

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

**Civil**  
**Case No. 21/807 SC/CIVL**

**BETWEEN: Francois Chani**  
Claimant

**AND: Harbour Views Limited**  
First Defendant

**AND: Ocean Logistics Limited**  
Second Defendant

**AND: Republic of Vanuatu**  
Third Defendant

*Dates of Trial:* 20-22 July 2022, 27 July 2022 and 13 September 2022  
*Before:* Justice V.M. Trief  
*In Attendance:* Claimant – Ms A. Sarisets  
First and Second Defendants – Mr N. Morrison  
Third Defendant – Ms J.E. Toa  
*Date of Decision:* 28 September 2023

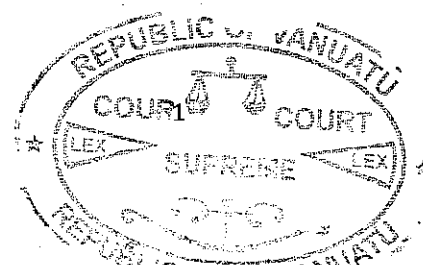
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**JUDGMENT**

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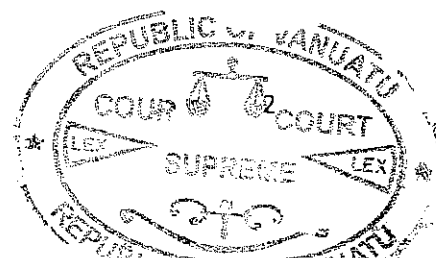
A. Introduction

1. This was a claim in negligence by the Claimant Francois Chani in relation to excavation works carried out by the Defendants Harbour Views Limited ('HVL') and Ocean Logistics Limited ('OLL') on HVL's property next door to Mr Chani's residential property.
2. The works are alleged to have imperilled a house on Mr Chani's property which lies alongside his and HVL's shared boundary. Gross negligence is alleged against all three Defendants HVL, OLL and the State. Damages are sought. The Claim is disputed.



B. Background

3. Mr Chani is the registered proprietor of leasehold title no. 11/OA23/021 located at Nambatri area in Port Vila ('Mr Chani's property'). The property is located at the edge of the cliff overlooking Port Vila Harbour and which lies adjacent to the road leading to Star Wharf (the 'Wharf Road'). Mr Chani resides on the property.
4. There is no entrance to Mr Chani's property from Wharf Road – up the cliff face. The entrance to his property lies off a back road of Nambatu area, Port Vila.
5. HVL is the registered proprietor of leasehold title no. 11/OA23/013 which is located adjacent to Mr Chani's property at Nambatri area, with frontage directly onto the Wharf Road ('HVL's property').
6. HVL contracted OLL to carry out excavation works on its property.
7. OLL in turn subcontracted Dinh Van Tu Enterprise to carry out the excavation works on HVL's property.
8. In June 2020, OLL commenced its excavations. Facing HVL's property from the Wharf Road, the excavation was bordered on the left side by Mr Chani and HVL's shared boundary. The whole of HVL's property was excavated and all of the excavated material removed down to the level of the Wharf Road. There is now a cliff face as a result of the excavation along the length of Mr Chani and HVL's shared boundary of quite some height.
9. Mr Chani raised concerns with the Defendants as to the effect of the excavation on his property including the house located along the shared boundary that he had tenants living in.
10. The parties met a number of times.
11. The Government's Department of Geology and Mines ('Geology & Mines') and Department of Environment Protection and Conservation ('DEPC') refused to give Mr Chani copies of the permits issued. The excavation continued and stopped once the entire area of HVL's property had been excavated.
12. On 18 March 2021, Mr Chani filed the Claim.
13. There are cracks in the cliff face along the Wharf Road facing Port Vila Harbour that have appeared since the excavation works. Those are located on public land and form no part of the Claim in this matter. It is common ground that these cracks are concerning and need to be fixed, but they lie outside Mr Chani's and HVL's properties.



C. Pleadings

14. Mr Chani's case for gross negligence was pleaded, relevantly, at para. 5 of the Claim as follows:

5. *The Claimant brings this claim for damages against the First, Second and Third Defendants for Gross Negligence and breach of the 3 Meter buffer zone, thus causing permanent damage to the Claimant's Property.*

PARTICULARS

a. *Breach of 3 Meter Buffer zone.*

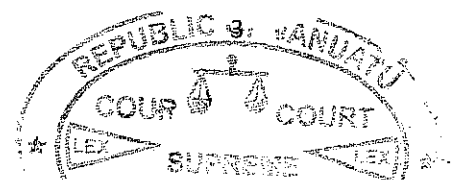
15. The following was also alleged in the Claim:

- a) That during the excavation process, OLL dug too close to the edge of Mr Chani's property, exposing his property to a great risk of danger in cases of natural disasters because the property is located at the edge of the cliff overlooking the Port Vila Harbour;
- b) That Mr Chani asked Geology & Mines and DEPC for 'advice on the assessments of the excavation' and for the recommendations in the permits issued to OLL but none were provided to him;
- c) That HVL and OLL did not undertake proper process and assessment in obtaining the permits used to carry out the excavation on HVL's property;
- d) That Mr Chani's house alongside the shared boundary is allegedly now exposed to great risk of damage;
- e) That his tenants have vacated that house due to fear of the house collapsing during an earthquake or cyclone into the huge hole dug by OLL;
- f) That but for HVL and OLL's gross negligence, excavation went ahead on HVL's property resulting in the damage caused to Mr Chani's property; and
- g) That Mr Chani is alleged to have been deprived the enjoyment of his property and that he is likely to relocate in the future due to the damage caused.

16. Damages of VT910,000,000 and costs were sought.

17. The Claim is disputed.

18. HVL and OLL denied in their Defence that they were grossly negligent. They also denied that there was something relevant to their actions called a 3-metre buffer zone and that Mr Chani's property has been permanently damaged. They alleged that they acquired all necessary permits for the excavation being the DEPC permit dated 19 July 2019, Quarry Permit dated 28 May 2020 and Port Vila Municipal Council ('PVMC') permit dated 28 May 2020 and complied with the terms of those

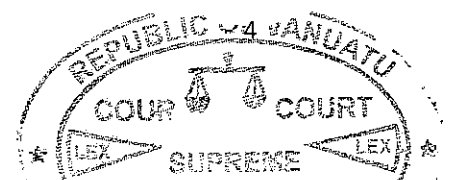


permits. They alleged that the permits define the relations between the parties and they relied on the terms of those permits. They alleged that the claim for damages is grossly excessive.

19. A Reply to the First and Second Defendants' Defence (titled "Claimant's Response") was filed joining issue with the matters disputed by HVL and OLL.
20. In its Defence, the State denied that it was grossly negligent. It admitted not giving Mr Chani information about the permits issued but said that the DEPC and Geology & Mines held several meetings with him, HVL and OLL in attempts to resolve Mr Chani's concerns.
21. The State alleged that OLL applied for an environmental permit, and the DEPC conducted a Preliminary Environment Assessment ('PEA') which found that there was no need for an environmental impact assessment ('EIA') to be carried out. Then the 19 July 2019 environmental permit was issued authorising OLL to excavate soil for ground levelling and to construct a warehouse.
22. In addition, OLL applied for a quarry permit and was issued a landscaping permit for 12 months. OLL notified Geology & Mines of the contracted company to undertake the excavations and on 28 May 2020, the Commissioner of Mines and Minerals issued a quarry permit to Dinh Van Tu Quarry Limited for the period 1 June 2020-1 June 2021 for limestone quarry works only.
23. Finally, the State alleged that para. 13 of the environmental permit issued to HVL and OLL stated that a 5 metre buffer from the land boundary adjacent to Mr Chani's house must be established. However, it is clear from the excavations that HVL and OLL did not comply with para. 13. The damages sought were stated to be excessive and should be borne solely by HVL and OLL.
24. The State's Counter Claim against the First and Second Defendants was withdrawn on the second day of trial, 21 July 2022. Mr Morrison stated that no costs were sought.

D. The Evidence

25. The standard of proof that Mr Chani was required to establish to succeed in his Claim was "on the balance of probabilities." That is, that his assertions were more likely than not to be correct. There was no onus on the Defendants to establish facts or their non-liability.
26. The evidence had to be analysed to ascertain what was accepted and what was not.
27. I assessed the credibility and accuracy of a witness' evidence not only by how the witness appeared in Court but more significantly, by the consistency of accounts. I looked firstly for consistency within a witness' account. Secondly, I looked for

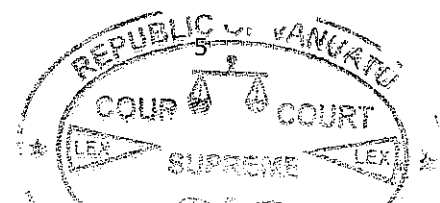


consistency when comparing that account with the accounts of other witnesses, and then, when comparing the account of a witness with relevant exhibits.

28. I also had regard to the inherent likelihood of the situation then prevailing.
29. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts.
30. I now set out my summary of the relevant evidence of each witness, and my assessment of what weight should be given to that particular evidence.

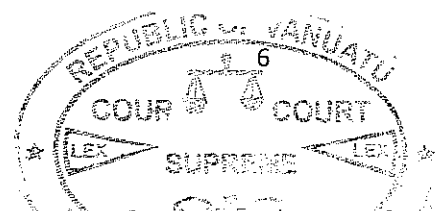
#### *The Claimant's Witnesses*

31. **Francois Chani** deposed in his Sworn statement filed on 18 March 2021 that OLL's excavation started in June 2020 and he was worried that it would affect his property [**Exhibit C1**]. He asked OLL for an expert geologist assessment of excavation area and was told there was no expert geologist assessor in Vanuatu but they had engaged Cyrille Mainguy, a civil engineer and had all the necessary permits to excavate. He asked OLL to stop the excavation but they refused to, saying they had the necessary permit. OLL excavated right up to his and HVL's shared boundary line. He understands that the work should be done up to 3 metres within HVL's property but not too close to his own property.
32. He approached Geology & Mines and asked to be provided with their assessment of the excavation, for their advice on how the cracks on the edge of the cliff could be rectified and for a copy of OLL's permit. He did not receive any.
33. He approached DEPC and asked to be provided with an impact assessment of the excavation and for a copy of OLL's permit. He did not receive either one.
34. None of the Defendants gave him official notice before the excavation occurred.
35. The excavation has affected his tenant business. There are huge cracks on the side of the excavation area [photos attached as **Annexure "F3", Exhibit C1**]. The chances of his property collapsing in the near future are very high. He has spent a lot of money on maintaining his property and is deprived of the enjoyment of his property.
36. Mr Chani deposed in his Sworn statement filed on 21 May 2021 that he, OLL personnel and Loic Dinh from Dinh Van Tu Quarry Limited corresponded [**Exhibit C2**]. There were meetings on-site which were also attended by Geology & Mines officers. He asked for a retaining wall due to the cracks on the public land and on the side of the excavated area next to his property. He stated that the chances of his property collapsing in the near future are very high. There is no planning for



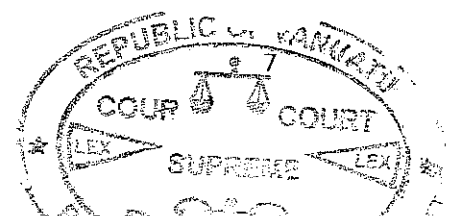
drainage. All rain run-off is washing away rocks from under the footings of his building and into the excavated area.

37. He stated that HVL and OLL breached the 5-metre buffer zone condition of the Environmental Permit, and there was no supervision by the DEPC. If there had been, there would be no breach of that buffer zone. There are huge cracks on the side of the excavation area so the chances of his property collapsing in the near future is very high.
38. He bought the property in 2014 for VT49,000,000 which was financed by a mortgage from the BRED Bank Vanuatu. He and his wife then applied for an extension of the loan and this was approved. They are still repaying the loan. He and his family had rented the property then purchased it when it was put up for sale. They used 3 bedrooms and rented the rest. This was to be their permanent family home. They purchased the property because they knew its value would increase in the future. They have invested a lot of money, time and sweat on the property and did not expect something like this to occur and ruin their future plans to develop and improve the property for their family's benefit.
39. In 2015, Stephen Tahi provided a report containing property valuation of VT163,200,000 [Annexure "FC8", Exhibit C2]. He cannot expect the normal growth in the value of the property anymore and he cannot sell the property for its fullest value. He can no longer get a tenant to rent his rental flats. They moved out. Only one stayed but with a 50% reduction in rent.
40. The protection of buffer zones has been taken away and this is a permanent damage which cannot be replaced. Without a buffer zone, he does not have peace of mind as Vanuatu is vulnerable to disasters and specifically this area is prone to landslides, as occurred in 2003 and the big rocks which detached from the cliff and landed in the harbour.
41. Mr Tahi's report was objected to on the basis of hearsay as Mr Tahi would not be called as a witness. It has remained in evidence [Annexure "FC8", Exhibit C2] to show that the report was made, but not to prove the truth of its contents.
42. In cross-examination by Mr Morrison, Mr Chani stated that since he bought the property in 2014, he has lived in Australia but bought it as it was a very good investment due to the rental income earned. He agreed that before the excavation work started, he had some contact with HVL and OLL about what was going to happen. He agreed he saw a sign on the excavation site detailing the permits that had been granted. He denied meeting with HVL and OLL members 3 weeks after the excavation started in June 2020.
43. Mr Chani denied reading Mr Sean Griffin's sworn statement. He did not recall that he met Mr Griffin and Mr Bohn on the land to be excavated and that they explained to him their intentions. He agreed that he sent an email to Mr Griffin towards the end



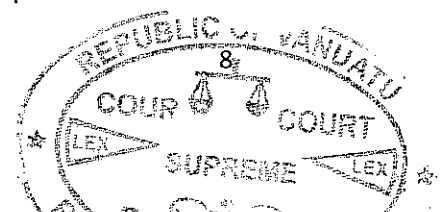
of June 2020 raising concerns. He stated that then they had 3 or 4 meetings on site. He stated that the first meeting was a few months before the excavation at OLL's office when Mr Griffin assured him that he (Mr Chani) would be kept informed but then he did not get anything until he saw the excavator coming downhill the day to excavate.

