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

Civil Appeal
Case No. 19/3441 CoA/CIVA

BETWEEN: KILBRIDE LIMITED
Appellant

AND: REPUBLIC OF VANUATU
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John William von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Viran M. Trief***
Counsel:	***Mr Mark J. Hurley for the Appellant*** ***Mr Lennon Huri for the Respondent***
Date of Hearing:	***8th May 2020***
Date of Judgment:	***15th May 2020***

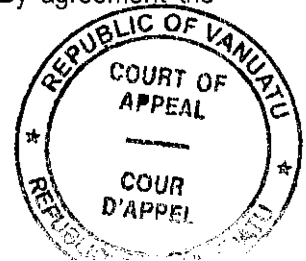
JUDGMENT

1. This is an appeal against the dismissal of a Constitutional Application brought by the Appellant in which relief was claimed for alleged breaches of fundamental rights recognised by Articles 5(1)(j) (unjust deprivation), 5(1)(d) (protection of the law) and 5(1)(k) (equal treatment under the law) of the Constitution.

2. The Appellant alleged its rights had been infringed by amendments to the Land Acquisition Act [CAP. 215] (the LAC) which permitted the Government to compulsorily acquire leasehold land owned by the appellant on terms significantly more favourable to the acquiring authority than before the amendments. The Appellant sought declarations that the amending legislation contravened Article 5 of the Constitution and was therefore invalid.

Two preliminary matters

3. The initiating proceedings brought by the appellant, although in the form of a constitutional application joined additional claims in the application seeking damages and other relief based on causes of action described as legitimate expectation, estoppel and contract. By agreement the



constitutional claims proceeded to trial as separate issues with the additional claims being deferred for later consideration.

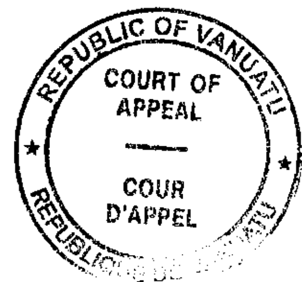
4. At trial extensive evidentiary material was received and discussed in the reasons for judgment: see **Kilbride Ltd v Republic of Vanuatu** [209] VUSC 159. Much of that evidence was directly relevant to the additional claims rather than to the constitutional issues. When the appeal was called the Court questioned whether it was appropriate to consider the constitutional issues until the completion of the trial of the additional claims. However counsel for the appellant in his submissions has clearly separated the constitutional issues and has persuaded us that the appeal on those issues should be decided at this stage. The appeal proceeded accordingly and insofar as the judgment below is interlocutory, leave to appeal is granted.

5. The other preliminary matter concerned the status of the appellant, a corporate body, to seek the protection of the fundamental rights and freedoms recognised in Article 5 of the Constitution. This question has been considered and determined to include corporate entities by two single judges of the Supreme Court and has been assumed in one appeal before this Court, although without argument. The question is an important one.

6. By Article 5 the Republic of Vanuatu recognises "*all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex ...*". If the Constitution were to be construed as an ordinary Act of Parliament, arguably these opening words limit the Article 5 rights and freedoms to natural persons. Such a construction would receive further support from the fact that not all rights and freedoms identified in Article 5 are ones which a corporate body could enjoy.

7. However the Constitution is not an ordinary Act of Parliament. It is the supreme law of the Republic based on the Westminster model. In **Minister of Home Affairs v Fisher** (1980) AC 319 at 329 the Privy Council stated that the way to interpret a constitution based on the Westminster model is to treat it not as if it were an Act of Parliament but "*as sui generis calling for principles of interpretation of its own suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law*". This approach was approved by a differently constituted Privy Council in **Ong Ah Chuan v Public Prosecutor** (1981) AC 648 at 670 where the Board said that such a constitution should receive a generous interpretation. See also **Attorney General v Timakata** [1993] VULawRp 2; [1980 – 1994] Van LR 679.

