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

Civil Appeal
Case No. 3285 of 2020

BETWEEN: **MIGALE LIMITED**
Appellant

AND: **REPUBLIC OF VANUATU**
Respondent

Coram: ***Hon Chief Justice V Lunabek***
Hon Justice R Asher
Hon Justice D Aru
Hon Justice O Saksak
Hon Justice VM Trief
Hon Justice R White

Counsel: *Ms L Raikatalau for the Appellant*
Mr L Huri for the Respondent

Date of hearing: *10 May 2021*

Date of Decision: *14 May 2021*

JUDGMENT

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1. This appeal raises a question as to the extent of the public land adjacent to the First Lagoon in Port Vila which is capable of being subject to a lease from the Republic under the *Land Leases Act.*

2. The issue arises in the following way. The Constitution of the Republic of Vanuatu provides for ownership of land by two bodies in the Republic. Article 73 provides that all land in the Republic "belongs to the indigenous custom owners and their descendants" and Article 74 provides that the "rules of custom shall form the basis of ownership and use of land in the Republic". Article 80 provides that, "notwithstanding Articles 73 and 74, the Government may own land acquired by it in the public interest". Accordingly, land in the Republic may be owned either by custom owners or by the Republic itself.

3. By the *Land Reform (Declaration of Public Land) Order No. 26 of 1981*, the Republic acquired all the land within the urban physical boundary of Port Vila as public land. The order which was Gazetted on 26 January 1981 provides:

> *"Republic of Vanuatu*
>
> *Land Reform (Declaration of Public Land) Order No. 26 of 1981*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

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.*

...

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

Made at Port Vila this 26th day of Jan. 1981
T Reuben
Acting Minister of Lands"

4. Annex 2 to the Order identifies the outer boundary of a large area in the Port Vila region. The effect is that all land within the boundary is "public land. Relevantly for the purposes of this appeal, the description of the boundary includes:

> *... to the low water mark in a generally north eastern direction the length of the western coast of the Ekaauvat Lagoon (First Lagoon of Erakor) ...*

5. The specification of to "*the low water mark*" as the boundary is significant in the context of this appeal.

6. The appellant (Migale) is the proprietor of two adjacent residential leases located on the waterfront of the First Lagoon. These are 11/OA24/099 (Lease 099) and 11/OA24/100 (Lease 100) (collectively the Leases). The seaward boundaries of the Leases are identified in the Leases as the mean high water mark (MHWM). A residential house has been constructed on the Leases and the Director of Migale resides in that house.

7. There had been two earlier leases (11/OA24/005 (Lease 005) and 11/OA24/009) (Lease 009) but these were surrendered on 9 August and 10 March 2016 respectively and the current leases then registered. It was common ground that the boundaries of Leases 099 and 100 are the same as the boundaries in the respective earlier leases.

8. As both the earlier leases extended, and the Leases themselves extend, only to the MHWM whereas the public land the subject of Order No. 26 extends to the low water mark (and, subject to a matter to be mentioned shortly, those marks were not co-terminous) this meant that there

was a strip of public land on the seaward side of the MHWM, being the area between the MHWM and the low water mark, which was not leased to Migale.

9. In 2011 and 2012, Migale, acting pursuant to an authorisation granted under the *Foreshore Development Act*, reclaimed land on the seaward side of the MHWM adjacent to the Leases and constructed improvements on it. The area of reclaimed land in front of Lease 100 comprises 823 square metres. The area of reclaimed land in front of Lease 099 comprises 386 square metres.

10. As will be seen shortly, a small portion of the reclaimed land extends beyond the low water mark. That is to say, the effect of the actions taken in 2011 and 2012 is that some of the improvements on the two Leases now extend beyond the MHWM and a small amount extends beyond the low water mark as it was in 1981. Counsel for Migale characterised the reclaimed land extending beyond the previous MHWM as the "unleased land" and we will do likewise.

11. On or about 18 June 2019, the Erakor Village, through Paramount Chief Pomal and the members of the Erakor Council of Chiefs, issued a notice to Migale informing it that it was occupying the reclaimed land unlawfully, asserting their interest in the reclaimed land, and seeking, amongst other things, a rental for its use of the reclaimed land.

12. By reason of actions taken in support of the claims made by the Council of Chiefs, Migale commenced an action seeking an injunction restraining incursion onto the Leases. That application was resolved by an undertaking given by the Erakor Council of Chiefs on 16 July 2019.

13. When the proceedings were commenced, the only respondents were Paramount Chief Pomal and members of the Erakor Council of Chiefs. On 2 December 2019, the Republic was joined as second respondent to the proceedings. Then, on 7 February 2020, the Erakor Council of Chiefs indicated that it did not wish to defend the claim. Accordingly, on that day, the primary Judge issued an injunction permanently restraining the Council of Chiefs from trespassing on the land on the seaward side of the two Leases and from "harassing and/or demanding rent payments or other payments" in respect of unleased land.