44. It was suggested that Mr Griffin's evidence would be that he and Mr Chani met on 2 July 2020 once Geomap had completed its survey. Mr Chani responded that the excavation happened without Geomap having done a survey so he (Mr Chani) offered them his own survey plan to guide them as to the boundary, but Geomap did its survey after that by which time the excavation was already halfway. It was suggested that it was agreed that after the 2 July 2020 meeting and Geomap's survey was done that the excavation would continue. Mr Chani disagreed saying that they agreed that a survey must be done and he did not know about a buffer zone condition but that they had to comply with the conditions of their permits.
45. Mr Chani was asked if he recalled discussions at an on-site meeting about a 150cm setback from the boundary. Mr Chani responded that that was after numerous visits to Geology & Mines and to DEPC to ask what buffer zone there was. No one would tell him. He went to the PVMC too and they would not help him. So, he asked for a 3-metre buffer zone, then a metre, and just any buffer because his property was at risk. If he had known of a 5-metre buffer zone, he would have told them that they breached that condition of their permit. Their response was they have all the right to excavate on their property as they own it.
46. It was suggested that at the 2 July 2020 meeting, he was offered a 50cm setback which he accepted but was not given. He replied that they said they could excavate on their own property and so he could have said anything but they said they would excavate on their own boundary.
47. Mr Chani agreed the excavation was completed in early September 2020.
48. He agreed that in his discussions with HVL and OLL, there was consideration of making a retaining wall along the excavated boundary. He said he always asked about that.
49. It was suggested that he was also offered a further excavation on the Government corner where the deep crack is. He said they wanted to rectify that crack by cutting into the Government property but he told them that was public land and he would not consent to any more excavation unless a Geomap technician assessed the severity of the crack all the way from the Government land to the façade of his property that it was safe. He agreed he did not have confidence in Cyrille Mainguy's opinion about the excavation of the limestone face because Mr Mainguy is an engineer but not an expert in geology. He also did not believe Mr Mainguy's explanation as he was not on-site every day even though he had been hired as the engineer. The response to



his request for a Geo technician was that there were none in Vanuatu and it was expensive to bring them in because of Covid.

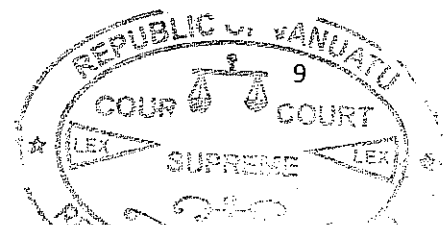
50. Mr Chani explained that the PVMC did not help him and he did not get any satisfactory answer from Geology & Mines and DEPC so he stated in para. 11 of **Exhibit C1** that the excavation should be done up to 3 metres within HVL's property as it is his common sense and he would hope is everyone's common sense that there must be a 3-metre buffer zone from the excavation to his property.
51. It was suggested that it was also common sense that his rental building on the shared boundary should have been set back from that boundary. He replied that the building was already there when he bought the property and he could not do anything about that. He disagreed that the building was built over-lapping the boundary as how could HVL and OLL say that it was encroaching when they did not even have a survey!
52. He disagreed that HVL and OLL offered him a 50cm buffer zone and then when that did not eventuate, he was offered a retaining wall, saying that he was the one who asked for those, it wasn't offered! He stated that he did not reject a retaining wall but wanted it designed by someone more expert than Mr Mainguy.
53. It was suggested that there would be no problem/issue if the rental building on the shared boundary was set back 3 metres. He replied that the excavation should have complied with the Environmental Permit which required not 3 metres but 5 metres.
54. He agreed that there would not be a problem if he had received a 5-metre buffer zone in accordance with the Environmental Permit. He disagreed that the 5-metre buffer requirement related to construction but not to the excavation.
55. He agreed that he purchased the property in 2014 for VT49 million and that he paid his insurance premium for the property valued at VT45 million. He agreed that he had seen Richard Dick's valuation of his property post-excavation of VT49 million.
56. It was suggested that the excavation at the front of his property was the same height as on the side. He replied that the excavation hole described used to be a grassy, maintained lawn that renting families would picnic on. It was suggested that the height on the excavation site and on the Wharf Road are similar being a 20-metre drop and rather steep. He did not agree. It was put to him that if his rental building had been set back 3 metres from the shared boundary, this would not have arisen. He disagreed. He also disagreed that excavation sites in Vila such as Vanuatu Bijouterie, the Tana Russet complex, the excavation at the USP roundabout and other similar excavations always occurred right up to the boundary.
57. In re-examination, Mr Chani stated that the reason why he did not trust Mr Mainguy to design the retaining wall was that he did not have confidence in him as he rarely saw him on-site and as engineer for the project, he should have pointed out the 5-





metre buffer required. He was asked where he got the 3-metre buffer zone from. He replied that he suggested that they give him a 3-metre zone or something as a buffer! He was not given a buffer as they said they can excavate to their boundary.

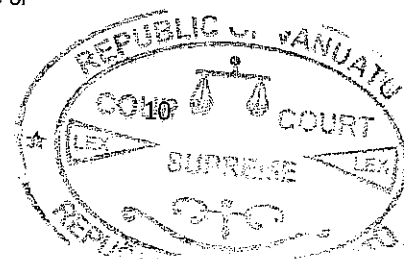
58. In cross-examination by Ms Toa, Mr Chani stated that he only saw after the Claim was filed the Environmental Permit condition for 5-metre buffer zone and that there was confidentiality between the Government department and client so they could not provide information to him. He stated that his property is in an area where rocks have fallen down therefore his common sense was to ask for a buffer of 3 metres. It was put to him that the 3 metres was from his own thinking but not from a document or the law. He responded that he wished they had provided that to him but they did not.
59. It was also put to Mr Chani that the 5-metre buffer zone in the Environmental Permit was for the building only. He disagreed saying it was for the boundary.
60. In re-examination, Mr Chani was asked to explain his last answer. He stated that the 5-metre buffer was to protect the integrity of the cliff and his property therefore the Department's lack of supervision meant the value of his property was not the same as it was prior to the excavation. And too his potential return from rent in the future was affected unless he spent a lot of money to secure the property which it was not possible for him to do. So, the situation was he had purchased his property as an investment that he expected to grow in value and to retire at but the property was no longer the same as it was before. He felt that officials had failed in their duty to protect people's hard-earned money spent on property. He met with the Commissioner of Mines twice at her office and even on-site. She did not say anything about what the 5-metre buffer zone related to.
61. That concluded Mr Chani's evidence.
62. Mr Chani is clearly upset by the excavation and its effect on his property and rental business. I accept his evidence as to those matters. However, I do not accept his evidence as to a 3-metre buffer zone or a 5-metre buffer zone as neither is supported by the documentary evidence or by the applicable legislation. Mr Chani is not an engineer so I do not have regard either to those parts of his evidence asserting that there are high chances of his property collapsing in the near future. I considered therefore that besides the evidence as to the effect on his property and rental business, that I could not rely on Mr Chani's evidence unless it was supported by the accounts of other witnesses or by the documentary evidence.
63. Mrs **Bernadette Chani's** Sworn statement filed on 27 May 2021 [Exhibit C3] was tendered by consent. Mrs Chani is married to Mr Chani. She works and resides in Australia while he is in Vanuatu. Their family had rented the house at leasehold title no. 11/OA23/021 then bought the property in 2014 with a BRED Bank loan and it became their family home for many years while their children and grandchildren were growing up.



64. They were proud to host their son's wedding at the property and everyone admired the gorgeous surrounds. Today with the massive quarry abutting their property they would be embarrassed to hold any function there as it is both an eyesore and extremely unsafe to be on that side of their property. They would never allow the grandchildren to be outside for fear they would fall into the vast expanse that is now there where once there was a rolling hill, and fall. They worry now when that side of the property will collapse.
65. Part of the property was used for rental purposes. Due to the excavation, only one tenant remained but with a 50% rent reduction. The property is still under mortgage, she and Mr Chani are still repaying the loan, there is now a high likelihood that the value of the property will be affected in future, that they will be forced to relocate and not live in the same place with a very nice view overlooking Port Vila Harbour. If they relocate, they will still have to pay off the mortgage and have spent money on property insurance too. The damage caused by the excavation is permanent. They can no longer fully develop and enjoy the property as expected and are already deprived enjoyment of it. They have invested a lot of her money, time and sweat on the property and did not expect something like this to occur and ruin their future plans to develop and improve the property.
66. Whether or not the side of the Chani property will collapse and the likelihood of the property value being affected in future are matters for the Court to determine. I therefore do not have regard to those aspects of Mrs Chani's evidence. Otherwise, I consider that Mrs Chani endeavoured to assist the Court with the truth and accepted her evidence.
67. Mr **Jeremy Dick's Sworn statement** filed on **3 June 2021 [Exhibit C4]** was tendered by consent. Mr Dick is the Managing Director of Land Logic who prepared a property report for Mr Chani in May 2021 showing the present market value of Mr Chani's property as VT49,300,000 [**Annexure "JD1", Exhibit C4**]. The market value could have increased but the market rents have dropped due to what happened to the property.
68. In the Land Logic report, under "Site Description – Threats and Risks", it is noted as follows under the heading "Environmental Hazards":

*Environmental Hazards*

*Property is located on top of a cliff, in an earthquake zone there is the possibility of landslides. The neighbouring property has been extensively excavated on the boundary line with no reinforcement. We are not qualified to determine the threat from erosion or collapse as a result of the works completed. We recommend that a suitably qualified engineer report be referenced as to the safety of the cliff areas for safety and maintained beneficial use of the subject site.*



69. In the Land Logic report, under “Risk Analysis – Property Risk Rating”, it is noted as follows under the heading “Environmental Issues”:

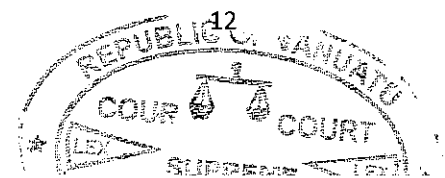
*Environmental Issues*

*Property is adversely affected by  
mining/excavation subsidence*

70. I accepted Mr Dick’s evidence as there was no challenge to it.
71. **Albert Abel Williams**, a freelance environmental consultant, deposed in his Sworn statement filed on 4 June 2021 that he prepared an Environmental Report on the Assessment of the Excavation dated 4 June 2021 [**Annexure “A1”, Exhibit C5**]. He referred to breach of a 5-metre buffer zone.
72. In Mr Morrison’s cross-examination, Mr Williams related his educational qualifications. He agreed that he did not have any qualifications relative to geo-physical matters. He agreed that his comments on photos 1-6 in his report could be termed geo-physical, and were from his experience rather than his training. He agreed that he had not sighted the Application for Quarry Permit. He confirmed that when he made his report, he was not aware that Mr Chani had had meetings some weeks prior to the excavation commencing with the excavating people and discussed the project.
73. In re-examination, Mr Williams stated that the buffer zone would have been for the excavation as a building buffer zone would be based on a building permit issued by the Municipality.
74. In cross-examination by Ms Toa, Mr Williams repeated that he was not privy to the applications made to the two Departments. He agreed that the application made did not specify the depth of the ground levelling that would occur. He saw the Environmental Permit before he made his report. Here, it was determined that a full EIA was not required but if an EIA was carried out, that would have included public consultation. As a former Director of DEPC, even if a full EIA was not required, DEPC still had to conduct monitoring to ensure compliance with the conditions of the approval.
75. In re-examination, Mr Williams stated that where a Director had approved following a PEA or a full EIA, there had to be monitoring to check compliance with the conditions of approval.
76. I consider that Mr Williams’ evidence as to a 5-metre buffer zone is not supported by the documentary evidence or by the applicable legislation therefore his evidence did not assist me in determining the issues.
77. **Raysen Vire** is a civil engineering consultant, trading as RJV Civil Engineering Consulting. He deposed in his Sworn statement filed on 31 May 2021 [Exhibit C6] that he prepared an Engineering Assessment report about Mr Chani’s property dated 17 May 2021 [**Annexure “RV1”**]. He stated in the report that Mr Chani could claim

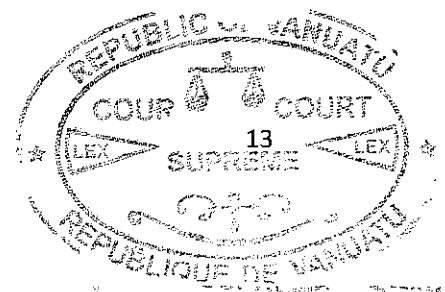
VT110,910,000 for protection camber to property damaged, for the replacement value of the building and for loss of rental income.

78. Mr Vire deposed in his Sworn statement filed on 21 June 2022 [Exhibit C7] that in his expert opinion, a retaining wall along Mr Chani and HVL's shared boundary is a permanent remedy but must be properly designed following a geo-technical civil engineer's investigation of soil properties and strength. He referred to breach of a 5-metre buffer zone.
79. Mr Vire referred again to breach of a 5-metre buffer in his Further Sworn statement filed on 18 July 2022 [Exhibit C8]. He deposed that the Quarry Permit provided for extraction of not more than 11,000 cubic metres but his assessment was that the estimated quantity excavated was 14,720 cubic metres. He stated that the weakening of rocks continues after each earthquake and will eventually collapse. There was a high likelihood of landslides on Efate due to weakening of rocks. The environmental and quarry permit-holders breached the required buffer zones.
80. In cross-examination by Mr Morrison, Mr Vire agreed he did not know exactly when Mr Chani's building lying along the shared boundary was built. He worked for the Government as a civil engineer then started his private firm. His formal education was in New Zealand where he obtained a bachelor's degree. He confirmed that his calculation of the "protection camber to property damaged" was a calculation of the value of the limestone removed being a 5-metre wide buffer zone that in his view should not have been removed. He agreed that a replacement building would take less than 1 year to build and if so, Mr Chani would not lose 25 years' rental but just 1 year's rental income.
81. Mr Vire also agreed that his calculations of the volume of limestone excavated was on the basis that the height of the excavation was the same at all corners. He agreed that according to Mr Dinh's diagram [Exhibit D6], the green lines depicting what Mr Dinh excavated shows that 3 of the corners are different heights.
82. It was put to him that if 14,720 cubic metres of a piece of land was excavated, it would be a higher volume of ground as it would now be loose material that takes up more room. He replied that that figure was correct if talking about quarry only but if the material includes more than quarry, then the volume would be greater than his 14,720 cubic metres calculation.
83. Mr Vire was shown the document "Wharf Road Removal Sheet" that in Mr Dinh's evidence, was his worksheet showing the removal of coral from the site. He agreed that the sheet showed reasonable figures for 1 week's extraction. He also agreed that he has seen Mr Qualao's sworn statement [Exhibit D3]. It was put to him that Mr Qualao's evidence is that the comments Mr Vire made in his para. 2 are not relevant to OLL's excavation as this site concerned the removal of limestone which has different properties to other soils and other land types. Mr Vire responded that Mr Qualao's statement was true about previous excavations except that the previous excavations with buildings left some space before the edge of the excavation, for



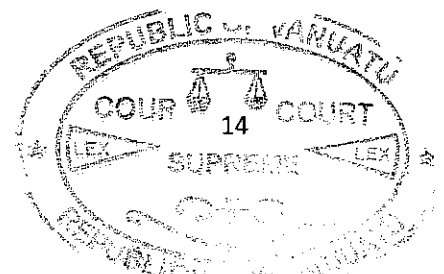
example, between the Tana Cine excavation/building and the Menzies Flats. Whereas in OLL's excavation, the excavation was done right up to the boundary line which is also how Mr Chani's building is placed, right on that edge, so he does not have assurance to say that that building is safe.