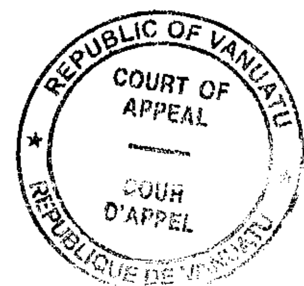
8. When the Constitution of the Republic of Vanuatu was adopted by the people of Vanuatu, corporate bodies established under laws recognised by Article 95 as continuing after Independence were well-established in the economic life of the Vanuatu community. Then and now companies had and have the capacity to sue and be sued as if they were natural persons.



9. In **Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu** [2006] VUSC 74 (the VCCE case) Lunabek CJ held that a corporate entity was entitled to Article 5 rights and freedoms. His Lordship said:

> *"By perusing the provisions of Article 5 of the Constitution, it is obvious that there are certain rights and freedoms in Part I of Chapter 2 of the Constitution which from their very nature cannot be enjoyed by a corporation e.g. the right to life specified in Article 5(1)(a), the right to personal liberty specified in Article 5(1)(b) and the right to be protected from inhuman treatment and forced labour in Article 5(1)(e); but there is nothing in principle which prevents a corporation like a company from enjoying the rights relating to the securing of protection of law in Article 5(1)(d) and (2), the protection from unjust deprivation of property in Article 5(1)(j) and protection for equal treatment under the law or administrative action in Article 5(1)(k). It would not be an affront to common sense or reason to contend that if a corporation's property were unjustly acquired (Article 5(1)(j), the company should, in like manner as a natural person, be entitled to compensation. Nor could it be convincingly maintained that a corporation, like a human being, if charged with a criminal offence would not be entitled to the right of a fair hearing in accordance with the fundamental principles of justice as prescribed in Article 5(2) of the Constitution. If bodies corporate were not entitled to use the machinery of Articles 6 and 53 of the Constitution, many anomalies would arise. For example, a natural person would lose the protection of the Constitution for his business if he formed a company to take it over.*
>
> *For these reasons, I am of the opinion that the expression 'all persons' in Article 5(1) of the Constitution includes artificial legal persons. Therefore, the Applicant VCCE Ltd, has standing to apply to the Supreme Court for redress under the Constitution. The Respondent's (State Republic of Vanuatu) first limb of submissions in support of the first ground of their application to strike out the Constitutional Application fails."*

10. The VCCE decision has been followed and applied by Aru J **In the matter of Trident Holdings Ltd and In the matter of the Republic of Vanuatu** [2012] VUSC 257 at [20] – [21], and by the trial judge in the present case. In **Groupe Nairobi (Vanuatu) Ltd v Government of the Republic of Vanuatu** [2009] VUCA 35 where a company sought redress under Article 5(1)(j) the jurisdiction of the Supreme Court to consider the Constitutional claim was not challenged, and assumed without argument in this Court. In **Groupe Nairobi** this Court observed that the provisions of Article 5 reflect the fundamental human rights recognised in the Universal Declaration of Human Rights which were also reflected in the European Convention on Human Rights (the ECHR), and that the ECHR provisions influenced the development of legal principles in the United Kingdom. The Human Rights Act 1990 (UK) incorporates the ECHR as a schedule. Human rights protections in the ECHR have been held by the European Court of Human Rights to extend to corporate entities. In the United States of America redress under the 1st and 14th Amendments has been granted to companies. In New Zealand the Bill of Rights Act 1990 (NZ) applies to corporate bodies: s 29. To include corporate entities within the protection of Article 5 is in line with these international developments.



11. In our opinion the decision of the Chief Justice in the VCCE case correctly states the law in Vanuatu, and the Supreme Court and this Court have jurisdiction to hear claims for redress under Article 5 brought by a corporate entity.