14. Migale has sought to regularise the title position by negotiating with the Republic an extension of the Leases so as to cover the unleased land. However, the Republic declined to accept that the portion of the unleased land between the MHWM and the low water mark was public land within the meaning of Order No 26. Accordingly, in the proceedings at first instance Migale sought a declaration that "a part or whole of the unleased land in front of the leases is public land within the meaning of the 1981 Order" and an order requiring the Republic to negotiate leases of the unleased land.

15. In the preparation for the hearing at first instance, Migale and the Republic agreed to undertake a survey identifying the location of the low water mark adjacent to the Leases. Each of Migale and the Republic commissioned a surveyor for this purpose and the surveys were carried out on 6 June 2020, this being identified as the time of the lowest low tide. The Judge noted that there

was very little difference in the two survey reports. Mr Meltenoven, the surveyor retained by Migale, reported:

> *[M]y observation and finding in relation to the reclaimed sections is that almost all the reclaimed section of lands in front of Lease 099 and Lease 100 are within/or above the limit of the lowest water mark, and therefore those reclaimed sections are part of the municipal boundary of Port Vila.*
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> *The part outside the municipal boundary is a small area which covers the part from the bottom of the wall to the top of the wall and is approximately one metre from the water to the limit of the lowest tide.*
> *(Emphasis added)*

16. It can be seen that Mr Meltenoven indicated a relatively small intrusion by the reclamation and the improvements into the area of the sea beyond the low water mark.

17. The primary Judge refused to make either the declaration or the order sought by Migale. His Lordship referred to *Terra Holdings Ltd v Sope* [2012] VUCA 16, to which we will return shortly, and continued:

> *[19] In my view, Order No. 26 of 1981 very precisely sets out the area in Port Vila that is "public land". What has occurred is that by reclaiming additional land adjacent to Lease Title No. 11/0A24/100 and Lease Title No. 11/0A14/099 Migale Limited has increased the footprint of land on the water's edge of Lagoon Number One and as a result moved the low water mark further into the Lagoon than is depicted in Order No. 26 of 1981.*
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> *[20] Although the language used in Annex 2 refers to the low water mark, the appended survey at Annex 1 has depicted an exact delineation of what is included as "public land" and what is outside it.*
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> *[21] The moving of the low water mark in this way, if attended also by a moving of the boundary, would adversely affect the rights of the customary owners, whose rights are closely protected by the Constitution. In my view that would be wrong.*

18. In the proceedings at first instance, counsel for the Republic had submitted that, when Order No. 26 was made, the MHWM and the low water mark were "*one and the same*", as the water's edge was "*a cliff face*".

19. Counsel for Migale submitted that it was implicit in the Judge's reasons that he had accepted the submission concerning the presence of a cliff face. She noted that the submission of the Republic's counsel at trial had not been supported by evidence and applied for leave to introduce on appeal further evidence in the form of an affidavit from Mr Meltenoven and an affidavit from a

member of her solicitor's firm. Both the topographical map from 1975 annexed to the latter affidavit and Mr Meltenoven's affidavit indicated fairly clearly that there had not been any "*cliff face*", so as to make the MHWM and the low water mark in the area of the Leases co-terminous.

20. Counsel for the Republic opposed the Court receiving the further evidence on the appeal and we reserved our decision on that point.

21. The Judge's reasons make only one reference to the presence of a "cliff face", that being in the summary of the submissions of the Republic's counsel. Moreover, it does not seem to us to be implicit in the Judge's reasons that he relied upon the submission concerning the presence of a "*cliff face*". It would be surprising if the Judge had done so, in the absence of any underlying evidence of the presence of a cliff face. Nevertheless, we have considered it appropriate to receive the further evidence because it does indicate that the submission based on the presence of a cliff face was misplaced and it adds to our understanding of the topography of the area in 1981.

22. Despite the Republic's position, there can be no doubt about the ownership by the Republic of the strip of land between the MHWM and the low water mark in front of the Leases and of its ability to grant a lease in respect of that strip. The reclamation and parts of the improvements now occupy the whole width of that strip. The issue on the appeal concerns the ability of the Republic to grant a lease in respect of the relatively small area identified by Mr Meltenoven which extends beyond the low water level.

23. The matters to which we have referred thus far suggest that, provided that the seabed on the seaward side of the low water mark is "land" to which Articles 73 and 74 of the Constitution refer, that seabed is owned by custom owners. Previous decisions support that view.