84. In re-examination, Mr Vire explained with reference to Mr Dinh's hand-written diagram that there was no survey plan or map for guidance which is why he (Mr Vire) used the simple logic of length by width by depth to calculate the quarry extracted. He explained his answer about the rental income loss that if he had the money to replace the building in one year then he could, but if he did not have the money, he would not be able to. He also explained the basis for the rates he used for 'protection camber to property damaged' and for 'building value'.
85. In cross-examination by Ms Toa, Mr Vire confirmed that when he made his statement **Exhibit C7**, he had not seen the Quarry Permit or the Environmental Permit. It was put to him that Ms Kalfatak and Mrs Garae's evidence is that the 5-metre buffer in the Environmental Permit is for the construction of the warehouse building only. He replied, "Yes, for building, yes". It was put to him that he implied that the 5-metre buffer should be for the excavation too. He replied, "*No, building nomo*" and agreed that there was no 5-metre buffer zone for the excavation. He again agreed that the 5-metre buffer zone was to protect the building only and was not for the excavation. It was also put to Mr Vire that the area excavated will not be the same as in other places therefore needs to be observed and inspected then report done? He agreed.
86. In re-examination, Mr Vire stated that he had answered "Yes" to the questions about the 5-metre buffer being for the building only referring to Mr Chani's building which is an existing building already there next to the excavation site and therefore there should be some protection for that existing building.
87. I asked Mr Vire to explain what he meant by "quarry only" in answer to Mr Morrison's cross-examination question. Mr Vire stated that on a cliff face, to get to the "quarry" meaning the white stone, you would first have to remove a few metres of "*other materials we l no includem quarry nomo*" referring to the topsoil and maybe trees.
88. I consider that I cannot rely on Mr Vire's evidence as the existence of a 5-metre buffer zone that he assumed is not supported by the documentary evidence or by the relevant legislation. Further, his calculation of the quantity excavated was not based on actual dimensions of HVL's property (whereas Mr Dinh's calculation was). Finally, he calculated the volume of limestone excavated without taking into account that it will be a higher volume once extracted due to having been turned into rocks and loose material. For those reasons, I considered that Mr Vire's evidence was not reliable or credible.
89. That was the evidence from Mr Chani's witnesses.

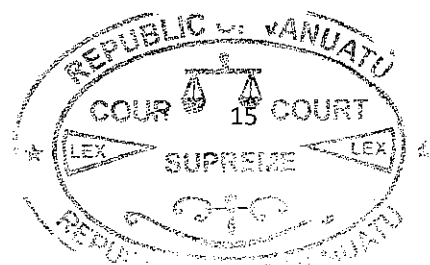


*The Defendants' Witnesses*

90. **Robert M. Bohn**, deposed in his Sworn statement filed on 21 October 2021 [**Exhibit D1**] that in addition to his position as Group President and CEO of the Bayer Group of companies which includes HVL and OLL, he lives in the Harbour View Apartments so is a neighbour of Mr Chani's.
91. He deposed that in or about March 2020, he approached Mr Chani in person to discuss the broad idea of excavating title no. 11/OA23/013 for the construction of an office building which would have access to Wharf Road. It was agreed that further discussions would take place when OLL was clearer as to its plans.
92. In late May or early June 2020, he met with Mr Chani and Sean Griffin on-site to fully discuss the plans developed by the OLL team. During the discussion of the shared boundary, Mr Chani admitted that when he bought his property, he knew that the previous owner had built a residential structure on the property without respecting the 3-metre setback rules of the Municipal Council. Mr Chani also admitted that it was possible that in one point of the building, that the construction may have encroached onto title no. 11/OA23/013. As part of these discussions, it was noted that the excavation set-back would be no more than 50cm.
93. On 27 June 2020 and again on 2 July 2020, he, Mr Griffin and Loic Dinh met with Mr Chani. It was always their hope to work with Mr Chani and keep him fully briefed as to the excavation planning and execution. During the 2 July 2020 meeting, it was noted that the excavator driver had excavated too closely to the boundary but that the 50cm setback committed to could be achieved by building a safety wall.
94. At all times during the planning and execution of the excavation works, the discussions were open and friendly. At no time during the six-month period from March to September 2020 were relations strained. At no time during that six-month period did Mr Chani give OLL any indication that he was not in agreement with the plans discussed.
95. In cross-examination by Ms Toa, Mr Bohn agreed that the Environmental Permit obtained was for the purpose of excavation, to level off ground on which a warehouse would be constructed. He stated that their understanding was that the 5-metre buffer in clause 13 of the Environmental Permit referred to the second part being construction of the building. He agreed that they specifically informed DEPC that the ground levelling would be from the top where grass grows to the bottom where Wharf Road is and did so in the on-site meeting that occurred whereas the full discussion for the excavation was with Geology & Mines as part of the excavation discussion under their permit. It was put to him that the Quarry Permit did not contain any condition or limitation that the excavation has to be 5 metres from the property adjacent to the excavation site. He agreed that the Quarry Permit did not contain any buffer or set-back areas.
96. There was no re-examination.



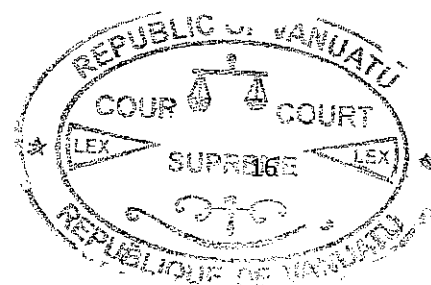
97. In cross-examination by Ms Sarisets, it was put to Mr Bohn that Mr Chani denies having met him in March 2020. He disagreed with Mr Chani. He stated that at the March meeting, they discussed the excavation idea in general terms. In May/June 2020, they discussed detail of the idea. The excavation had not yet started then. Mr Chani did not request a survey to be done until after the excavation started.
98. Mr Bohn stated that he suggested the 50cm setback as it was the estimated encroachment that Mr Chani's rental building had encroached onto HVL's property which was the estimated encroachment provided by both surveyors Martial Meltenoven from Geomap and Maurice Phung from CTF. He did not know that according to the Government's surveyor, there was no encroachment onto HVL's property.
99. It was put to Mr Bohn that the property on the other long side of the excavation site had a little space provided for that property but no space was provided on the side shared with Mr Chani. He replied that the excavation was done to HVL's boundary on both sides but the space you can see on the other property is because their wall/fence is built inside their title. He stated that they were allowed under the law to excavate to the boundary which they did without favouring any of their neighbours – they excavated to the boundaries.
100. Mr Bohn stated that the engineer involved in the warehouse project was Cyrille Mainguy but subsequently there has been other engineering advice provided to OLL. He disagreed that the engineer involved in the project has to be on the excavation site every day during the excavation, saying that it is not necessary for the engineer to be on-site every minute of the day during the excavation – he or she needs to have general oversight. Officers of both DEPC and Geology & Mines attended the site on a preliminary basis to understand the applications for permits and during the excavation. He disagreed that the Environmental Permit only allows for removal of topsoil. It was put to him that the Environmental Permit allowed OLL to remove more than soil from the ground level? He responded that maybe Ms Sarisets was confused by the word, "soil" but in this instance, "soil" refers to both the topsoil and the white soil, the coral, underneath. It was put to him why was a Quarry Permit needed if the Environmental Permit already authorised removing soil and the coral. He gave a lengthy answer as to the process and that you actually need to obtain both an Environmental Permit and a Quarry Permit, and later a PVMC or Shefa Provincial Government permit for the actual building process. He disagreed that the 5-metre buffer in clause 13 of the Environmental Permit had anything to do with neighbouring buildings; it only tells OLL what it has to do within its own property which is that its building has to be set-back from the boundary.
101. There were questions put about what Mr Bohn's understanding of "buffer zone" was and the purposes of a buffer zone. These were unhelpful.
102. There was no re-examination.



103. Mr Bohn's account is consistent with that of Mr Dinh and Mr Griffin and the documentary evidence. Mr Chani accepted in cross-examination that before the excavation work started, that he had some contact with HVL and OLL about what was going to happen. I considered that Mr Bohn was a reliable and accurate witness, and accepted his evidence.
104. Cyrille Mainguy relied on his Sworn statement filed on 26 October 2021 [Exhibit D2]. He deposed that his formal education is as a Civil Engineer and he is fully licensed in Vanuatu to carry out a full range of duties. Part of his education and training involved knowledge of geologic structures and geotechnical theory as to land movement.
105. As part of his experience in Vanuatu, he has worked with clients doing excavation works on different islands and with differing soil structures. He inspected the excavation works on title 11/OA23/013 after completion of the works then drafted an email report dated 20 July 2020 [**Exhibit 2**, **Exhibit D2**] in which he noted as follows:

*I have read the various emails and please find below my comments after my inspection yesterday:*

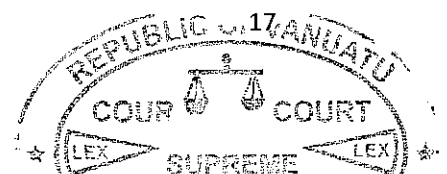
1. *There are no specialised geotechnical engineers in town and most Civil Engineers would have minimal knowledge of the type of soil encountered in the Country. We (Civil Engineers) do undertake geotechnical investigations on land prior to Buildings being erected in Vanuatu as we cannot get a specialised geotechnical engineer in town every time a Building is constructed. Therefore, Civil Engineers can make comments on geotechnical issues;*
2. *Coral rock on Efate is quite stable and solid and vertical cracks are encountered everywhere especially in the areas of Nambatu & Nambatri;*
3. *Vertical cuts in coral are also common on Efate.*
4. *The vertical cracks or soil pockets visible under the Building at the top of the hill are not unstable. They can create voids under the footings and slabs and thus the recommendations to fill these holes with mass concrete if it happens. You will see in the photo below these soil pockets.*
5. *To me the crack at the bottom of the hill is more of a concern as the crack in the coral is visible along the front face towards the road and going all the way up to the side. In addition, the crack is above "slope stability zone" line (roughly 45 degrees from bottom of hill) shown in RED below and over time the rock above this line can detach and fall on the road. You will recall the "big" rock that detached from the cliff after the 2001 earthquake before the wharf and ended up in the water. We have a similar case here!!*







106. Mr Mainguy further deposed that the works appear to be in good order and after over one year and as expected, there has been no slumping. He does not feel there is a need for a security wall, but he has drafted the layout for a stabilizing (security) wall [attached as “**Exhibit 1**”, **Exhibit D2**]. He stated that a similar outcome for security could also be designed and built into the building that will be designed and built on the site.
107. There was no cross-examination by Ms Toa.
108. In cross-examination by Ms Sarisets, Mr Mainguy agreed that the exposed footings of Mr Chani’s rental building are obvious from the picture in Mr Vire’s report [**Exhibit C6**]. But as set out in his (Mr Mainguy’s) own report [**Exhibit D2**], the building is structurally stable and if the topsoil is removed over time from the vertical cracks or vertical pockets of topsoil visible under that building, his recommendation is to fill these voids or holes with concrete. He confirmed his picture in “**Exhibit 2**”, **Exhibit D2** was dated July 2020. He pointed out that in that picture, you can see all the topsoil pockets at the top come to an end, and below that, no more topsoil pockets, just limestone. Only vertical cracks do not affect the full stability of a hill but in his (Mr Mainguy’s) report, he did express that the incline cut closer to the main road which is on public land could result in a future slippage. He disagreed that the developer had to give part of his property as a buffer to his neighbour Mr Chani as the developer has the right to work within his boundary.
109. There was no re-examination.
110. Mr Mainguy’s account remained unchanged in cross-examination and he clearly explained his evidence. It is consistent with that of Mr Qualao and Mrs Garae. I consider that he was a reliable and accurate witness, and accepted his evidence.
111. Harold Qualao, civil engineer, relied on his Sworn statement filed on 13 July 2022 [Exhibit D3]. He deposed that he is the Principal Engineer of Qualao Consulting Ltd and **attached** his engineering report dated December 2021 for HVL and OLL, in which he stated as follows (relevant excerpts):



## **Geotechnical Assessment of the Wharf Road Excavation by Ocean Logistics Ltd**

...

### **2.0 Ground Conditions**

#### 2.1 Geology

"The geology of the island of Efate as described in the British Government Overseas Development Administration "Geology of Efate and Offshore Islands, and 1:100,000, New Hebrides Geological Survey Sheet 9" shows the formation underlying the area in which the site is contained as being raised coral reef with associated detrital limestones of Pleistocene age. The presence of uplifted coral reefs in the area is confirmed by numerous coral exposures and references made in geological publications, e.g., Howarth et al 1985." – Tonkin Taylor International Ltd.

#### 2.2 Geography

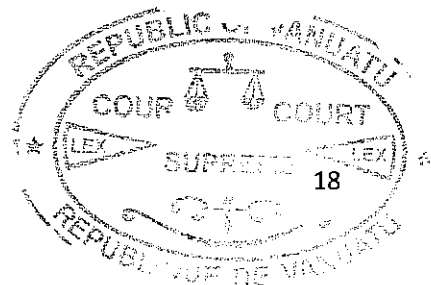
The excavated site is part of an escarpment that runs from Paray Bay through to the Parliament, Air Vanuatu Building, La Case di Andrea et Luciano and on to Tanna Russet Building and beyond. The rocks in this escarpment are characterised by a shallow soil cover overlying the raised coral limestone, which has seen little weathering, thus despite the discontinuities associated with coral formations it makes very competent foundation material as demonstrated by the picture below and several other cases.

...

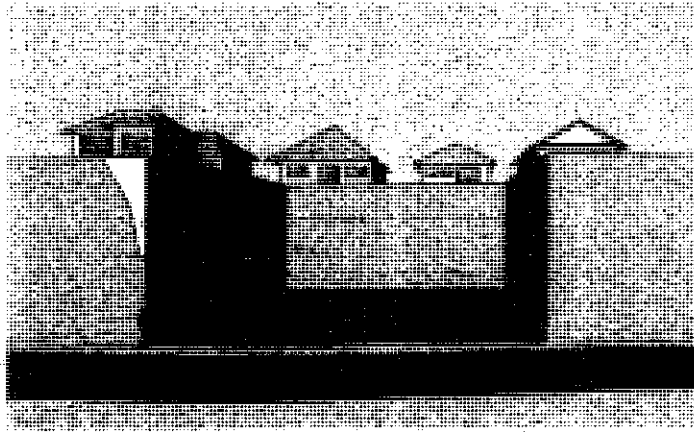
### **3.0 The Site**

#### 3.1 Background

The site is located on land title 11/OA23/013 owned by Harbour Views Limited and is on the west side of the escarpment. The area was excavated to the level of the Wharf Road. See Appendix 1 – 3D Drawing of site.