12. The consequence of holding that "person" in Article 5 includes corporate entities is that the fundamental duties imposed by Article 7 rest on corporate entities. Article 8 provides:

> *"Except as provided by law, the fundamental duties are non-justiciable. Nevertheless it is the duty of all public authorities to encourage compliance with them so far as lies within their respective powers".*

13. Although the fundamental duties are non-justiciable, Articles 7 and 8 may provide powerful reasons for a public authority responsible for regulating the conduct and affairs of corporations to encourage compliance with the duties, and for Parliament if thought necessary, to enact law that makes the duties or some of them justiciable. We note that the former Chief Justice in **Timakata v Attorney General** [1994] VULawRp9; [1980-1994] Van LR 575 said in relation to Articles 7 and 8:

> *"The fundamental duties are not justiciable against individuals but the duties of the authorities and Government under Article 8 are enforceable under Article 53".*

The background facts

14. The appellant is the registered lessee of three bare parcels of land in the Nambatu area of Port Vila which are referred to in the judgment below as leases 048, 058, and 063. The leases are adjacent to each other and if amalgamated would constitute a large and valuable property for waterfront development in the heart of Port Vila. Three attempts have been made by the State to compulsorily acquire one or more of these leases. The first was in 1992 before the appellant was the lessee; the second was an attempt to acquire lease 048 in 2011 and the most recent attempt commenced with an Acquisition Notice given to the appellant to acquire leases 048 and 063 in 2018. These proceedings arise from the second and third attempted acquisitions.

15. The first attempted acquisition was stated to be for the purpose of turning the land into a park. The second attempt was for "*public purposes*" and the third was for "public purposes" specifically for green space for the communities in Port Vila.

16. The LAC makes provision for the compulsory acquisition of land by the State and provides a methodology for compensating the owner for the acquisition. Under the methodology set out in the LAC in 2011 the Valuer-General was required to assess the compensation. The appellant challenged the Valuer-General's assessment of compensation for the proposed 2011 acquisition. The challenge was heard by Justice Sey in the Supreme Court in 2014. The court held that the Valuer-General's assessment did not comply with the matters to be taken into account under s.9(1)(a) of the LAC in that the assessment did not take into account market value. The court directed that the Valuer-General re-assess compensation within 30 days taking into account market value: see **Kilbride**

Limited v Republic of Vanuatu [2014] VUSC 24. Independent valuations before the Court that took into account market value were very much higher than the Valuer-General's assessment.

17. Within the 30 day period rather than have the Valuer-General re-assess compensation, the State informed the appellant that it no longer intended to pursue the compulsory acquisition of the lease.

18. Thereafter the LAC was amended in three ways that the appellant alleges greatly advantaged the State so as to permit it to acquire land in exchange for compensation that was so far below its real value as to be unjust to the owner, and to limit the grounds on which an owner could object to the acquisition.

19. The 2018 attempted acquisition followed these three amendments.

20. On 11 October 2018 the appellant entered into an agreement for sale and purchase of all three leases to Yang Huanduo for US$7.5 million, and on 12 October 2018 sought the Minister of Land's consent to the transfer of the leases.

21. On 17 October 2018 the appellant received the Acquisition Notice for leases 048 and 063 from the State. The appellant filed an objection to the proposed acquisition and then commenced these proceedings seeking orders declaring the Acts which amended the LAC to be unlawful and in breach of Articles 5(1)(j), 5(1)(d) and 5(1)(k), and orders under Articles 6 and 53 of the Constitution striking down those Acts.

The Law

22. **The Constitution**. Article 5 relevantly provides:

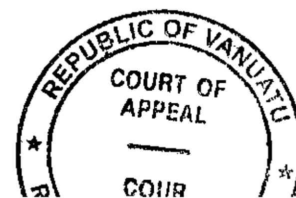
"***5. Fundamental rights and freedoms of the individual***

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-.........

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

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

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas."



23. **The LAC** at the time of the second attempted acquisition in 2011 relevantly provided:

"***s.9. Matters to be considered in determining compensation***

(1) In determining the amount of compensation to be awarded for any land or easement acquired under the provisions of this Act, the acquiring officer or the Valuer-General under this Act shall take into consideration –

(a) the market value of the land or easement at the date of the notice of intention to acquire such land or easement;

(b) to (h)...(not presently relevant)

(2) A determination must be in writing and a copy of it must be given to the custom owner or owners of the land, and any other person interested in the land."

24. Section 4 of the Act made provision for objection to an intended acquisition to be made to the acquiring officer by persons interested in the land. The Act did not limit the grounds on which objection could be made.