24. In *Willie v Sarginson* [2000] VUSC 20, one of the issues was whether a lessee of an agricultural lease was entitled to harvest trochus shells from reefs which were permanently under water or covered by the water at high tide. The Chief Justice noted that, while land is defined in the *Land Reform Act* to include "land under water including land extending to the seaside of any offshore reef but no further", the *Land Leases Act* defines the term "land" to include, amongst other things, "land above the mean high water mark". The Chief Justice resolved the dispute in *Willie v Sarginson* by holding:

> *The land under water or recovered by water at the high water flow of the tide belongs to the plaintiffs as custom land owners and does not form part of the demised Agricultural Land Lease Title No. 314. The [lessees] have no right to harvest trochus shells on the reef under water or land recovered by water on the high flow of the tide, unless the plaintiffs give them permission to do so.*

25. *Terra Holdings v Sope* is an important and authoritative judgment. In that case, the question was whether an approval issued by the Minister of Internal Affairs under the *Foreshore Development Act* constituted lawful authority for Terra Holdings to carry out work reclaiming and developing part of the seabed in Fatumaru Bay in Port Vila. As in the present case, Terra

Holdings was the leaseholder of an area of public land bounded on one side by the MHWM. The development for which Terra Holdings had been given approval included the area of public land located between the MHWM and the low water mark. Mr Sope, who claimed to be a customary owner, contended that the seabed and water below the low water mark boundary of the public land was custom land, with the consequence that, by reason of s 5(1)(j) of the Constitution, it had not been open to the Minister to grant approval for a development over any of that area without the consent of the custom owners.

26. In relation to this submission, the Court of Appeal said:

> [10] *Mr Sope's submission assumes that the present title and ownership boundaries will remain in the same positions notwithstanding that the proposed reclamation will move the high and low water marks to the seaward edge of the development. This assumption is correct.* Where the water mark slowly and gradually changes through naturally occurring accretion or erosion of sand the boundary will in law continue to run to the relevant water mark even though the actual area of land within the title may increase or decrease. However, where the water mark is altered by artificial means, as would occur here, the boundary does not change. The artificial structure or development which changes the water mark is considered to be an improvement situated on the land within the original boundaries. This doctrine applies equally to State land as to land owned by individuals ...
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> [11] The legal position was clearly stated by the Privy Council in **Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Ltd** [1915] A.C. 599 at 615:
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> *"Artificial reclamation and natural silting up are, however, extremely different in their legal results; the latter, if gradual and imperceptible... becomes an addition to the property of the adjoining land; the former has not this result, and the property of the original foreshore thus suddenly altered by reclamatory work upon it remains as before..."*
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> ...
>
> [13] In this case if the development were to occur the reclaimed land would be land above the high water mark. The reclamation of the strips of land presently comprising lease 11/OF12/003 and the public land within the municipality would be improvements thereon for the purpose of the Land Leases Act [CAP.163] as that Act defines "improvement" to include the reclaiming of land from the sea. Likewise the reclaimed land beyond the strip of public land would be an improvement on the custom land.
> (Emphasis added and citation omitted)

27. These conclusions meant that the essential question in *Terra Holdings v Sope* was whether the Minister's approval for foreshore developments on custom land could be given validly in the absence of the consent of the custom owners, at [20]. The Court noted the various definitions of

the term "land" in the legislation of Vanuatu but also noted that those definitions could not dictate the meaning of "land" in the Constitution. After referring to various matters bearing upon the proper construction of the Constitutional term, the Court concluded that the term "land" in the Constitution should be understood to include both inland waters and territorial seas including the seabed, at [35]. It then addressed the issue of ownership of land under the Constitution and continued:

> *[38] In Vanuatu, in so far as land belonging to custom owners includes land beneath the water, Articles 73, 74 and 80 are domestic laws setting rules and regulating the use of these lands. Importantly Articles 73 and 74 vest custom ownership rights to the lands in the custom owners and correspondingly limit the sovereign rights and powers that the State could otherwise exercise over those lands. The protection under Article 5(1)(j) of those individual rights given to custom owners are an important part of the domestic law.*
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> *[39] Parliament, by enacting in the Law Reform Act the definition of "land" so as to include land under water extending to the sea side of any offshore reef, has recognised that custom ownership rights exist over underwater areas ... The case of* ***Willie v. Sarginson*** *[2000] VUSC 20 concerned the harvesting of trochas shell on a reef adjacent to the boundary of leased land. The Chief Justice held that the boundary of the custom ownership of the underwater land runs to the offshore reef as provided for in the Land Reform Act.*
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> *[40] Apart from these acknowledgements that custom land extends to seabed, it was common ground between all parties before this Court that the sea bed beyond the strip of public land included in the proposed development was custom land. The lack of agreement between the parties was as to whether the custom owners included Mr Sope or those he purports to represent. We conclude therefore that "land" within the meaning of Articles 73 and 74 of the Constitution extends to the waters below low water mark and includes seabed.*
> *(Emphasis added)*

28. The Court of Appeal then determined that the approval of the development was not authorised. That was because the custom owners owned the seabed on the seaward side of the low water mark and the area of the proposed intrusion to the area of the seabed owned by them was so substantial as to constitute an unjust deprivation of the property within the meaning of s 5(1)(j) of the Constitution.