Appendix 1  
3D Drawing & Google Map



3D representation of the excavation. The corner shown in white is in the road reserve

3.3 Concerns

We are obliged to point out what is observed near the north-west end of the excavation. This is on public land i.e., part of the road prism. It is an area that is of concern. In the interests of public safety PWD may need to take a closer look at it.

In order to draw some conclusions on the excavation case, certain steps may have to be taken. A complete slope stability analysis can be made but at this point in time the observations pointed out in the foregoing paragraphs would indicate that the issue may be understood, without going into a complete slope stability study, which would be very involved and expensive and will only confirm what is already known.

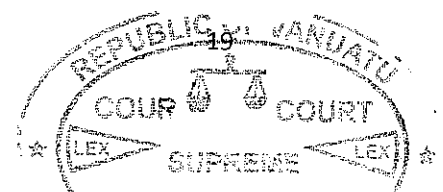
3.4 Options

A complete slope stability analysis is at the top range of solutions. We have made the observations in the foregoing paragraphs in order to show that a feasible solution is possible through existing observations. At present there seems to be a fear that something dramatically disastrous will happen or is happening. There is as yet no solid sound information gathered in a scientific manner to back this fear. Therefore, we propose that the interested parties collect information over say 6 months or 12 months to see if there is any justification for the fear.

4.0 Slope Stability Analysis

4.1 Slope Stability

In the book *Geotechnical Engineering* by Ian K Lee, Weeks White and Owen G Ingles published by Pitman 1983, chapter 7 Stability of Slopes p. 281: "This chapter deals with



**typical slope instabilities encountered in natural and man-made slopes. It is the objective of the geotechnical engineer to quantify the factor of safety of a soil or rock slope or, more logically, establish the probability of failure. Slides of rotational and translational types are generally amenable to one of the simple stability analyses, provided the geometry, soil strength and pore pressure conditions can be satisfactorily defined. It is rare to be able to confidently analyse other types of instabilities such as flows, spreads, or falls, although observational-probabilistic techniques may prove to be of some significant predictive use to the geotechnical engineer and engineering geologist."**

This quote in bold is very significant and pertinent to the issue in question. Observations on other sites along this escarpment appear to be contrary to the trend of thoughts promulgated by Mr Francois Chani.

#### 4.2 Nature of Slope

From the quote above and the observations made on site we can say that we are dealing with a rock slope. Since we are dealing with a rock slope the nature of the failure will most likely be falls type. In that category and due to the nature of the coral limestone the failure mode will tend to be dislodged rocks that fall causing other rock particles to become dislodged and fall. This means that rocks at the face of the scarp become loose and are dislodged and fall to form a scree at the foot of the scarp. Observations along the escarpment referred to above have not revealed the formation of scree either in the undisturbed or disturbed escarpment face. The existing vertical or nearly vertical face on the scarp is an advantage because a falling rock is not likely to roll along the slope creating further instability.

#### 4.3 Pore Pressure

Coral limestone formation is known for its drainage properties. As the surface and subsurface are well drained pore pressure is not likely to be a major consideration in the slope stability.

During the geotechnical investigations for the Parliament Buildings on the same escarpment, drilling descended to a depth of 16m without hitting any water. This means that the water table is at sea level, confirmation that the coral limestone is free draining.

#### 4.4 Soil Strength

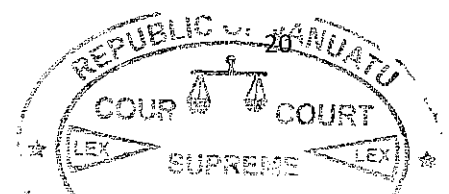
The soil strength is not going to be an issue as the coral limestone has very good strength and generally foundations are designed for about 150-300kPa allowing for weak spots. The absence of a rock scree at the time of visit would appear to indicate there is no dislodgement of particles at the cut face. The coral limestone is well packed.

#### 4.5 Geometry

The third factor is geometry that is the slope of the soil that is considered to be at risk of falling in any of the failure modes identified in the quote. This is a perception but the perception needs to be substantiated by analysis of the available data. In this case the historical indicators show that the perception is at variance with actuality.

#### 4.6 Risk Considerations

As stated in the quote above rotational and translational types of failure can be predicted using these three factors of soil strength, pore pressure and geometry. In this case none of these factors are critical. For instance, the coral limestone is a rock and so the soil strength is good, in fact so good that the face is able to stand vertically without any support. Therefore, geometry does not come into play. Pore pressure is not a concern because coral limestone has very



good drainage properties. Water drains through the coral limestone with ease so that there is no water retained in the body of the coral limestone to adversely affect the internal bonds.

The presence of discontinuities act as paths of least resistance to water flow, so that it may be possible to get localized subsidence on the surface due to leaching of soil fines. This process may in the long term affect the stability of the cut, however, the fact that similar cuts have existed elsewhere along this escarpment since the 1960s and earlier suggests that the likelihood of failure through this mechanism is negligible. In paragraph 3.4 we have suggested that observations be made over a period of time to see if there are any indications of subsidence near the perimeter of the excavation.

The other possibility of failure is the dislodgement of rocks at the face of the scarp. As rocks become dislodged, they weaken the bonds between particles and at the same time increase the loads on existing bonds. This grows until it is large enough to cause a major rock fall. Again, observations on this cut and others along the escarpment, suggest that the likelihood of such a failure is also negligible.

#### 4.7 Risk Assessment

This quote refers to observational-probabilistic techniques as a way to determine if there are any activities and if so of what type and magnitude. It is along this line of approach that we would recommend that the issue is addressed so that the fears can be substantiated and quantified and appropriate preventative measures put in place or the fears allayed. It will take time and we propose that since there are other examples along the same escarpment that have stood the test of time; the observations over a period of 12 months at the site would be more than sufficient.

### 5.0 Monitoring Process

#### 5.1 Subsidence

In order to monitor the effects of the work carried out on the face of the scarp; benchmark levels have been established. Geomap Ltd was engaged to take accurate levels along the top of the scarp. See attached document at ["Exhibit 1", Exhibit D10]. These points will form the benchmarks that will be checked at six and twelve months after the survey to see if there is any subsidence of the soil. This will indicate if there is an impending slide or leaching of soil fines by runoff is occurring below the surface.

#### 5.2 Scree Build Up

The face of the cut may have been destabilized by the recent works so regular observations will be made during the same period to see if there is a concentration of scree at the top of the scarp. Such an occurrence might indicate the likely risk of rock fall.

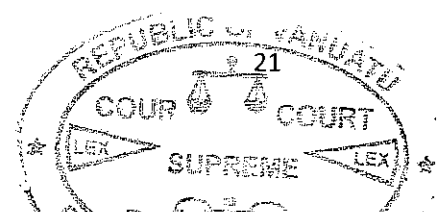
#### 5.3 Visual Observations

The cut is fresh and the freshly cut coral face colour will begin to fade with time, so that any dislodged rock or falls from the face of the cut will result in a colour difference. Such incidents and their frequencies will be documented through photographs as well as notes during the 12-month period.

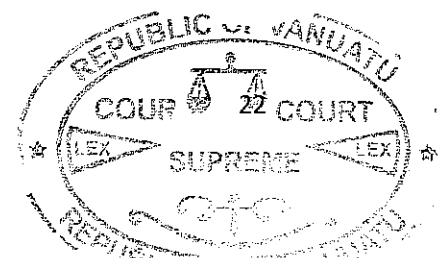
### 6.0 Concluding observations

There are similar excavations along this escarpment with buildings at the toes, on top of or on the edge of the cut face and they have stood the test of time and earthquakes.

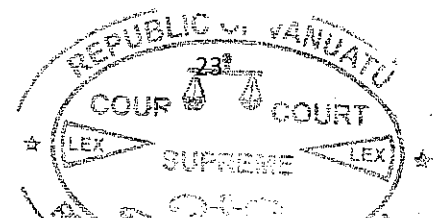
(my emphasis)



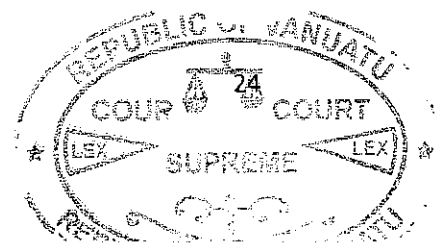
112. There was no cross-examination by Ms Toa.
113. In cross-examination by Ms Sarisets, Mr Qualao stated that he has a degree in civil engineering and a master's degree from the University of Birmingham (UK). The book that he quoted from in his report by Ian Lee, Weeks White and Ingles is a reference book from his master's study. There were questions about the Menzies Flats excavation which were not helpful. He disagreed that the area in which OLL excavated has a history of rock falls – there were rockfalls only in the area closer to the wharf. The excavated site is coronus material but the rock falls there were sitting on the surface, not embedded in the coronus material.
114. Mr Qualao confirmed that he referred in his report to the crack on public land which looks unstable. He was asked about the cracks along the edge of the excavated shared boundary. He responded that those are referred to as “discontinuities” which are not cracks but form during the formation of coronus material with water seeping down and dragging with it the “fines” meaning the materials such as coral dust and things like that. He was asked if discontinuities open up during earthquakes or natural disasters. He replied that he had not seen a situation like that. He was asked if he thought such a situation is likely to happen in the future? He replied that that is a question of probabilities and as he set out in his report, there are different factors such as “slope stability” and “pore pressure” which a geotechnical engineer will look at to quantify the probability of the modes of failing.
115. He was asked to comment on Mr Mainguy's para. 4 in which he stated that the vertical cracks or soil pockets visible under Mr Chani's building are not unstable and if become voids, his recommendation is to fill these holes with mass concrete. Mr Qualao responded that the soils along this escarpment are characterised by a thin layer of clay that is a soil cover and then the “discontinuities” he referred to are formed by water dragging down the fines through the coronus body. He disagreed with Mr Vire's report referring to underground cracks saying that discontinuities are not cracks. They were caused by movements and existed since creation when the coral reef that formed this area was growing and alive. He disagreed with Mr Vire's comment about the exposed footing beam being not structurally safe saying that foundation designs, particularly strip footings, are designed to bridge the “weak spots” being the gaps of discontinuities within the coral body.
116. The questions about Mr Qualao's understanding of a “buffer zone” and whether it applied to an excavation were unhelpful.
117. There was no re-examination.
118. Mr Qualao's evidence was not dislodged by any of the cross-examination. His evidence is consistent with that of Mrs Garae. He explained his evidence clearly and the basis for his comments. I considered that Mr Qualao was a reliable and accurate witness, and accepted his evidence.



119. **Madeleine Tom** relied on her Sworn statement filed on 21 October 2021 [Exhibit D4]. She works for OLL. She deposed that she worked at the PVMC for over 10 years and as a political appointee in different Government ministries for over 10 years.
120. On 3 June 2019 they organised a meeting between OLL CEO Andrew Bohn and Osborn Melenamu from DEPC at OLL's office to talk about the new development that OLL wanted to carry out on the Wharf Road. After they met at the OLL office, they went to Nambatri to look at the property where the development would take place. Andrew Bohn explained that the proposal was to excavate the land to the Wharf Road level and build a warehouse which would also accommodate OLL's new office and a storage facility, so that the main entrance to the new building would be from the Wharf Road. Mr Melenamu requested that OLL provide a detailed plan for the proposed development.
121. On 6 June 2019, OLL followed the Environmental Permit application process and provided a document called, "OLL Warehouse Construction Project Proposal".
122. Also on 6 June 2019, Mr Melenamu requested some information about how the excavation would be carried out. On 11 June 2019, they sent a letter which talked about the operation method for the excavation.
123. On 13 June 2019, they submitted the Application for Quarry Permit.
124. On 19 July 2019, OLL received Approval for Environmental Permit for construction of warehouse.
125. On 22 July 2019, they did a site visit to the property with Norma from DEPC and Ben Titus from the Lands Department. They went to Nambatri and entered the property there then left and approached along the Wharf Road. Mr Andrew Bohn explained to the officers that the excavation would start on the Wharf Road and proceed inside so that the main entrance of the new building would be from the Wharf Road and that the new building would be on the same level as the Wharf Road.
126. On 28 August 2019, there was another site visit to HVL's property by Ben Titus, another officer from Lands and Norma from DEPC.
127. On 26 May 2020, she phoned Geology & Mines to query the status of the excavation permit and was told that Ben Titus was away on study leave.
128. On 27 May 2020, OLL contracted Enterprise Dinh Van Tu to carry out the excavation on lease title 11/OA23/013.
129. On 28 May 2020, Enterprise Dinh Van Tu accepted OLL's offer and followed up on the application that had been submitted. That same day, Geology & Mines granted the Quarry Permit to Enterprise Dinh Van Tu to carry out the excavation work.



130. Also on 28 May 2020, OLL applied to the PVMC and received approval for excavation at the Wharf Road.
131. There was no cross-examination by Ms Toa.
132. In cross-examination by Ms Sarisets, Mrs Tom confirmed DEPC and Lands Department officers' visit to the site occurred before the excavation started and that after the excavation started, she did not go back onto the site.
133. There was no re-examination.
134. I take it that Mrs Tom is mistaken as to the date that the OLL Project Proposal was presented as the date on the Project Proposal document in **Exhibit D13** is dated 6 May 2019 and that is also the date on the receipt for the application fee. That aside, Mrs Tom's evidence is uncontradicted and consistent with the documentary evidence. I accepted her as a reliable witness and accepted her evidence.
135. Loic Dinh relied on his Sworn statement filed on 22 October Geology & Mines r 2021 [**Exhibit D5**]. He is the General Manager of Enterprise Dinh Van Tu Limited, a family company. He has worked there his entire adult life. He has extensive experience operating heavy equipment including excavators, and with excavation and quarry work on Efate island.
136. He deposed that in over 20 years' experience with major excavation works, he has never experienced a collapsed wall on any of his projects. In May 2020, he was contacted by OLL to provide a quote for its excavation project on Wharf Road. The project seemed straight forward and the material to be excavated seemed well compacted and hard. In late May, he was briefed by OLL and provided survey maps by Geomap. He was also briefed by Brooks Rakau of Geology & Mines. They were told that the coral ground along Wharf Road was generally strong but there were weaker areas that faced Wharf Road.
137. His company obtained the permits and licences for the quarry work. Before the works began, his company erected a Public Notice Board as required by the PVMC and he spoke briefly with Mr Chani about the works that would occur.
138. The excavation works on title 11/OA23/013 began in early June 2020. They did not experience any adverse problems on the property but in the third week of June 2020, Mr Chani contacted him and OLL as to his concerns about the boundary. On or about 25 June 2020, works were stopped. Discussions proceeded through to early July and Geomap completed their survey.
139. In early July, it was agreed with Mr Chani that all matters were in order and works recommenced on 2 July 2020. They were completed in late August or early September 2020.