25. **The Land Acquisition (Amendment) Act 2014** repealed s.9(1)(a) of the principal Act that required market value to be taken into account and substituted new sections 9(a), 9(aa), 9(1A) and 9(1B) as follows:

"***Paragraph 9(1)(a)***

Repeal the paragraph, substitute
"(a) the market value of the land or easement where the land is not subject to a lease at the date of the notice of intention to acquire such land or easement;
(aa) the lessee's interest and the lessor's interest where the land or easement is subject to a lease at the date of the notice of intention to acquire such land or easement;"

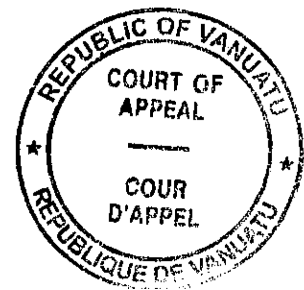
After subsection 9(1)

Insert

"(1A) For the purpose of paragraph 1(aa):

"lessor's interest" means:

(a) the present value of the contract rent receivable by the lessor for the remaining term of the lease subject to rent review; and



(b) the present value of the reversion to perpetual ownership of the land when the head lease expires or the present value of the reversion to Full Rental Value in perpetuity;

"lessee's interest" means:

(a) the present value of any profit rent enjoyed by the lessee for the remaining term of the lease subject to rent review; and

(b) the value of any lessee's buildings, houses on the lease and any improvements made to the lease.

(1B) For the purpose of subsection (1A):

"contract rent" refers to the reserved rent as agreed originally in a lease or as reviewed according to section 39 of the Land Leases Act [CAP 163];

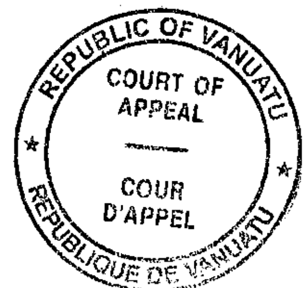
"profit rent" means the difference between the annual lease rent determined by the market and the rent agreed upon by the lessor and the lessee."

26. The **Land Acquisition (Amendment) Act 2017** amended the LAC so as to require that in determining the amount of compensation only the matters specified in s.9(1) be taken into account. The appellant contends that this amendment had the effect of confirming in the strongest terms that market value was not to be taken into account. This Act also introduced a new definition of 'public purpose' and limited the grounds on which objection to an intended acquisition could be made to whether or not it related to a public purpose.

The case at trial

27. The fundamental submission of the appellant was that compensation must include the market value of the property, and that anything that departed from market value would render the acquisition an unjust deprivation of property within the meaning of Article 5(1)(j). It was argued that the amending legislation had the practical effect of eliminating the appellant's right to meaningful compensation as its leases are "bare land". Breaches of Articles 5(1)(d) and 5(1)(k) were also asserted.

28. Article 5(1)(d) was allegedly breached as the State had not kept the appellant informed about the proposed amendments to the LAC and its continuing interest in the acquisition of the leases. The lack of information and transparency constituted a denial of natural justice and a denial of a fair hearing. The appellant was therefore denied the protection of the law. This argument was founded upon a further allegation that there had been a settlement agreement between the appellant and the State following Justice Sey's decision that required the State to keep the appellant informed.



29. Article 5(1)(k) was allegedly breached as the 2014 amendment provided different compensation assessments for the owner of unleased land and for the owner of leased land, and in the case of leased land provided different assessments as between lessors and lessees. The amended compensation methodology was convoluted and cumbersome and on any objective view provided substantially less than market value compensation. That, together with the restricted grounds for objection, meant that landowners subject to compulsory acquisition were denied equal treatment under the law.

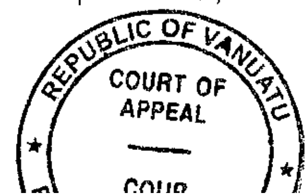
30. At trial extensive undisputed evidence was led as to the considerations within government leading to the amendments to the LAC. That evidence indicated that whilst Justice Sey's judgment was the catalyst for change, the amendments were intended by the government to deal with a range of other issues as well that were of concern to it. The evidence showed that there had been discussion between the Valuer – General and the Minister of Lands directed to designing a new methodology for assessing compensation that struck a fair balance between holders of different interests in land, the public interest, and the revenue.