29. As we have said, *Terra Holdings v. Sope* is an important and authoritative judgment and we do not wish anything said in this judgment to be regarded as detracting from it. It supports a number of propositions of present relevance:

(a) the erection of artificial improvements which alter the location of the low water mark do not have the effect of altering the boundary established by an Order such as Order No. 26, or for that matter, by a lease granted under the LL Act;

(b) the consequence is that Migale's reclamation and improvements in 2011 and 2012 did not alter the boundaries of the Leases or the boundary fixed by Order No. 26; and

(c) in a case like the present, the land to the seaward side of the low water mark may (not must) be owned by custom owners in accordance with Articles 73 and 74 of the Constitution.

30. The continued ownership of the seabed, included the seabed to the seaward side of the low water mark, depends of course on there being custom owners who have the rights of ownership vested by Articles 73 and 74 of the Constitution.

31. It can be said, however, that this case differs in a number of material respects from the circumstances considered in *Terra Holding v Sope*.

32. On our understanding of Mr Meltenoven's report, the intrusion of the reclaimed area and the development beyond the low water mark is minimal, being assessed by him as being approximately one metre. This is very different from the 50 metres of intrusion considered in *Terra Holdings v Sope*. In our opinion, the smallness of the area supports an inference that the extra one metre must have been regarded in 2011 as no more than a minor incident of the Republic's grant of approval to the reclamation and the development and as encompassed by it.

33. Secondly, by its approval of the reclamation and development in 2011, the Republic asserted authority over the area in dispute including the additional one metre. So far as the evidence adduced in the Supreme Court indicates, it did so without any objection from custom owners.

34. Thirdly, despite the previous involvement of the Erakor Council of Chiefs, no custom owner has sought to be heard in opposition to the orders sought by Migale. As previously noted, the Council of Chiefs withdraw its opposition to Migale's application and, in effect, did not object to the Court issuing the permanent injunction to which reference was made earlier. Furthermore, no person has sought to identify themselves as a custom owner of the area immediately to the seaward side of the low water mark in front of the Leases. In fact, so far as the evidence before the Court indicates, it is not clear that there are persons who are custom owners in respect of that area.

35. Fourthly, there has been no suggestion in this case that the intrusion into the area beyond the low water mark constituted an unjust deprivation of the property of custom owners, so as to infringe the rights of custom owners protected by s 5(1)(j) of the Constitution.

36. The differences in the circumstances suggest that *Terra Holdings v Sope* may be properly distinguished and that this Court may find that the Republic does have power to grant a lease in respect of the whole of the unleased land. It is understandable that the Republic would wish to respect and protect the rights of custom owners and would not wish to grant a lease over even a small area of land not owned by it. Its defence of Migale's claim was therefore appropriate.

However, for the reasons stated, we consider that it was not necessary for the primary Judge to apply the *Terra Holdings v Sope* reasoning in the unusual circumstances of this case.

37. Accordingly, we allow the appeal and issue a declaration in the terms sought by Migale.

38. We decline, however, to order the Republic to negotiate leases with Migale over the unleased land. It is for the Republic to decide whether or not such leases are appropriate and, if so, their terms. These are not matters which should be the subject of, in effect, a mandatory order by this Court.

39. The formal orders of the Court are:

(1) The appeal is allowed.

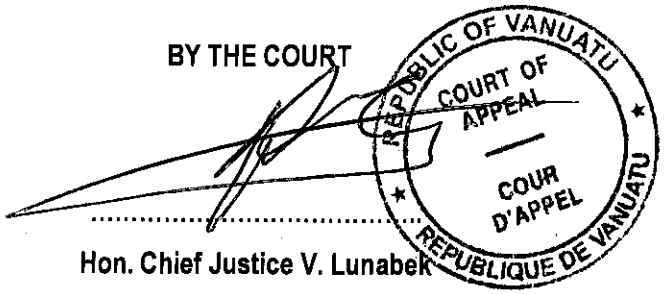
(2) The orders of the primary Judge, other than the orders for costs, are set aside.

(3) There be a declaration that the whole of the unleased land in front of Leases 11/OA24/099 and 11/OA24/100 is public land under the authority of the Minister of Lands as prescribed by the *Land Reform (Declaration of Public Land) Order No. 26 of 1981*.

(4) The Republic is to pay Migale's costs of the appeal to be taxed in default of agreement.

DATED at Port Vila, Vanuatu, this 14th day of May, 2021

BY THE COURT



Hon. Chief Justice V. Lunabek