140. There were no adverse conditions arising from the cut along Mr Chani and HVL's shared boundary but there were issues that did arise related to the area of public land between the Wharf Road and Mr Chani's property. The issues 'became apparent from the excavations but not caused by the excavations were fissures and unstable ground'.
141. His company has many contracts with the Government so he offered on a free-of-charge basis to stabilize the ground owned by the Government. The Government and Mr Chani could not agree to his offer and so he removed his equipment on or about 15 September 2020.
142. In early 2021, he was further contacted by Mr Chani as to the recommended works and after further discussions with Mr Chani and the Government, no agreement could be reached. HVL and OLL were not part of these discussions because their excavated title was not concerned with the discussion of unstable ground owned by the Government. Mr Dinh attached as "**Exhibit D2**", **Exhibit D5** the email chain between him, Mr Chani and Government officers. In his 8 February 2021 he stated in part:

*Hello all,*

*This email is address to the director of the department of environment, I have copied everyone that I think should be aware of the matter.*

...

*During the excavation we had several meetings on site with Mr Chani, and all along I thought we were in agreement, the most concerning part we had to deal with was the front of the land, which clearly has a visible crack, we offered to address that matter FOR FREE at the time, but Mr Chani was against it so we ended up respecting his wish!*

*Both Mr Mainguy (civil engineer) and Mr Rakau (Geo n Mines) were in agreement that the only concern on that excavation was that crack in the front left corner on the excavation (you can read Mr Mainguy's report attached [from Mr Mainguy's 22 July 2020 email]).*

*We are now several months after that excavation has been successfully done!*

*I, all along the excavation reminded the Dept of Geo n Mines (which in my opinion the most specialized in rock knowledge) that I was at their entire disposition to address the excavation to their requirements, and I have warned everyone many times that after a certain point I would not accept to address any matter for free. Everyone was aware of the potential danger of that front crack, I have given 3 notices before removing my machine, and yet we all respected Mr Chani's wish to save that corner (for whatever reason whether they'd be personal or not) we just wanted to cooperate with our neighbours!*

*I am now more than 6 month after full completion of that excavation, answering you on a matter that I don't really understand to be honest!!*

...

*Now dear director, the excavation has been done... Mr Chani's house, although encroaching my client's land, has been left untouched and despite what is being said, is sitting on a stable soil. We can go one forever about that topic and keep going in circle!!! I suggest we find solutions,*

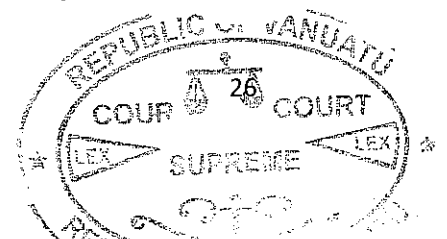
*please contact me directly, I am willing to cooperate with you if you have any suggestions, and the only matter we should consider is the front corner crack since local engineer and Geology and Mines former commissioner both agreed that it was the only critical matter on that excavation.*

143. In his email in reply dated 9 February 2021 [**Exhibit 1**, **Exhibit D5**], Mr Chani stated in part:

*With all due respect Could we have a geotechnical whom is an expert in those work that will advice and make recommendations. We do have expert in Vila such as ACG and others. I was not even given any report or assessment on the nature of work.*

*You did give 3 notices when you left, unfortunately I was not inform of the excavation work until the day the machine arrived on site. These practices of not informing neighbours must stop.*

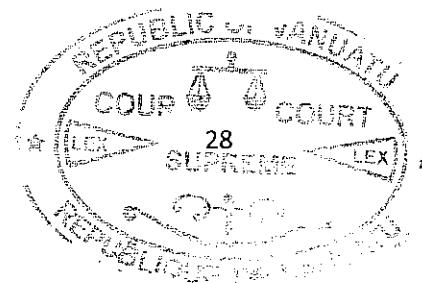
144. Mr Dinh deposed also that in late February or early March 2021, there were further discussions involving him, OLL and Mr Chani as to the possibility of erecting a security wall along the shared boundary to provide a safety buffer of 50cm. Mr Mainguy's engineering firm was retained to look at the wall and they determined that the wall was stable and not in danger of collapse. To provide such 50cm safety buffer, a stabilizing wall was designed and proposed to Mr Chani. Before a decision could be taken on the construction of the security wall, Mr Chani obtained a Supreme Court order to stop all works.
145. After one full year since the excavation works were completed, no slumping has been experienced at the work site. Using his formal education and extensive experience with excavation works, he believes that the construction site is safe and further, that it will be made safer if a security wall is built as a stand-alone process or built into the building construction.
146. Mr Dinh also tendered his hand-drawn diagram showing the length/width/breadth/volume of material excavated from HVL's property according to Mr Vire's calculation (in purple ink/lines) and the same according to his own calculation (in green ink/lines) as he did not agree with the numbers presented in Mr Vire's sworn statement [**Exhibit D6**].
147. Mr Dinh also tendered a bundle of documents [**Exhibit D7**] which consisted of: (i) a copy of Government receipt no. 1711586 dated 5 February 2021 for payment of quarry royalties of VT15,300; (ii) Mr Dinh's "Wharf Road Removal Sheet" showing the volume extracted from June to September 2020 of 7,560 cubic metres, of which 6,505 cubic metres went to landfill and 1,020 cubic metres was commercial; and (iii) the Quarterly Royalty Return Form which showed that 1,020 cubic metres of limestone was extracted, the price per cubic metre of VT300, therefore total amount of VT306,000, of which 5% would be paid to the Government as royalties therefore VT15,300.



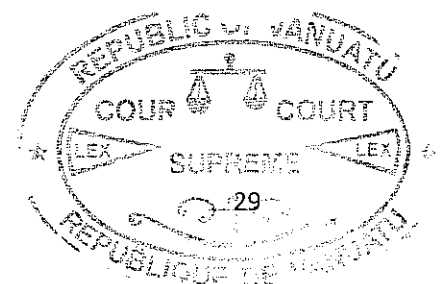
148. In cross-examination by Ms Toa, he agreed he applied for the Quarry Permit but it is Geology & Mines who chooses the type of permit. He had to remove trees and topsoil as well as limestone in this excavation. He asked Brooks Rakau of Geology & Mines to the site before he applied for the permit. The first time he met Mr Chani on-site, Mr Chani just asked him what he was doing and he explained briefly.
149. Mr Dinh stated that the reporting condition in the Quarry Permit is expected of a permit-holder mainly to monitor accidents on-site and if there is spilling of oil from their big machinery. It is too time-consuming to take daily reports to the Commissioner of Mines so he keeps records and has GPS trackers on his truck and the Commissioner knows they have full access to his data at any given time. He keeps daily records and completes his weekly worksheet and if Geology & Mines want to, they can come and check on-site the difference between the original point being a GPS location with longitude and latitude points, and the level of the point after extraction. It was put to him that he did not do all the reporting required. He replied that he normally liaised with Geology & Mines to apply for the permit, to pay royalty and if any problem occurred. At the time, they also had a shortage of staff so it was difficult to reach an officer of Geology & Mines so it made more sense to report weekly or monthly. He submitted his data sheet and if they needed detail, they requested detail. He agreed there was no buffer zone as none was required.
150. In re-examination, Mr Dinh explained that in each month, he had to give the volume that he extracted every week and he did that for this job. The Government receipt he tendered [**Exhibit D7**] was for the royalty paid for this particular job based on Geology & Mines' calculation after he provided them with his data sheet. They pay royalty every quarter.
151. In cross-examination by Ms Sarisets, he stated that in his job as an excavator, he does not require an engineer to be on-site as well. He started the excavation with the lease survey plan and then after Mr Chani raised his concerns, they had to ask Geomap to come on-site and put up the pegs so they could physically see them. He disagreed that clause 13 of the Environmental Permit applied to the excavation as well as he has never been required to put a buffer zone on any excavation, though always for construction. He has never heard of a 5-metre buffer zone. They were discussing a security wall with Mr Chani because despite his advice that the cliff was stable, and the engineer's advice that the cliff was stable, OLL wanted to find a friendly way to resolve the issue raised. He refuses to say it's a retaining wall because it is not one but would be a security wall. It is not needed. It has not been built because of this Court case. OLL was also redesigning its building which would incorporate the security wall because they only found out after the excavation that the land was smaller than the size on the lease.
152. It was put to Mr Dinh that his Wharf Road Removal Sheet could have been prepared for any job as it did not have a stamp or signature on it. He agreed it could be but that that particular sheet was received by the Geology & Mines officer and his royalties were accepted based on that sheet. He disagreed that only a certified

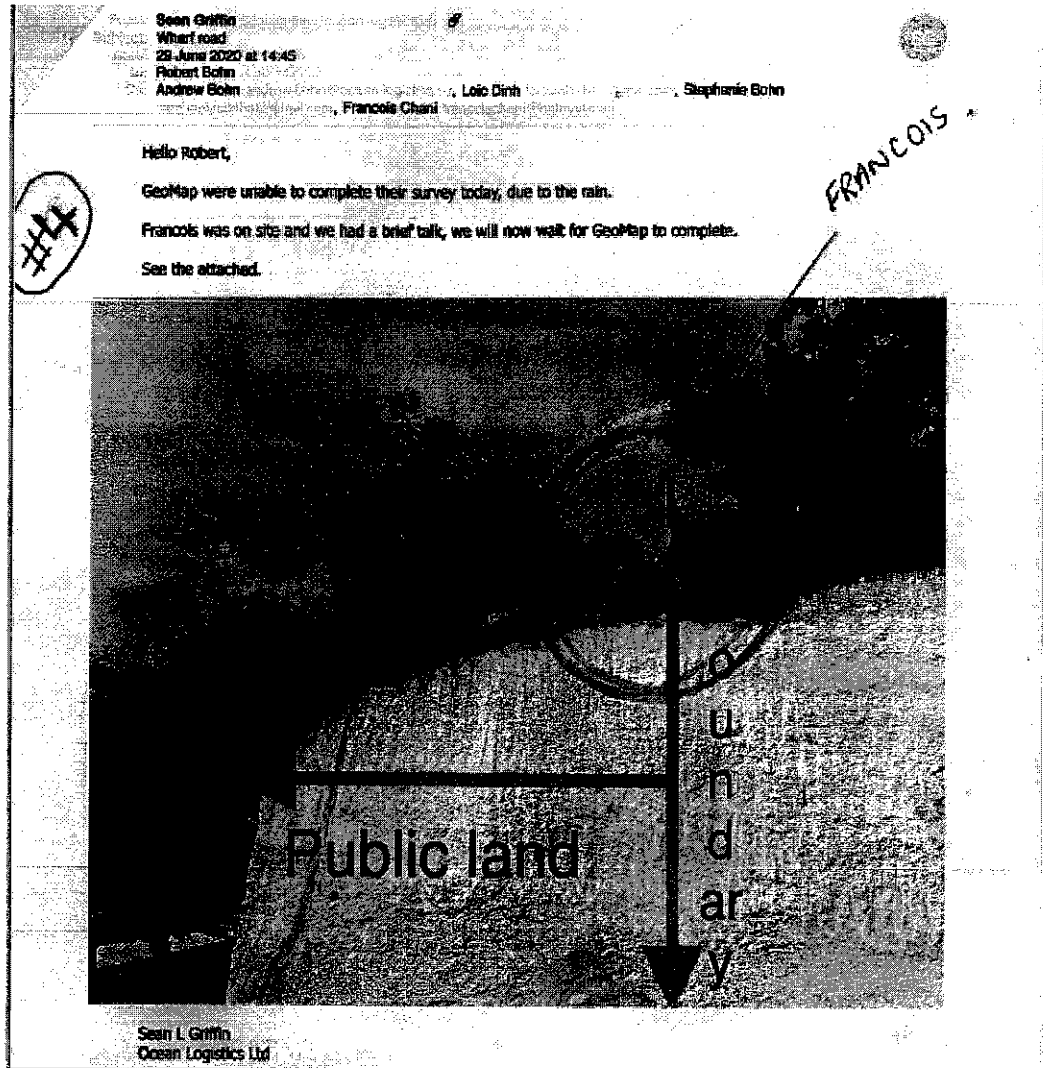
engineer should draw his **Exhibit D6** drawing as anyone who knows how to take a survey mark can go on-site, take the actual size of the excavation and make the simple volume calculation.

153. In re-examination, Mr Dinh stated that he drew **Exhibit D6** as he did to show the actual volume removed because the land had different heights at the corners and even on each side. His reports are based on removed volume rather than the cut material. The removed volume is way larger than what is cut because it breaks into rocks and there is air between them when loaded into the truck. The Quarry Permit maximum of 11,000 cubic metres refers to the size of the removal.
154. Mr Dinh's evidence remained unchanged in cross-examination and is uncontradicted. It is consistent with the evidence of Mr Bohn and Mr Mainguy and supported by the documentary evidence. I accepted him as a reliable and accurate witness, and accepted his evidence.
155. **Marie Louise Milne** relied on her Sworn statement filed on 5 May 2022 [**Exhibit D8**]. She deposed that she is an elected Councillor of the PVMC and the Council was currently dissolved pending the upcoming municipal elections.
156. Her specific job on the Council was to oversee the issuance of building permits for development and building in the Municipal area. She had reviewed recent cases of substantial excavation works such as the Tana Russet Mall, the project next to the Agriculture Bank, the three building projects facing the Tennis Club and Volleyball Courts, the Vanuatu Bijouterie building, Au Bon Marche fuel station at Nambatu and the OLL project along Wharf Road. In all cases the engineering reports have been that the excavations are stable and so far, after years of experience, there have been no slumping leading to public or private damage.
157. From her research, she has determined that all excavation work on all those projects was to the boundary line. There were no setback provisions.
158. She understands that OLL will be applying for a building permit that will include a provision for a security wall. The Municipality looks forward to the development project going ahead.
159. There was no cross-examination by Ms Toa.
160. In cross-examination by Ms Sarisets, she stated that she was Chairlady of the Town Planning Committee. She confirmed that OLL had not yet applied for a building permit. The cross-examination was not helpful.
161. In re-examination, Ms Milne stated that the Municipal Permit number displayed on the sign at HVL's property was a municipal permit for the excavation, not a building permit.