31. The trial judge was not persuaded by the appellant's arguments. He observed that the Constitution makes express provision for the government to own land (Article 80) and to acquire land provided that there is a regime in place dealing with compensation (Article 77). He considered that the LAC as amended established such a regime. He considered that the Court must allow the Government to make laws in the public interest, and it is not the Court's function to interfere unless there is a breach of the Constitution involved. The Government is in a better place to determine what is in the public interest, and indeed this is part of the government's mandate. The judge had earlier referred to the **Groupe Nairobi** case which discusses the role of the Court when considering the constitutional validity of legislation passed by Parliament. The judge concluded that the appellant had not made out that the LAC amendments involved a deprivation of property let alone an unjust deprivation. Further, there was no merit in the argument that the Government had an implied obligation to advise the appellant of the intention to amend of the LAC, this conclusion following from the Judge's rejection of the allegation of that the parties had reached an agreement to settle the litigation before Justice Sey.

The grounds of appeal before this court

32. The appellant did not pursue its appeal in relation to Article 5(1)(d).

33. The appellant contended that the amendments to the LAC were intended to and did bring about a substantial reduction in the statutory compensation for the acquisition of registered leases. Compensation would no longer be based on market value. This submission was directed both to the application of the methodology to the situation of lessees generally, and specifically to its application to the appellant. In its application to the appellant it was contended that under s.9(1)(a) and s.9(1A) as amended the appellant's compensation entitlement in practical terms was eliminated because the appellant's leases are bare land. As the land was bare, that is vacant and without improvements,



there would be no "profit rent" to attract compensation under paragraph (a) of the formula to compensate a lessee contained in s.9(1A), and as there were no buildings or improvements there would also be no compensation under paragraph (b). The obvious effect of the LAC amendments was to allow the State to acquire leases, in particular the appellant's leases at less than market value. Counsel acknowledged that this proposition was central to the constitutional challenge.

34. Counsel accepted that the LAC operates to allow the Minister of Lands to take whatever land he chooses to take. The taking will constitute a deprivation of property. The question posed by the appellant for this Court is whether that deprivation will be an unjust deprivation within the meaning of Article 5 (1)(j).

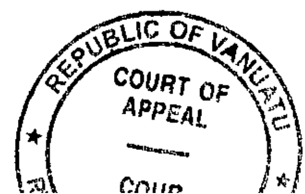
35. Counsel submitted that to force an owner to accept less than market value as compensation for compulsory expropriation amounts to an unjust deprivation. To be just the compensation should put the deprived owner in as nearly the same position as a payment of money can bring about, and it has long been a common law principle that money compensation in a case like the present should be sufficient to enable the deprived owner to purchase another registered lease that is of equivalent value. To achieve this end the compensation must be based on market value.

36. Given that the proviso to Article 5 limits the scope and operation of the enumerated individual rights and freedoms counsel acknowledged that there must be a balance drawn between the enjoyment of individual rights and freedoms and the public interest considerations recognised in the proviso. The need for such a balance was recognised by this Court in **Groupe Nairobi**, and to an extent at least was recognised by the trial judge when he said that the Government is in a better place to determine what is in the public interest than the Court. However, counsel argued that the trial judge did not correctly undertake this balancing exercise as he appears to have considered that the effect of Article 80 (government may own land) and Article 77 (Parliament may make laws for assessing compensation) created a special part of the Constitution giving rise to a "sovereignty of Parliament" in relation to laws relating to compensation for government acquired land that put the legislation beyond the reach of the Article 5(1) guarantees.

37. Counsel also argued that the scope of the proviso was not wide enough to qualify the operation of the guaranteed rights in the present case where the intended purpose of the acquisition was for "green space". It was contended that such a purpose was not within any one of the topics "rights and freedoms of others" or legitimate public interest in "defence" or "safety" or "public order" or "welfare" or "health".

