exist with the enactment of the Land Reform Act and the making of the "*1981 Order*" when both types of land become "*public land*". Once it is accepted that "*Ohlen Freshwind*" become "*public land*" by virtue of the "*1981 Order*" and the custom owners had been compensated in terms of a 1992 Agreement, the land belonged exclusively and beneficially to the Government. (**see**: Kalomtak Wiwi Family v Minister of Lands [2005] VUCA 29).

19. Furthermore as proprietor of "*Ohlen Freshwind*", the Government without any need to consult or protect former custom owners of the land was perfectly entitled to lease the land to Freshwind Limited. Such a leasing is not an

exercise of powers given to the Minister of Lands pursuant to section 8 of the Land Reform Act as counsel appears to suggest, rather, it was a lease in terms of section 31 of the Land Leases Act.

20. Counsel also sought to doubt the accuracy of the sketch map attached to the "*1981 Order*" which was "*stained*". That doubt is finally laid to rest in our view, by the coloured unstained annexures "**JMP4**" to the sworn statement of the Director of Lands dated 11 June 2015 which locates "*Ohlen Freshwind*" well within the boundaries of the "*public land*" declared in the "*1981 Order*". It must be remembered that besides the map, there was also attached to *"1981 Order"* a comprehensive narrative description of the boundary which could be easily traced to obtain a surveyed map.

21. By the same token we consider Counsels' submission that the compulsory acquisition by Government of lots within the "*Ohlen Freshwind*" subdivision for the public purpose of protecting the catchment area of the water supply for the Port Vila urban area is not "*significant*". Rather, it was an inevitable consequence of the indefeasibility that attached to the "***Ohlen Freshwind***" head lease. In other words, having leased the area to Freshwind Limited it was necessary for Government to compulsorily reacquire part of the leased land during the term of the lease under the Land Acquisition Act and to compensate the lease owner for such acquisition. There is nothing untoward or inconsistent in that reacquisition that might throw doubt upon or undermine the "*1981 Order*". The submission is a "*red herring*".

22. As for Counsels' submissions about the appellant's entitlement to compensation, there is no evidence that the appellants obtained the consent of the Minister of Lands at the time, to build houses and plant fruit trees at "*Ohlen Freshwind*" after they moved onto the land. Accordingly such structures and plantings cannot give rise to a right to compensation.

23. What is more the appellants cannot claim compensation under the Land Reform Act which as already pointed out only applies to "*custom owners*" of the land which the appellants have never claimed to be.

24. The appellants have also mounted an argument under the heading "*acquiesce* (sic) *and reliance loss*" and reliance is placed on dicta in Hughes v. Metropolitan Ry Co. (1877) 2 App Cas 439 as raising some form of promissory or proprietary estoppel against the Government.

25. We are satisfied that the argument has no merit. "*Ohlen Freshwind*" became "*public land*" pursuant to the "*1981 Order*" before any of the appellants entered upon the land. That entry was not effected under the provisions of the Land Reform Act and is therefore unprotected by it.

26. Furthermore the fact that no appellant has deposed that he or she obtained the consent of the Minister of Lands before erecting buildings or planting any fruit trees and crops on the land as required in terms of section 10 renders such building, fruit trees and crops illegal structures and improvements for which no compensation is payable under the Land Reform Act. The entry of the appellants onto "*Ohlen Freshwind*" did not create for them a particular legal states or interest in the land from the start as from the start as they were not "*custom owners*" and that status did not change with the passage of time.

27. Needless to say the claim by the appellants that they were given permission by a Minister of the Government who was a custom owner of the land is of no assistance to the appellants. Barak Sope was not the Minister of Lands at the relevant time and any claim he might have had to custom ownership of "*Ohlen Freshwind*" had been extinguished by the "*1981 Order*". At best, he was an uncompensated former custom owner of "*Ohlen Freshwind*" with no rights over the land which became "*public land*" from the 26th January 1981 the date of signature of the "*1981 Order*".

28. Finally we say something about the claim of the appellants under Section 17(g) of the Land Leases Act. That provision was fully canvassed in the judgment of this Court in Williams v. Williams [2004] VUCA 16 where the Court enumerated seven important matters that arise from the language of Section 17 and Section 17(g) in particular.

29. For present purposes it is only necessary to refer to the fifth and seventh matters which read:

> *"**Fifthly, s.17(g) operates in respect of "rights", that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision**. A right may arise under custom law, or it might be a right that derives from and through the proprietor of a registered lease or the predecessor in title of that lease. The nature of the rights asserted in this case by the appellants are rights which they say derive from the Ezra William when he was the registered proprietor of the lease".*
>
> and:
>
> *"**Seventhly, the evident intent of s.17(g) is to protect on the one hand a person who is in actual occupation of land pursuant to rights recognized by law**, and on the other hand to provide a mechanism for those acquiring leases to protect themselves by making appropriate enquiry and inspection before acquisition. If a person in actual occupation is found on the land, the would-be purchaser, by making enquiry, can have the rights of that person identified so that the consideration for their acquisition can be adjusted, or the proposed acquisition can be abandoned. Alternatively, **if the person found in actual occupation does not disclose a right that justifies his or her actual occupation, the would-be purchaser will obtain good title against that person, and will be entitled after registration to recover possession**."*
>
> (our highlighting)

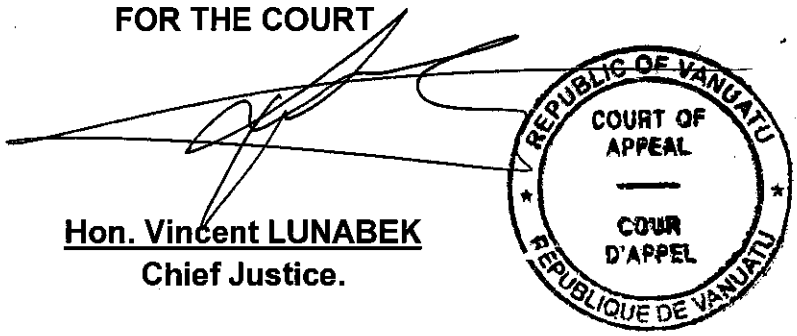
30. In the present case the appellants who claim to be persons in actual occupation of land at "*Ohlen Freshwind*" assert a right to occupy the land on the basis that the First Respondent a former Minister and custom owner of the land had verbally permitted them to move onto the land.

31. In this regard as the trial judge correctly observed and as pleaded in the claim: "*between the period 1982 to 1995 the (appellants) took possession of the said premises ...*". The earliest date of occupation was therefore 1982 the year after the "*1981 Order*" had been signed and as the trial judge found the appellants went onto the land "*as squatters and their status remains as squatters. They had no rights which could be protected by Section 17(g)*".

32. For the foregoing reasons the appeal is dismissed with costs to the Second and Third Respondents to be taxed if not agreed.

DATED at Port Vila, this 18th day of November, 2016.

FOR THE COURT



Hon. Vincent LUNABEK
Chief Justice.