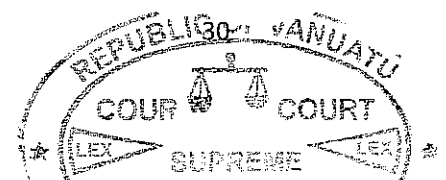


162. There was no supporting documentation attached to Ms Milne's sworn statement. The evidence did not assist me to determine the factual matters in dispute.
163. **Sean L. Griffin**, OLL Operations Supervisor, relied on his Sworn statement filed on 15 October 2021 [**Exhibit D9**]. He deposed that he has oversight for the Wharf Road excavation and building project. Madeleine Tom as OLL's Government liaison person assisted him for purposes of permits and licensing for the project.
164. At the end of May 2020 or early June 2020, prior to the excavation commencing, he and Robert Bohn met with Mr Chani on HVL's property and explained to him their intentions and specifically discussed the boundaries. Mr Chani pointed out to them the structure on his boundary which had not respected the 3-metre setback in PVMC building regulations and worse, that the structure had been built slightly over the boundary onto HVL's property.
165. Before the works commenced, a public signboard was placed on the road next to the excavation site showing the quarry permit no. VOQP220006 and Municipal Permit 6516/20 [**Attachment #1**, **Exhibit D9**].
166. In the third week of June 2020, Mr Chani raised his concerns as to the exact location of the boundaries. In his email dated 25 June 2020, Mr Chani forwarded the survey plan completed by CTF a few years ago [**Attachment #2**, **Exhibit D9**]. Two days later, he, Loic Dinh and Robert Bohn met on-site and agreed that the excavation would stop pending a survey to be completed by Geomap.
167. On 29 June 2020, Geomap cancelled the survey due to the rain but he and Mr Chani met on-site at around 1.30pm and inspected the boundaries pegs. After that, Mr Griffin sent an email to Robert Bohn, copied to Mr Chani, with a picture of Mr Chani standing on a survey peg and showing the front boundary of Mr Chani's property and the public land fronting onto Wharf Road [**Attachment #4**, **Exhibit D9**]:



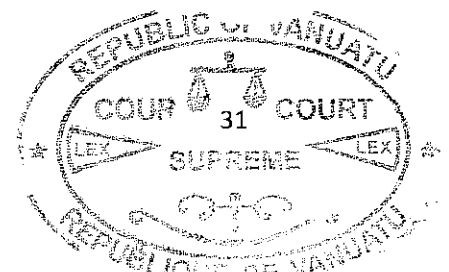


168. On 30 June 2020, Geomap completed its survey. It marked on the survey plan the letter "E" to show the existing boundary points identified on the site. The other boundary points were identified by the letters "IR" (referring to an Iron Rod), the point on the wall and by the letters "CP" (a concrete post). All points were shown to him and to Mr Chani.
169. On 2 July 2020, he, Mr Dinh, Robert Bohn and Mr Meltenoven met with Mr Chani on-site. They concluded that the excavations had observed the boundaries and that the excavation would continue. During these discussions it was agreed that the final distance from Mr Chani's structure would be 50cm.
170. The excavation works were completed on or about 1 September 2020.
171. In late January or early February 2021, Mr Chani raised the idea of a security wall for the excavated boundary. Cyrille Mainguy reported that the excavated wall appeared to be sound and that no slumping was appearing. OLL agreed with Mr Chani to explore the idea of building a security wall and share the cost because



this was fair as OLL had excavated the area and because Mr Chani's structure had not respected the 3-metre setback required by the building code.

172. OLL knew there were other discussions being held with the Government concerning the Government land from the Wharf Road to Mr Chani's property but this had nothing to do with OLL so it was not part of those discussions.
173. Ultimately the discussion of a security wall did not proceed because OLL received an order from the Court to cease all works at the excavation site.
174. In cross-examination by Ms Toa, he stated that he did not see the Environmental Permit himself but he was aware that one had been issued. He agreed that he is aware OLL obtained two permits but he is not well versed with their contents.
175. There was no re-examination.
176. In cross-examination by Ms Sarisets, he disagreed that Mr Chani provided a survey map to OLL because it did not have one. He agreed he did not attach the original survey documents. The balance of cross-examination was unhelpful.
177. There was no re-examination.
178. Mr Griffin's evidence was uncontradicted and consistent with Mr Bohn and Mrs Tom's evidence. I accepted him as a reliable and accurate witness, and accepted his evidence.
179. **Martial Meltenoven** relied on his Sworn statement filed on 15 October 2021 [Exhibit D10]. He deposed that he is a licensed Surveyor and is a Director of Cabinet de Geometres (Geomap).
180. In his capacity as a surveyor, he was retained by OLL to verify the boundary lines for lease title 11/OA23/013. He verified the boundary lines of that leasehold property as set out on the survey plan attached as "**Exhibit 1**" and which he explained in his report dated 2 September 2021 attached as "**Exhibit 2**". He determined that Mr Chani's residential structure was built without respecting the Municipal rules for a 3-metre setback. It is also his professional belief that Mr Chani's structure breached the boundary line. He showed and explained the results of his work to Mr Griffin and to Mr Chani.
181. There was no cross-examination by Ms Toa.
182. In cross-examination by Ms Sarisets, he confirmed he was consulted during the excavation. He agreed that he carried out an identification survey only to identify the survey pegs therefore would not know if Mr Chani's building had encroached into HVL's property or not.



183. In re-examination, he explained that his words, "it is my professional belief that the neighbour breached the boundary line" is a reference to the position of Mr Chani's house near the boundary line but not meaning encroachment.
184. I accepted Mr Meltenoven as a reliable witness and accepted his evidence.
185. The Sworn statement of Paul Gambetta filed on 25 June 2021 was tendered by consent. Attached to the statement were copies of the registered leases, transfer of lease and mortgage for lease titles 11/OA23/013 and 11/OA23/021.
186. This evidence did not assist me to determine the factual matters in dispute.
187. Donna Kalfatak, Director of the DEPC, relied on her Sworn statement filed on 13 July 2021 [**Exhibit D12**]. On 3 March 2019, the DEPC received OLL's application for an environmental permit to extract soil to build a warehouse and to have the work site levelled [**Attachment "DK1", Exhibit D12**].
188. On 13 June 2019, DEPC carried out a PEA on-site and determined that an environmental impact assessment ('EIA') was not required. Following this, on 19 July 2019, DEPF issued an Environmental Permit to OLL authorising it to excavate soil for ground levelling and construct a warehouse [**Attachment "DK3", Exhibit D12**]. Ms Kalfatak sent a cover letter dated 19 July 2019 with the Permit stating that the application was accepted and the permit granted [**Attachment "DK4", Exhibit D12**].
189. She confirmed that para. 13 of the Environmental Permit specifically required that a 5-metre buffer from the land boundary adjacent to the residential house must be established. This is for the warehouse construction.
190. Ms Kalfatak attached copies of an email chain in February 2021 including Loic Dinh's email to her dated 8 February 2021 [**Attachment "DK5", Exhibit D12**]. The chain includes an email from Mr Dinh dated 10 February 2021 in response to Mr Chani's email dated 9 February 2021 as follows:

*Hello all,*

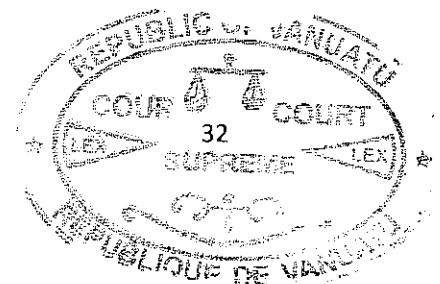
*I was really serious about not responding to any email anymore unless they were to offer a solution rather than a problem!*

*But I have no choice here, ... Mr Chani, you state that you were not informed of the excavation until my machine came on site,...*

*In Feb 2020, you were asked to meet in OLL office, with Andrew Bohn, Sean Griffin and Stephanie Bohn! Where they informed you of their plans to excavate the land! You then took a drive to the site and had a look at it from the bottom of the wharf road.*

*So it is not true when you say "you were not informed, and these practices must stop!"*

...





191. Mr Chani sought advice from DEPC in relation to the assessments of the excavation but was told that recommendations made to a person issued with a quarry permit is solely for that person.
192. In cross-examination by Mr Morrison, Ms Kalfatak agreed that all the small boxes in the “Application Checklist” in the application for the environmental permit were ticked but that she did not attach all the items referred to in the checklist. She confirmed the following documents which were then tendered as a bundle [Exhibit D13]:

- (i) Document entitled, “OLL Warehouse Construction Project Proposal, Presented on: Monday, 6 May 2019 to Department of Environmental Protection and Conservation, Presented by: Andrew Bohn (CEO), Ocean Logistics Limited” which contained the following;

**Executive Summary**

*Ocean Logistics Limited (OLL) is a Port Vila based shipping and maritime logistics company with a fleet of tugboats, barges, a landing craft and shore side equipment.*

....

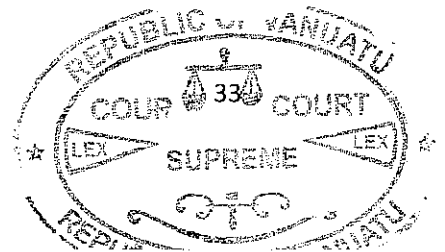
*... With the recent addition of our domestic shipping line, we have now reached a point where we require additional space for cargo storage and handling. Much like our office location, we require our new warehouse facility to be in the vicinity of both the wharf and our office. And so, OLL is proposing a two phase project to excavate land title 11/OA23/013 (located on Wharf Road, approximately 100m past the Vanuatu Handicraft Market) followed by the construction of a warehouse. This will drastically increase the efficiency and capacity of our work.*

**Description of Services**

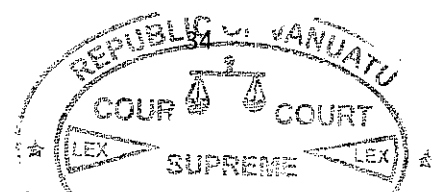
*OLL will obtain all necessary permits, provide all necessary labor, equipment and materials to excavate, remove excess aggregate and level land within the boundaries of lease title 11/OA23/013 followed completing all works associated with the construction of a 25M x 10M warehouse and parking area...*

*(my emphasis)*

- (ii) Survey plan and coloured site plans for lease title 11/OA23/013;
- (iii) Application for Environmental Permit by OLL; and
- (iv) Government receipt dated 6 May 2019 for OLL’s Application for Environmental Permit.
193. It was put to her that the document entitled, “OLL Warehouse Construction Project Proposal for Environmental Permit” was presented on 6 May 2019, 3 days after the application for environmental permit dated 3 May 2019. She disagreed saying the date was 3 March 2019. It was put to her that the handwritten “Mar” was changed to “May” so the application appears to have been lodged on 3 May 2019? She disagreed saying the date was 3 March 2019 as she stated in her sworn statement. She did not agree that the 3 March date was an error.

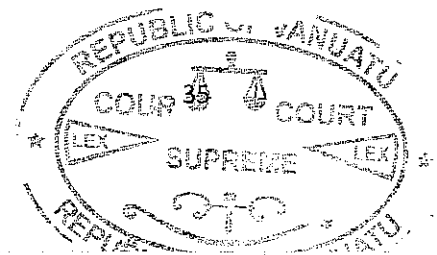


194. Ms Kalfatak agreed that the Environmental Permit was issued based on what was in the application for environmental permit. DEPC issued the Permit following the application, for ground levelling and construction. The Application did not say anything about quarrying.
195. In re-examination, she said that the "Y" in the handwritten month was not clear to her which is why she put the date as 3 March in her sworn statement. She confirmed that the documents tendered as **Exhibit D13** were those ticked in the "Application Checklist" as attached.
196. In cross-examination by Ms Sarisets, she stated that the Environmental Permit was issued based on the details in the application for the environmental permit and on the PEA. She agreed that the Environmental Permit permitted soil removal only but to remove limestone required a quarry permit. She stated that the purpose of the 5-metre buffer was so that in construction, no stormwater or wastewater was caused to nearby residences. It was not from the Act. She agreed that commercial buildings needed both an environmental permit and a building permit. She stated that the 5-metre buffer was for the warehouse construction. When an application was received, a PEA is carried out which determines whether or not an EIA is required. If not required, the Environmental Permit is issued. If an EIA is required, it has its own process to be followed. She accepted that it was her oversight not to attach to her sworn statement the documents later tendered as **Exhibit D13**. There was a detailed design also attached to the application (but not in evidence), by the Shijiazhuang Sanhe Steel Structure Co., Ltd. She stated that the 5-metre buffer in clause 13 of the Environmental Permit was a condition for the building.
197. In re-examination, she explained that there was no site visit during the excavation because it would take place during the construction of the warehouse. She had not attached the attached documents to her sworn statement but they were received by DEPC and kept in its file and their registry.
198. I consider it more likely than not that the Application for Environmental Permit is dated 3 May 2019 as that is closer in time to the attached "OLL Project Proposal" document which was dated 6 May 2019 and to the Government receipt for payment for that application which was also dated 6 May 2019 [**Exhibit D13**]. Otherwise, Ms Kalfatak's evidence was consistent with the documentary evidence and I accepted her evidence.
199. **Noel Naki** relied on his Sworn statement filed on 12 July 2021 [**Exhibit D14**]. He deposed that he is a junior surveyor in the Department of Lands, Survey and Records.
200. On 28 June 2021, the Commissioner of Mines requested that a survey be carried out on lease title 11/OA23/013 to identify whether construction on that lease had encroached onto lease title 11/OA23/021. He carried out a high accuracy precise Survey on that date and found that there was no encroachment of construction



activities on lease 013 onto lease 021 and also that Mr Chani's existing building does not encroach onto HVL's property.

201. He confirmed in cross-examination by Mr Morrison that there was no encroachment by Mr Chani's building onto HVL's property.
202. There was no re-examination or other cross-examination.
203. This evidence did not assist me in determining the issues between the parties.
204. **Camillia Garae**, Commissioner of the Department of Geology and Mines relied on her Sworn statement filed on 7 June 2021 [**Exhibit D15**]. Mrs Garae deposed that on 13 June 2019, the Department received OLL's application for a quarry permit [**Attachment "CG1", Exhibit D15**]. The quarry permit class being applied for was a landscaping permit for a term of 12 months on lease title 11/OA23/013. On 27 May 2020, OLL wrote to say that Enterprise Dinh Van Tu was the contracted company to undertake the excavation works.
205. On 28 May 2020, a quarry permit was issued to Dinh Van Tu Quarry Limited for 1 year from 1 June 2020 to 1 June 2021 for limestone quarry works [**Attachment "CG3", Exhibit D15**]. The quarrying permitted was to extract not more than 11,000 cubic metres of limestone during the term of the permit. Royalty was to be paid to the Commissioner at 5% of the gross market value of the quantity of building materials sold.
206. In 2020, Geology & Mines had only 4 staff working and was short-staffed at the time of the excavation so there could not be an officer on-site full time to monitor the excavation works.
207. Mr Chani sought advice from the Department in relation to the assessments of the excavation but none were provided to him as any recommendations made to a permit-holder were solely for that person. Even though that information was not provided to Mr Chani, both the Department and DEPC held several meetings with Mr Chani to resolve the issues he raised.
208. On 8 July 2020, she and Brooks Rakau of the Department met with Mr Chani at HVL's property to evaluate the stability of the cracks at the front of the public land facing Wharf Road. They explained to Mr Chani that the cracks observed were formed as a result of mechanical weathering and the crack needed to be benched to stabilize it. Mr Chani did not agree with the Department's advice but agreed only to a reinforcement wall along HVL's property. The quarry company agreed to bench the crack but Mr Chani disagreed. At the Department and DEPC's request, the Acting Director of the Public Works Department ('PWD') agreed to the issuance of a PWD permit for the purpose of stabilizing the cracks within the public land facing Wharf Road.



209. In her Further Sworn statement filed on 2 July 2021 [Exhibit D16], Mrs Garae deposed that the geology of Port Vila area extending to the Wharf area is underlain by Pleistocene raised roof [limestone]. Therefore, in order to build on properties that are located on steep sloped raised reef terraces, it is recommended that landscaping be undertaken to allow for proper access to the property.
210. She deposed that this was common throughout the Port Vila area including the site which was excavated and levelled to allow for the construction of the Tana Cine Plaza, and the site which was excavated to allow the construction of the Post Office building. Also, the current Vanuatu Bijouterie building property located at the Wharf Roundabout was excavated for that building to be constructed and the current Au Bon Marche fuel station at Nambatu area was excavated for the construction of the fuel station and shop. These are some examples of many excavations undertaken within the Port Vila area.
211. Finally, she confirmed that the excavation face along Mr Chani and HVL's shared boundary was not a 90 degree angle cliff face but is sloped.
212. Mrs Garae also relied on her Sworn statement filed on 15 July 2022 [Exhibit D17]. She deposed that from her observations and expertise, the geology of Port Vila extending to the wharf area is underlain by Pleistocene raised reef [limestone]. Raised reef limestone is raised vertically in its formation from the seabed. The full substrate is solid with no pockets within the substrate.
213. She deposed that the current cliff face as it stands has not collapsed through all the earthquake events experienced from October 2020 to April 2022 of magnitude 5 to 5.8 [Attachment "CG1", Exhibit D17]. No change was evident in the cliff face structure so it can be said to be stable. There has also been no collapse of the limestone material along the Tana Cine Plaza limestone cliff face. This shows that the substrate is solid and able to withstand earthquakes.
214. Most of the properties excavated with cliff face structures including the Au Bon Marche fuel station and the Vanuatu Bijouterie property do not have retaining walls which shows the stability of the limestone substrate.
215. In cross-examination by Mr Morrison, she agreed that there was a buffer zone stated in the Environmental Permit and that she did not wish to make a comment on it. She agreed with Mr Qualao's views that it is a misnomer to call discontinuities "cracks", and that discontinuities do not affect the stability of the limestone.
216. There was no re-examination
217. In cross-examination by Ms Sarisets, Mrs Garae stated that she has a bachelor's degree and master's degree in earth science. Only VFSC-registered companies can carry out quarrying and be granted a quarry permit. That includes the Dinh Van Tu company. She stated that a landscaping permit is different from a commercial permit – the latter excavation can take over one year and what is extracted will be sold for

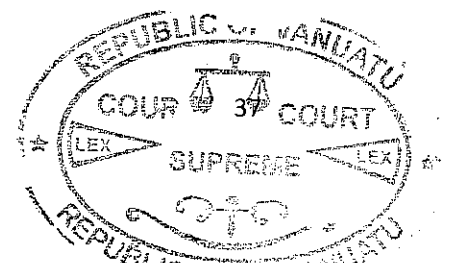
profit. This one was within landscaping class because they excavated to ground level for the developer to access the site.

218. Mrs Garae confirmed that Dinh Van Tu Enterprise submitted report to Geology & Mines about how much was extracted from the site but she did not attach it to her sworn statement. He extracted 4,400 cubic metres as reported but removed 8,000 in terms of actual truck loads. She disagreed with Mr Vire's calculation of the quantity extracted being more than the 11,000 cubic metres permitted in the Quarry Permit. She stated that she would believe the calculation by the excavator rather than Mr Vire's because the excavation operator removed the material and knows the baseline, the landform, before he excavated. However, Mr Vire's calculation was not done based on measurements taken before the excavation occurred therefore she cannot agree with his calculation.
219. She confirmed that the "Wharf Road Removal Sheet" document was Mr Dinh's record that he provided to Geology & Mines. She agreed that if he had lied in that sheet, they accepted it. She refused to comment on the 5-metre buffer condition in the Environmental Permit. The only rock type at all the newly excavated areas she mentioned is limestone and none of them experienced rockfalls. They knew for certain that Mr Chani's building was on the shared boundary after Noel Naki's survey. There is no condition in the Quarry Permit like the buffer condition in the Environmental Permit.
220. In re-examination, she explained that she disagreed with Mr Vire's calculation as he did not have baseline data to be able to work out an accurate amount of the material that was extracted. If he had carried out measurements before the excavation, then that would give him baseline data. But if there were no measurements taken prior to the excavation, then he would not have known what the landscape looked like to get an accurate quantification or volume extracted therefore his calculation looks like it is based on assumption than on actual facts. She stated that Geology & Mines has engineers who can verify the records submitted by an excavation operator.
221. Mrs Garae's evidence remained unchanged in cross-examination and she clearly explained her evidence and the basis for it. It is uncontradicted and consistent with Mr Qualao's evidence. I accepted her as a reliable and accurate witness, and accepted her evidence.

222. That was the evidence from the Defendants' witnesses.

E. Discussion

223. To prove the Claim, Mr Chani must establish that the Defendants owed him a duty of care, that they breached the duty, that the breach led to the damage alleged (causation) and that he suffered damage as a result of the breach of duty.



*Duty of care owed by HVL and OLL*

224. It is not expressly pleaded in the Claim that any of the Defendants owe a duty of care to Mr Chani.
225. However, HVL and OLL accepted that they owe a duty of care to Mr Chani. It is breach of the duty that is denied.
226. In closing submissions, Ms Sarisets submitted that:
- a. HVL and OLL owe a duty of care to their neighbour Mr Chani not to conduct activities on HVL's property that will affect Mr Chani's property, citing *Heaven v Pender* (1883) 11 QBD 503;
  - b. That HVL owes a duty of care to Mr Chani to ensure that whatever activity is carried out on its property does not affect in any way Mr Chani and his property;
  - c. As for OLL, it wanted to excavate and build a warehouse for commercial purposes, in an area of residential houses. Accordingly, OLL owes a duty of care to Mr Chani to ensure that the activity which is carried out does not affect Mr Chani and his property; and
  - d. That Mr Chani's health and safety was also of significance, under ss 4 and 5 of the *Health and Safety at Work Act* [CAP. 195].
227. I reject the submission that the *Health and Safety at Work Act* has any application in this matter. That Act requires employers to maintain safe workplaces for their employees. Mr Chani was not an employee of any Defendant. That Act does not apply in any way in this matter.

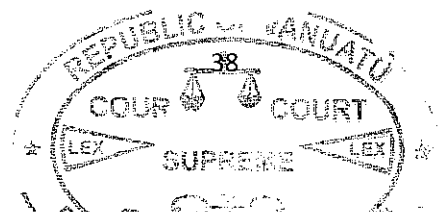
*Alleged breach of duty and damage caused by HVL and OLL*

228. The allegations of HVL and OLL's breach of duty and damage caused to Mr Chani are set out in paras 5, 9, 12-16 of the Claim as follows:
5. *The Claimant brings this claim for damages against the First, Second and Third Defendants for Gross Negligence and breach of the 3 Meter buffer zone, thus causing permanent damage to the Claimant's Property.*

**PARTICULARS**

- a. *Breach of 3 Meter Buffer zone*
- ...

9. *On or about June 2020, the Second Defendant commenced excavation within Leasehold Title No. 11/OA23/013. In the process of excavation, the Second Defendant dug too close to the edge of the Claimant's property, exposing the Claimant's property to a great risk of*



*danger in cases of natural disasters because the Claimant's property is located at the edge of the cliff overlooking Port Vila Harbour.*

**PARTICULARS**

d. *Photos of the work carried out and the damage caused to the Claimant's property*

...

12. *As a result of the gross negligence of the Defendants, the Claimant's house is now exposed to a great risk of damage, the Claimant's tenants have vacated the rent house due to fear of the house collapsing into the huge hole dug by the Second Defendant in the event of an earthquake or cyclone.*
13. *Proper process and assessment was not done by the First and Second Defendants in obtaining the permits used to carry out excavation on Leasehold Title No. 11/OA23/013.*
14. *But for the gross negligence of the First and Second Defendants, excavation went ahead on Leasehold Title No. 11/OA23/013 thus resulting in the damage caused to the Claimant's property.*
15. *The Claimant is derived [sic] from the enjoyment of his Land.*
16. *The Claimant is likely to relocate in the future due to the damage.*

229. The only particular given in relation to the pleading of gross negligence was the Defendants' "breach of the 3 metre buffer zone" causing permanent damage to Mr Chani's property: para. 5 of the Claim.

230. It was alleged in para. 13 of the Claim that HVL and OLL did not undertake proper process and assessment in obtaining the permits authorising the excavation on HVL's property.

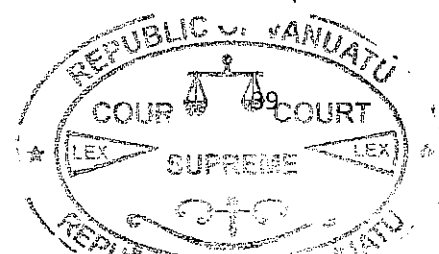
231. I turn now to the four main pieces of documentary evidence:

- i) The Application for Environmental Permit;
- ii) The Environmental Permit;
- iii) The Application for Quarry Permit; and
- iv) The Quarry Permit.

(i) The Application for Environmental Permit

232. OLL's Application for Environmental Permit is dated 3 May 2019 [**Annexure "DK1", Exhibit D12**].

233. The application gave the following description of OLL's project titled "Ocean Logistics Warehouse Construction":

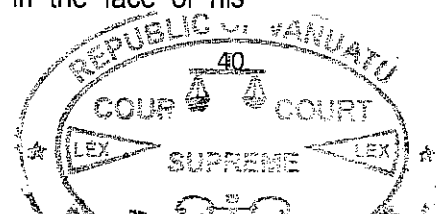


<b>WHAT IS THE NAME OF YOUR PROJECT?</b>	<b>OCEAN LOGISTICS WAREHOUSE CONSTRUCTION</b>
<b>WHAT IS YOUR PROJECT?</b> Please describe your project from construction through to operation. Include plans and layout of project on the site with your application. Use another sheet of paper if required.	PLEASE SEE ATTACHED PROJECT PROPOSAL  Extraction of soil is for preparation of building a warehouse thus the need to have the site levelled.

234. There was an Application Checklist (item 4) indicating items to be attached. All boxes were ticked and the documentation was attached. A copy of the application with all attachments was adduced into evidence by Ms Kalfatak [**Annexure "DK1", Exhibit D12 and Exhibit D13**]. Ms Kalfatak agreed that the attached documentation was received with the application.
235. The information in the Application references "rock generated from excavation."
236. There was then a 9-page PEA.
237. This assessment was prepared by Osborne Melenamu from DEPC who had also visited the site. He was not called as a witness by any party. As the State did not call him, there can be no suggestion that the project was not well understood.

(ii) The Environmental Permit

238. The Environmental Permit was issued by Ms Kalfatak, Director of the DEPC, consequent upon the Application [**Annexure "DK3", Exhibit D12**]. It is dated 19 July 2019.
239. The "Authorised activity" that OLL was permitted by the Environmental Permit to undertake was:
2. *Excavate soil for ground levelling*
  3. *Construct and build a Warehouse at Namba Tri Area – Road to international wharf.*
240. I infer from the Environmental Permit "Authorised activity" that soil would be excavated and the ground levelled (down to the Wharf Road) following by construction of a warehouse which would be accessed on the Wharf Road.
241. The site meetings and the Application for Environmental Permit were clear that the new building would exit Wharf Road. Mr Chani asserted that none of the Defendants gave him official notice before the excavation occurred. He did not explain what he meant by 'official notice' but I do not accept this assertion in the face of his





acceptance in cross-examination that before the excavation work started, he had some contact with HVL and OLL about what was going to happen and in the face of the uncontradicted evidence from Mr Bohn and Mr Griffin that they met with him prior to the excavation works and informed him of OLL's project to excavate the site to the level of the Wharf Road and construct a warehouse which would be entered from the Wharf Road. Mr Dinh's evidence also is uncontradicted that he met with Mr Chani before the works began.

242. The information in the Application for Environmental Permit referenced "rock generated from excavation." Soil according to Mr Qualao includes limestone soil and that is the soil permitted by the Quarry Permit to be excavated.
243. The ground needed levelling for the warehouse construction. That is what occurred.
244. Clauses 12 and 13 of the Environmental Permit provided as follows:

Site specific (Site preparation, construction and operation):

12. *Landscaping Permit must be obtained under the Quarry Act and all conditions set out in the Landscaping Permit must be complied with in full;*
13. *Five (5) meter buffers from the land boundary adjacent to the residential house must be established;*
245. Clause 12 of the Environmental Permit required OLL to obtain a Landscaping Permit under the *Quarry Act* No. 9 of 2013. That is exactly what occurred with OLL applying for a Quarry Permit and after it had notified the Commissioner of Mines of the subcontracted entity that would do the quarrying, the Quarry Permit was granted the following day.
246. The wording of clause 13 of the Environmental Permit is ambiguous. However, Ms Kalfatak issued the Environmental Permit. She confirmed in her evidence that the 5 metres referred to in clause 13 related to construction of the warehouse that OLL intended to build on HVL's property following the excavation works.
247. Even if clause 13 of the Environmental Permit did not relate to the construction of the warehouse but related to the excavation, it is not clear that the Director of DEPC had any power under the *Environmental Protection and Conservation Act* [CAP. 283] ('EPC Act') to impose a condition as to the boundary of the excavation authorised. The Director, pursuant to paras 17(2)(c) and (d) of that Act, must consider whether the project is likely to cause any environmental, social or custom impact, and the significance of any environmental, social or custom impact but it is not clear to me that this extends to imposing a condition as to the boundary of an excavation particularly when neither OLL's application for the environmental permit or the PEA Report [Annexure "DK2", Exhibit D12] raised any issue as to the boundary of the excavation with reference to Mr Chani's property.
248. I find therefore that there was no 5-metre buffer zone requirement for the excavation.

249. Ms Kalfatak sent a cover letter with the Permit stating that the application was accepted and the permit granted [**Annexure “DK4, Exhibit D12**]. Compliance was required. At no time was any issue of compliance raised. The State has made no such claim against HVL and OLL.