Discussion

38. We deal first with the appellant's last two submissions recorded above. As we read the reasons for judgment we doubt that the trial judge treated Articles 77 and 80 as creating a special power in Parliament that authorised legislation that infringes the enjoyment of guaranteed Article 5 rights. That



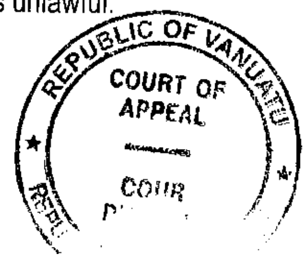
he referred to the several considerations discussed within government for the reasons given for the amendments suggests otherwise. However this court takes this opportunity to state that the Articles at 77 and 80 do not create a power that authorises Parliament to legislate in any way that lessens the scope and operation of Article 5.

39. Parliament is given wide powers under Article 16 (1) to make laws for the peace order and good government of Vanuatu and specific power to make laws on specific topics. See for example Articles 14, 31, 47(5), 50-52, 68, 77 and 82. But in every case the power bestowed on Parliament is qualified by Article 5. This is made clear by the enforcement provisions in Articles 6 and 53. Any person who considers that any of the rights guaranteed to him by the Constitution, or that a provision of the Constitution has been infringed in relation to him, may apply to the Supreme Court to enforce that right and for redress.

40. The submission that the proviso to Article 5 ("subject to ....the legitimate public interest in defence, safety, public order, welfare and health") by its reference to specific topics does not cover a "green space" purpose does not require answer in this case for two reasons. First it is an argument addressed to the operation of the proviso in a specific individual case and is not relevant to the present Constitutional Application which challenges at large the lawfulness of the 2014 and 2017 amending Acts, and seeks to have them struck down in their entirety. The proposition that the amending Acts, otherwise valid, do not apply in the appellant's particular situation is not the case presently before the court. Secondly, for reasons which follow, we consider the present proceedings are in any event brought prematurely and do not permit the Court to decide a Constitutional challenge. However we note that Article 5, like the Constitution generally, must be given a generous interpretation that best suits the intended purpose of the paramount law, and the words of the proviso should be understood generally as indicative of the many aspects of public administration which Parliament must regulate.

41. We turn now to the central premise of the appellant's argument which is that the amendments to the compensation methodology will result in an assessment of compensation that is unjust in the sense that at best it will grossly under value the property interest acquired from the owner.

42. The case was ran at trial on the unchallenged basis that under the new methodology compensation would be assessed at far less than an amount based on market value. Indeed it was argued that the appellant as lessee would get nothing. As the appellant was a lessee the case was presented from the viewpoint of a lessee and there does not appear to have been any analysis of how the new methodology would affect compensation payable to lessors, or to custom owners where the land was not leased. Before the Court could conclude that the amending Acts in their entirety should be struck down, such an analysis would be necessary and lead to the conclusion that guaranteed rights under Article 5 of owners of whatever type of interest in land would be unjustly infringed. An alternative conclusion might be that the new methodology infringed the rights of one class of interest holder and to that extent that part of the amending legislation, but not all of it, was unlawful.



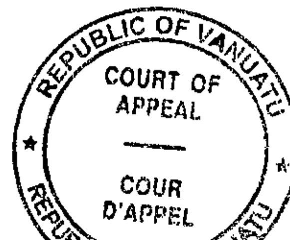
43. As we have set out, the challenged LAC amendments have removed the general test of "market value" at s.9(1), and in respect of land subject to a lease replaced it at s.9(1A) by "the lessee's interest", which is defined as "the present value of any profit rent enjoyed by the lessee for the remaining term of the lease subject to rent review". It seems to have been accepted that under s.9(1A) in the case of a lessee whose land was unimproved vacant land that the present value of any profit rent enjoyed by the lessee for the remaining term of the lease subject to rent review under paragraph (a) would be nil or nearly so. The meaning and scope of paragraph (a) was not the subject of analysis or expert evidence from well qualified valuers or actuaries.

44. Before this Court counsel frankly acknowledged that neither he nor the appellant, whose other advisors are well versed in local property matters, knew what paragraph (a) of s.9(1A) relating to a lessee's interest meant.