(iii) The Application for Quarry Permit

250. The Application for Quarry Permit is dated 13 June 2019 and was submitted by OLL [**Annexure “CG1”, Exhibit D15**].

251. The estimated extracted amount was 8,000 cubic metres of limestone.

252. Benjamin Titus of Geology & Mines received the application. He was not called.

253. OLL then submitted a letter dated 27 May 2020 confirming that Enterprise Dinh Van Tu had been subcontracted to do the quarrying.

(iv) The Quarry Permit

254. The Quarry Permit dated 28 May 2020 was issued by Mrs Garae, Commissioner of Mines, consequent upon the Application [**Annexure “CG3”, Exhibit D15**].

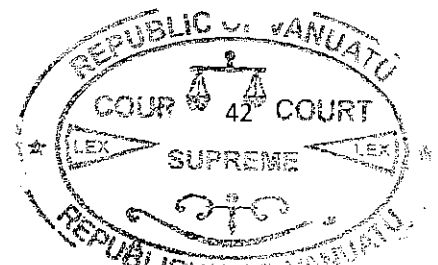
255. The permit provided for the extraction of limestone of not more than 11,000 cubic metres. In Mr Dinh’s evidence, 7,560 cubic metres was excavated – well within the permitted quantity.

256. Mrs Garae raised no issue in respect to compliance with the Quarry Permit.

257. Whether or not HVL and OLL undertook proper process in obtaining the permits is a matter for the State to raise. The State has not raised any issue with the process undertaken by HVL and OLL to apply for their permits nor with their compliance with the permits. There is no merit to this allegation.

258. The terms of the Environmental Permit and the Quarry Permit are clear. Neither contained any requirement for a 3-metre buffer zone.

259. It was common ground that a residential building must be set back at least 3 metres from the boundary of the property on which it is situated. Mr Chani accepted in cross-examination that his rental building had not been set back 3 metres from his and HVL’s shared boundary. Mr Bohn and Mr Griffin’s uncontradicted evidence is that Mr Chani pointed out to them that his rental property had not respected the 3-metre setback required of residential buildings.



260. None of HVL, OLL and the State's actions in this matter involved the construction of a residential building.
261. Accordingly, it has not been proved on the balance of probabilities that a 3-metre buffer zone was required as alleged.
262. It was also alleged in the Claim that OLL dug too close to the edge of Mr Chani's property during the excavation, causing damage to his property. The damage alleged to have been caused includes Mr Chani's house now being exposed to a great risk of damage particularly during natural disasters, that Mr Chani's tenants have vacated his rent house and that Mr Chani is likely to relocate in the future due to the damage.
263. In closing submissions, Ms Sarisets submitted that HVL and OLL breached the 5-metre buffer zone 'adjacent to the residential house' requirement in the Environmental Permit.
264. Mr Morrison is correct in his submissions that the Claim did not contain any pleading as to a 5-metre buffer zone. The absence of such pleading is fatal to this being raised as part of Mr Chani's case. Even if it could be raised, as already set out above, I have found that there was no 5-metre buffer zone requirement for the excavation.
265. Mr Chani has not proved either the 3-metre buffer zone alleged or the 5-metre buffer zone referred to in closing submissions. He has therefore not established that OLL dug too close to the edge of his property.
266. More significantly, Mr Chani has not established any breach of duty on HVL and OLL's part.
267. In the circumstances, the question of whether or not Mr Chani suffered damage and loss as a result of breach of the duty of care does not arise.
268. Even if HVL and OLL had breached their duty of care, Mr and Mrs Chani's evidence was that they purchased the property in 2014 for VT49 million. Post-excavation, Richard Dick of Land Logic's valuation of the property was VT49.3 million. The property has obviously maintained or even slightly increased its value following the excavation. I consider therefore that Mr Chani has not established a loss in terms of the value of the property.
269. As to the allegation that his house is now exposed to a great risk of damage particularly during natural disasters, the uncontradicted evidence before the Court from Mr Qualao and Mrs Garae is that the area is made of raised coral reef limestone and other excavated areas along the same escarpment have withstood earthquakes since excavation. Mr Qualao also stated in his evidence that discontinuities associated with coral formations are a naturally occurring feature of the limestone hence foundation designs, particularly strip footings, are designed to bridge the gaps of discontinuities within the coral body. He also deposed that no solid sound information had been gathered in a scientific manner to back up the fear that

something disastrous will happen or is happening and recommended 6-monthly and 12-monthly review to gather information. I consider therefore that Mr Chani has not established this allegation either.

270. It appears that some of Mr Chani's tenants have vacated his rent house but none of them gave evidence as to their reasons for doing so.
271. In the circumstances, if the Court had to consider what damage and loss Mr Chani suffered as a result of HVL and OLL's breach of their duty of care (of which there was none), I would conclude that he has failed to prove damage and loss suffered.

*The claim against the State*

272. The pleadings in the Claim in relation to the State are in paras 5, 10 and 11 as follows:

5. *The Claimant brings this claim for damages against the First, Second and Third Defendants for Gross Negligence and breach of the 3 Meter buffer zone, thus causing permanent damage to the Claimant's Property.*

**PARTICULARS**

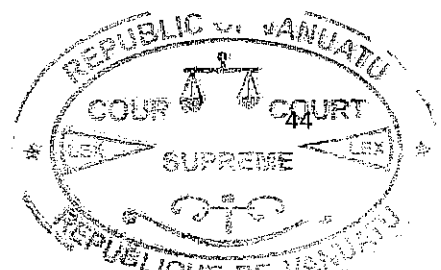
- a. *Breach of 3 Meter Buffer zone*

10. *The Claimant had approached the Second Defendants agents and asked them to provide him with an expert geologist's assessment but the response was that there is none in Vanuatu. The Second Defendant said they have engaged with Cyril Mainguy, who is a Civil Engineer, and that they have all the necessary permits from the Third Defendant to excavate.*
11. *The Claimant followed up with the Government office of Geologist and Mines and Environment to seek advice on the assessments of the excavation but none was provided to him. He even asked for the recommendations in the permits issued to the Second Defendant but none was provided.*

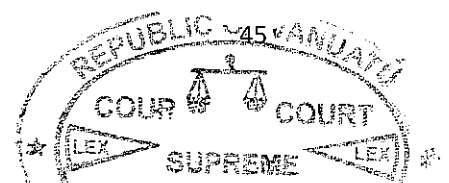
273. The only particular given in relation to the pleading of gross negligence was the Defendants' "breach of the 3 metre buffer zone" causing permanent damage to Mr Chani's property: para. 5 of the Claim.

274. The starting point is whether or not the State owes a duty of care to Mr Chani.

275. As already stated, it was not expressly pleaded in the Claim that the State owes a duty of care to Mr Chani. I infer from paras 5, 10 and 11 of the Claim that Mr Chani's case is that the State owes him a duty of care as it issued permits to HVL and OLL and a 3-metre buffer zone was required.

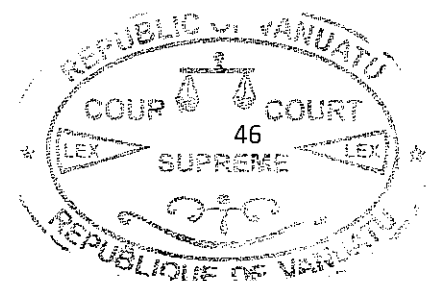


276. There is a three-stage conjunctive test to found a duty of care in negligence, established by the House of Lords in *Caparo Industries PL v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, [1990] UKHL 2. That case has been applied and is part of the law of Vanuatu: *Siri v National Bank of Vanuatu Limited* [2022] VUCA 12 at [26]; *Bulememe v Republic of Vanuatu* [2022] VUCA 10; *Coconut Oil Production (Vanuatu) Limited v Terry* [2007] VUCA 17.
277. The Court of Appeal set out the test as follows in *Siri* at [27]:
- i) *Was the damage to the plaintiff reasonably foreseeable?, and*
  - ii) *Was the relationship with the plaintiff and the defendant sufficiently proximate?, and,*
  - iii) *Is it just and reasonable to impose a duty of care in such a situation?*
278. The Court of Appeal stated in *Bulememe* at [17] that, 'All three stages of the test must be pleaded and then established through evidence for an action to be successful'.
279. None of the 3 stages of the test have been pleaded in the Claim in relation to the State. I consider that that is fatal to establishing that the State owed a duty of care.
280. However, in case I am wrong, I will consider the evidence in light of the 3-stage test established by *Caparo*.
281. Ms Sarisets submitted that the State owes Mr Chani a duty of care as it issued permits to HVL and OLL and in particular:
- a) That the State issued an environmental permit which required a 5-metre buffer zone 'adjacent to the residential house' therefore the excavation should not have occurred within 5 metres of Mr Chani's residential property and that the quarry permit provided only for topsoil removal;
  - b) That the foreseeability of harm caused by breach of the 5-metre buffer zone condition of the environmental permit was very high; and
  - c) The neighbourhood principle and the notion of proximity is established as Geology & Mines and DEPC had a duty to monitor the permit-holder's actions to ensure compliance with the permit conditions and that the neighbours were not affected by the project activity. She submitted that was why the EPC Act requires on-site monitoring.
282. Mr Morrison submitted that the Claim did not contain any pleading as to a 5-metre buffer zone. He and Ms Toa submitted that the 5-metre buffer zone requirement did not relate to the excavation but to HVL's intended construction of a warehouse on its property following the excavation.
283. Dealing first with Ms Sarisets' submission that the quarry permit provided only for topsoil removal, I am unable to agree as the Quarry Permit granted the quarry permit



holder Dinh Van Tu Quarry Limited the “exclusive rights to extract mineral type: limestone” in the specified area for a period of 1 year from 1 June 2020-1 June 2021 [Annexure “CG3”, Exhibit D15].

284. From the evidence of Mr Qualao and Mr Dinh, there are 2 relevant types of soil namely topsoil (see permit page 3 clause 14) and limestone soil which lies below the topsoil layer. Limestone was the bulk of the removal (see clause 23).
285. I find therefore that the Quarry Permit did not provide only for topsoil removal. It provided for excavation of limestone which is what primarily occurred.
286. As to the submission that the Environmental Permit required a 5-metre buffer zone ‘adjacent to the residential house’, I have already held above that the absence of a pleading in the Claim as to a 5-metre buffer zone is fatal to this being raised as part of Mr Chani’s case. I have also already found above that there was no 5-metre buffer zone requirement for the excavation.
287. Accordingly, there is no evidential basis for Ms Sarisets’ submission that the foreseeability of harm caused by breach of the 5-metre buffer zone condition of the environmental permit was very high.
288. Moving to the wider enquiry – was the damage to Mr Chani reasonably foreseeable if there were requirements in the permits which were not complied with and/or the permit-holders were not monitored by Geology & Mines and DEPC?
289. The State on application granted permits to HVL, OLL and its subcontractor Dinh Van Tu Quarry Limited. The permit-holders are required to obey the terms of those permits and if not, there can be sanctions imposed by the State.
290. However, there is no challenge by the State in relation to HVL and OLL’s compliance with either the permit application processes or their compliance with the permits. Accordingly, there were no permit requirements which were not complied with.
291. Further, there is no requirement in law that the State must give advice on the ‘assessments of the excavation’ or the recommendations in the permits issued to a permit holder to a third party (in this case, Mr Chani). Even so, as set out in Mrs Garae’s evidence, both Geology & Mines and DEPC officers met with Mr Chani and the Defendants several times in an attempt to resolve Mr Chani’s concerns raised during the excavation.
292. As to the submission that the permit-holders were not monitored by Geology & Mines and DEPC, the State’s actions in relation to either the issuance of the permit or failure to carry out one or other function or duty in relation to a permit can be challenged by way of a claim for judicial review. No claim for judicial review has been filed.



293. Ms Sarisets submitted that the EPC Act requires on-site monitoring. I am unable to agree on my reading of that Act that it contains a requirement for on-site monitoring. There is also no requirement for on-site monitoring in the Environmental Permit.

294. Ms Sarisets also submitted that Geology & Mines and DEPC have a duty to monitor the permit-holder's actions to ensure compliance with the permit conditions and that the neighbours were not affected by the project activity. No such duty is expressly provided for in either the EPC Act or the Quarry Act. There was no condition as to monitoring in the Environmental Permit.

295. Clause 4 of the Quarry Permit provided as follows:

4. **REPORTING**

*The following reports to be submitted to the Commissioner are: daily reports, monthly reports and annual reports.*

*Daily reports to be made available at the site. This will be cross checked upon daily monitoring on the site.*

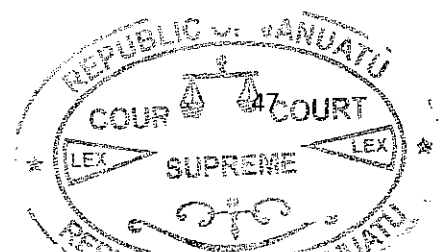
*(my emphasis)*

296. Mrs Garae's evidence was that in 2020, Geology & Mines had only 4 staff working and was short-staffed at the time of the excavation so there could not be an officer on-site full time to monitor the excavation works [**Exhibit D15**]. Mr Dinh in his evidence also related that Geology & Mines was short-staffed then and explained the reporting process he undertook and how Geology & Mines could verify his figures if they wished to.

297. On the evidence, I cannot agree that Geology & Mines had a duty to monitor the excavation, much less daily. It was a condition of the Quarry Permit that the permit-holder provide daily, monthly and annual reports to the Commissioner of Mines and any daily reports could be cross-checked at any time by monitoring on the site however I cannot agree that that can be elevated to a duty on the part of Geology & Mines to monitor the permit-holder to ensure compliance with the permit conditions and that the neighbours were not affected by the project activity.

298. If there were requirements in the permits which were not complied with, the State could impose sanctions on the permit-holders. Any alleged failures in the State's enforcement including to monitor the permit-holders is a matter for judicial review. Neither Act nor the Environmental Permit imposed a duty to monitor the permit-holders. Even on the terms of the Quarry Permit, I cannot agree that that can be elevated to a duty on the part of Geology & Mines to monitor the permit-holders.

299. I have found that Mr Chani did not suffer damage. Even if he had, I cannot agree with the submission that there was foreseeability of harm if there were requirements in the permits which were not complied with and/or the permit-holders were not monitored by Geology & Mines and DEPC.



300. In the circumstances, I do not agree that the relationship between Mr Chani and the State was sufficiently proximate.
301. For the reasons given, I find and conclude that the State does not owe a duty of care to Mr Chani. Accordingly, the Claim has not been proved on the balance of probabilities and established against the State, nor against HVL and OLL.

F. Result and Decision

302. The Claim fails and is **dismissed**.
303. Costs are to follow the event. The Claimant is to pay the Defendants' costs as agreed or as taxed by the Master and once set, paid within 28 days.

**DATED at Port Vila this 28<sup>th</sup> day of September 2023  
BY THE COURT**

*VM Trief*  
Justice Viran Molisa Trief