45. The terms used in paragraph (a) appear to be terms of art that should be meaningful to those with expert knowledge in matters of valuation, especially the valuation of interests that are to be enjoyed over an extended period of many years. In a highly specialised field of learning such as valuation of complex and long-term interests a court will be greatly aided by, indeed expect, evidence from the appropriate expert witnesses to assist the court in understanding the concepts expressed in, and lying behind, the language used. Assisted by evidence of that kind the court will then be in a position to interpret the legislation. And in doing so if it appears to the court after hearing the evidence that the language used by Parliament admits of more than one meaning, the court will on well accepted (the) principles, adopt a meaning that protects the guaranteed rights in Article 5 and thereby save the legislation so far as that is possible.

46. Without the aid of expert evidence this Court was left to explore unaided the various possible ways in which the terms of the provision could be applied. However some of the appellant's suggestions as to meaning were clearly wrong. The expression "any profit rent enjoyed" in paragraph (a) should not be strictly construed, as it was submitted, to include only actual rent being received at the present time – which in the appellant's case would result in a nil assessment as no rent is currently being paid. The expression in the section goes on to say "for the remaining term of the lease". The paragraph envisages an assessment that will cover the period to the end of the lease, taking into account the likely vicissitudes of the marketplace over an extended time and the prospect of the term being extended under any term of the lease that permits or envisages possible extension. Risks and uncertainties inherent in any long-term forecast must be evaluated.

47. Then consideration must be given to the definition of "profit rent" in s.9(1B). Profit rent means the difference between annual lease rent determined by the market and rent agreed upon by the lessor and lessee. This definition envisages rental amounts assessed on market rates. Then to arrive at a lump sum immediate payment of compensation, the anticipated difference referred to would have to be capitalised. The end result, it seems to us, might well be akin to a market valuation of the kind which the appellant says is necessary to be fair and just.



48. In the absence of evidence to assist in understanding how the amendments to s.9 of the LAC would work out if analysed by valuers the Court is unable to accept the basic premise of the appeal that the new methodology will, at least in the case of all interests held by lessees, always lead to an assessment of compensation that is so low that it will result in an unjust deprivation of property. Unless the Court could be satisfied that is the situation, and be further satisfied that the low compensation could not be justified under the proviso to Article 5, the Court could not declare the amending Acts, at least in so far as they concern the acquisition of a lessee's interest, unlawful.

49. As we cannot be satisfied that the amendments will always result in an unjust level of compensation for a lessee the claim to have the amending Acts or part of them declared unlawful on that basis must fail.

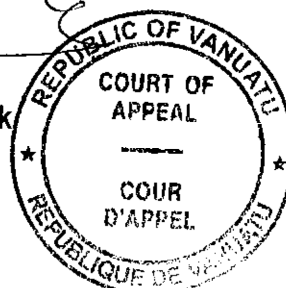
50. The appeal centred on the contention that as compensation would not be assessed taking into account market value any acquisition under the LAC would result in an unjust deprivation. The centrepiece of the argument was directed to Article 5(1)(j) but the additional claim based on Article 5(1)(k) also rested on the allegation of inadequate compensation. As we understood the argument, if the claim under Article 5(1)(j) failed so did the additional claim.

51. As we have indicated, we consider the Constitutional Application in this case was brought prematurely. The decision in this appeal decides no more. It may be that when compensation is assessed by the acquiring officer, on another application supported by appropriate evidence the court might be persuaded that the new methodology set out in the amendments, at least in so far as it concerns the acquisition of lessees' interests, infringes rights guaranteed by Article 5. It may be that a Court would be persuaded by evidence that the new formula could not on any workable basis provide fair compensation. Equally the evidence might be that an assessment of profit rent as defined was possible and produced fair compensation. With that background factual context determined, the Court would then be in a position to assess the constitutional arguments. We cannot assess them as we are left to speculate on the background factual context.

52. For these reasons we consider the appeal should be dismissed, but for reasons which differ from those of the trial judge. Costs will follow the event. The appellant is ordered to pay the respondents costs on the standard basis.

Dated at Port Vila, this 15th day of May, 2020.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice