D. J. GRAPHICS LIMITED	**Plaintiff**
-V-	
COMMISSIONER OF LANDS	**Respondent**
AND	
THE ATTORNEY GENERAL	**1st Defendant**
SOLOMON ISLANDS PORTS AUTHORITY	**2nd Defendant**
AND	
SOLOMON ISLANDS PORTS AUTHORITY	**Plaintiff**
-V-	
COMMISSIONER OF LANDS	**1st Defendant**
THE ATTORNEY GENERAL	**2nd Defendant**

High Court of Solomon Islands
(Palmer J)
Civil Case Nos. 102 of 1995
40 of 1995
164 of 1995
Hearing: 4th, 5th & 6th September, 1995
Judgment: 11th December, 1995

G.T. Traczyk and G. Suri for D.J. Graphics Limited
A. Radclyffe for Solomon Islands Ports Authority
P. Afeau for Commissioner of Lands
Attorney General for Minister of Lands

PALMER J: There are three cases before this Court which have been consolidated together on the grounds that the issues raised are similar and to some extent overlap.

In the first case, Civil Case No. 102 of 1992, D.J. Graphics Limited *(Plaintiff)* seeks Orders of Certiorari, Prohibition and Mandamus against the Commissioner of Lands *(Defendant)*, as follows:

> "1. An order of Certiorari quashing the decision of the Defendant on or about 16th January 1995 to seek registration of subdivision of perpetual estate on Parcel 191-022-83 and 191-022-87.
>
> 2. An order of Prohibition against the Defendant restraining him from taking any further steps to implement his decision to allocate the land referred to in paragraph 1, hereof to Solomon Islands Ports Authority.

3. An order of Mandamus directing the Defendant to transfer the land referred to in paragraph 1 hereof to the Plaintiff."

The second case, **Civil Case No. 40 of 1995**, involves the application by D.J. Graphics Ltd *(Plaintiff)*, for a declaration that the Solomon Islands Ports Authority *(Defendant)* is not empowered to engage in any commercial activity other than those activities authorised by its enabling statute.

The third case, **Civil Case No. 164 of 1995**, involves the application by Solomon Islands Ports Authority for declarations against the Commissioner of Lands *(First Defendant)* and the Attorney General *(Second Defendant)*, as follows:-

(1) Under section 18 of the Crown Proceedings Act that the Plaintiff has the right to have the fixed term estate in Lots 116, 117, 128 and 147 at Point Cruz, Honiara transferred to it.

(2) That the Minister of Lands and Housing has acted ultra vires in that:-

"(a) he has no power under section 4 of the Land & Titles Act to revoke or override the Commissioner of Lands' decision to allocate the said land to the Plaintiff;

(b) he has no power to allocate the said land or any part of it to D.J. Graphics Limited;

(c) he made his decision without considering a relevant matter namely that the Plaintiff had accepted the Commissioner of Lands' offer and had paid the full purchase price;

(d) he acted contrary to the rules of natural justice in failing to give the Plaintiff a right to be heard prior to his decision to revoke the allocation of the land to the Plaintiff, the Plaintiff having a legitimate expectation that title would be transferred to it."

The Facts

D.J. Graphics Ltd. *(hereinafter referred to as D.J.G.)* is a locally incorporated company under the Companies Act. Solomon Islands Ports Authority (*hereinafter referred to as SIPA)*, is a statutory

body set up under the Ports Act. The Minister of Lands, *(hereinafter referred to as MOL)*, currently is the Honourable Mr. Francis Orodani. The person acting in the Office of the Commissioner of Lands at the relevant times *(hereinafter referred to as COL)*, is Mr. Cherry Tanito.

On the 29 August, 1994, the Managing Director of DJG wrote a letter directly to the MOL seeking assistance to acquire a block of land in the Point Cruz area identified in his letter as Lots 147 and 128, for purposes of developing his business; which consisted of screen printing and graphics designing, plus a comprehensive t-shirt and souvenir shop *(a copy of that letter is annexed to the affidavit of David Chow filed on 4 April 1994, and marked Exhibit 'A')*.

On 6 September, 1994, the MOL responded to the letter of the Managing Director of DJG, inter alia, as follows:

> "To date, I can only assure you of my support of your intention to develop and expand your operation onto the area. Following this assurance, I now wish to inform you that I accept your application in principle awaiting certain necessary formalities which have to be processed before the final approval can be endorsed."

(A copy of that letter is marked Exhibit 'B' in the same affidavit of David Chow.)

By a further letter of 9 September, 1994, the MOL advised that the application for *"Lots 147 & 128/III/H which occupies the old government ministry of education building"* was accepted. By copy of the same letter, the Managing Director of KPF Consultancy was informed that his application for the same block of land was cancelled. There was also a copy of the same letter sent to the COL, informing him of the MOL's decision and asking him to proceed with the necessary formalities to effect registration *(a copy of that letter is marked Exhibit 'C' in the same affidavit of David Chow)*.

On 14 September, 1994, the COL wrote to the Managing Director of DJG, referring to the letter of the MOL copied to him, and advising the Managing Director that Lots 147 & 148/II/H *(sic)* had been allocated to SIPA for the expansion of Port facilities. It appears that the reference to Lot 148 was a mistake and that it should have read *"Lot 128"*. The MOL was duly informed of the contents of this letter, according to the version in evidence of the COL, by a minute done through the Permanent Secretary of the Ministry of Lands.

On the very next day, 15 September, 1994, the MOL wrote a letter addressed to the Managing Director of DJG, and copied inter alia, to the COL, advising the Managing Director that he had invoked his powers under section 4(4) of the Land and Titles Act, and directed, that Lots 147

and 128 be transferred to DJG. In the same letter, the MOL purported to revoke any allocation of the said lots to SIPA *(see paragraph 3, p.1 of that letter)*. At paragraph 5 of page 2 of the same letter, the COL was directed to prepare the grant instrument in favour of DJG for their execution, and to advise SIPA in writing of the MOL's revocation of the Government's offer in respect of the said lots. At the last paragraph of the second page, there was another direction inter alia, to the COL to revoke any offer to Ports Authority, *(a copy of that letter is marked 'E' in the same affidavit of David Chow)*.

On 4 October 1994, there is another letter from the MOL to the Manager of DJG, assuring him that Lots 147 & 128 would be transferred to him, and that he had instructed the COL to have the land transferred to him without any further delay. The COL however, has refused to comply with the directions of the MOL claiming inter alia, that they were ultra vires his powers as prescribed under the Land and Titles Act, and has sought to proceed with his intentions to have the two lots transferred to SIPA.

On or about 16 January, 1995, an application was lodged with the Office of the Registrar of Titles, for registration of subdivision of the perpetual estates in parcel 191-022-83 and 191-02-87.

It is that decision to file an application for subdivision, which is the subject of the order sought for **certiorari** in CC.102 of 1995. The order for **prohibition** sought in the same case seeks to prevent or restrain the COL from taking further steps to implement his decision to allocate and transfer the said land to SIPA. And the order for **mandamus** is sought to direct the COL to transfer the said land to DJG.

In CC.164/95, the tables are turned the other way around with SIPA seeking declarations that they have the right to have the fixed-term estates in Lots 116, 117, 128 and 147 *(Point Cruz)* transferred to it, and also that the MOL had acted ultra vires his powers under the Land and Titles Act.

Under CC.40/95, DJG asserts that the purposes for which SIPA intended to acquire the said land for, namely, office, retail and tourist development were ultra vires its statutory powers as stipulated in the Ports Act, and accordingly seeks a declaration that SIPA is not empowered to engage in such commercial activities.

The Issues

As correctly raised in the submissions of the learned Solicitor-General, the issues in this case revolve around the question of rights and interests which both SIPA and DJG may have

acquired. The question of rights and interests in turn revolve around the question of the powers of the MOL, and the COL, as provided for under the Land and Titles Act. DJG asserts a legal or an equitable right over the land in issue, pursuant to the purported acceptance of its application by the MOL, in his letter of the 9 September 1994 *(Exhibit 'C')*, and subsequent revocation by the MOL, in his letter of 15 September, 1994 *(Exhibit 'E')*, of any allocation of land to SIPA, and further directions to the COL, also to revoke any offers to SIPA, and to prepare a grant instrument in favour of it.

SIPA on the other hand also asserts a legal or an equitable right over the said land and relies inter alia, on a legally binding contract between the COL and SIPA.

The Powers of the MOL and the COL

The common questions for consideration by this Court are:

(i) Does the MOL have power under section 4(4) of the Land and Titles Act to allocate the said lots to DJG and thereby to bind the Government?

(ii) Does the MOL have power under s.4(4) to revoke the allocation to SIPA by the COL, and bind the Government?

(iii) Does the MOL have power to direct the COL to revoke the allocation and offer made to SIPA, and is the COL legally bound to comply with such direction. Does he have power to direct the COL to allocate land to DJG?

(iv) Does the MOL have power to direct the COL to prepare a grant instrument in favour of DJG for execution? Is the COL lawfully bound to comply with such direction?

These are crucial questions the answers to which will determine which way the judgment will go.

The MOL and the COL each claim that the powers relied on in this case are derived from statute; the Land and Titles Act [Cap.93], *(hereinafter referred to as "LTA")*. Both claim to have exercised their powers within the precincts of the said Act, on one hand, whilst on the other hand, they each assert that the other is acting beyond the powers prescribed in that Act.

The Law

The crucial section relied on is section 4(4) of the Land and Titles Act. It reads:

> "The Commissioner shall have power to hold and deal in interests in land for and on behalf of the Government, and, subject to any general or special directions from the Minister, to execute for and on behalf of the Government any instrument relating to an interest in land."

The first part of the said subsection describes the power of the COL *'to hold and deal in interests in land'*. That power however is not exercised in his capacity as the COL per se, but <u>for and on behalf of the Government</u>. This clause is very, very important. It identifies both the recipient, and the beneficiary of that power, and its effect; which is that it will bind the Government. Note in particular, that there is no reference to the MOL.

The second part of that section then refers to the power of the COL *"to execute for and on behalf of the Government any instrument relating to an interest in land".*

The first issue of construction on the above subsection is as to the meaning of the phrase *"and, subject to any general or special directions from the Minister".* Does it refer to the power of the COL to hold and deal in interests in land, or to the power only to execute instruments, or to both? On one hand it is possible to argue that the power to hold and deal in interests in land is also subject to any general or special directions from the MOL, inclusive of the power to execute instruments.

All learned Counsels however, inclusive of Counsel for DJG and the learned Attorney General, do not subscribe to that construction of the subsection. All their submissions have been made on the basis that the phrase *"and, subject to"* only applies to the power of the MOL to issue directions in respect of the execution of instruments. I think that is correct, and I have dealt with the submissions of learned Counsels on that basis as well.

DJG's Argument on the first part of subsection 4(4)

Mr Traczyk seeks to place emphasis on the words *"for and on behalf of the Government",* and to argue that in this case, the Government through the Minister, has decided how the COL is to *"hold and deal"* with the land in question on its behalf, namely, that a fixed-term estate be given to DJG. He cites in support, the preamble to the Constitution, and argues that the power of the Commissioner under section 4(4) of the Land and Titles Act to hold and deal in interests in land, for and on behalf of the Government, is limited to the extent that the COL is responsible to the Government through the Minister. He then argues on the point of Government policy and

submits that the decision by the MOL to allocate a fixed-term estate to DJG was in line with Government policy, as stated in the evidence of the MOL. He further argues that no firm or binding government policy has been expressed or formulated, prior to the Minister making his decision to allocate a fixed-term estate to DJG. Accordingly, he submits that the COL decision to allocate a fixed-term estate to SIPA, is not for and on behalf of the Government, and is a decision in excess of jurisdiction. On the other hand, the decision of the MOL to allocate a fixed-term estate to DJG is a valid allocation in law and binding on the Government.

The above arguments raise the first question earlier posed, plus a collateral question which must be addressed together.

(i) (a) **Does the MOL have power under section 4(4) Land and Titles Act to allocate the fixed-term estate in Lots 147 and 127 to DJG and to bind the Government?**

(b) **What about the COL? Does he have the power to allocate the fixed-term estate in the said lots to SIPA and is it binding on the Government?**

As to question (a) above, I have already recounted Mr Traczyk's submissions on that point. Both Counsels for SIPA and the COL on the other hand, have argued strongly that the MOL has no power to allocate a fixed-term estate to DJG and, that any such allocation is not binding on the Government.

The answer to the above important question in my view must be found within the provisions of the Land and Titles Act; in particular, section 4(4) Land and Titles Act. This would require a close examination of the first part of subsection (4). That part of subsection (4) in my respectful view is crystal clear. There is no ambiguity or uncertainty about it. It is the COL, not the MOL who has been delegated the power to hold and deal in interests in land for and on behalf of the Government. **So what does that power to hold and deal in interests in land entail?**

Mr Traczyk for DJG argues that the power of the COL to *"hold and deal in interests"* in land, does not include an agreement to transfer; which, in effect is to say, that the COL does not have the power to allocate the fixed-term estate in the said lots to SIPA, or, to agree to sell the said lots to SIPA. The effect of this, is that whatever allocations or agreements to sell the said land to SIPA were entered into by SIPA and the COL, were a nullity. The only valid allocations or agreements, were the ones entered into by the MOL in favour of DJG. In support of his submissions, Mr Traczyk sought to apply the definition of *"to deal"* in the following way. He

says that the word *"Dealing"* has been defined in the Land and Titles Act at section 2 as *"includes disposition and transmission"*. The word *"disposition"* in turn is defined in the Land and Titles Act as *"any act .... but does not include an agreement to transfer...."*. He then concludes by saying that the words *"to deal"* should be interpreted as not including an agreement to transfer. The actions therefore of the COL in allocating a fixed-term estate to SIPA prior to the allocation by the MOL were in truth a nullity.

SIPA and the COL Argument

The learned Solicitor-General refers to the definition of the word *"deal in"*, as contained in the Oxford Advanced Learner's Dictionary of Current English as, *"(deal in something) stock, sell, trade in. "Trade in"* is defined as *"buy and sell"*. He further submits that to agree to transfer means agree to sell, and points out that the ordinary meaning of the word *"deal in"* should be applied. This would mean, *"to sell", "trade in"* and includes to *"buy and sell"*. He pointed out too that the definition of *"dealing"* in the Land and Titles Act is inclusive and not exclusive.

Mr Radclyffe, Counsel for SIPA also supports the interpretation given by the learned Solicitor-General.

The Court's Interpretation

With respect to the submissions of Mr Traczyk, it is my view that the restrictive interpretation sought to be applied to the words *"to deal"* in subsection (4), unjustified, and misconceived. In seeking to identify the legislative intention or will of Parliament or the Legislators, in using those words, it is important to consider the context in which they are used. They refer to the powers of the COL as prescribed in subsection 4(4) Land and Titles Act. It is the COL who has been specifically given those powers to deal in interests in land, not the MOL. Accordingly, it would not be in accord with the general rules of construction, to give fair, wide and liberal interpretation, to the use of those words, unless the context otherwise shows. There is nothing in the context of subsection 4(4) Land and Titles Act, to show that a restrictive interpretation should be applied.

Further, the definition referred to in section 2, of the Land and Titles Act, of the word *"dealing"*, does not say *"means disposition and transmission"*. It states rather, *"includes disposition and transmission"*. In *"Words and Phrases legally defined"* 3rd Edition, the word *"include"* is defined as:

> "The word *'include'* is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such

things as they signify according to their natural import, but also those things which the interpretation Clause declares that they shall include."

The learned Author in that Dictionary however, did point out that the word *'include'* is susceptible of another interpretation, but that the context of the Act should show this out as implying an exhaustive definition of that word. That has not been done here by Mr Traczyk, and accordingly I must reject his submission on the meaning to be given to the words *"to deal"*.

The phrase *"deal in"* is defined by the Oxford Advanced Learner's Dictionary to mean: *"sell something, trade in something; concern oneself with something; indulge in something."*

The Australian Little Oxford Dictionary defines it as: *"be seller of"*.

Black's Law Dictionary, 6th Edition defines it as: *"an act of buying and selling; a bargain to purchase at a favourable price"; "To traffic; to transact business; to bargain or trade"*.

I am satisfied that the correct meaning that should be given to the use of the words *"to deal"* is as stated above, and as contained in the submissions of learned Counsels for SIPA and the COL. This means, contrary to the submissions of Mr. Traczyk, that the COL has power to enter into an agreement to transfer, or more correctly, an agreement to make a grant of a fixed-term estate. It also means that he has power to allocate land, or allocate a fixed-term estate in land to SIPA, and which will be binding on the Government. He also has power to make valid offers for sale of land which are capable of binding the Government, if accepted. In other words, he has power to enter into contracts for the sale and purchase of land.

So what of the power of the MOL to allocate land, or a fixed-term estate in land, capable of being binding on the Government?

I have pondered over the provisions of subsection (4), and cogitated over the submissions of Mr Traczyk, but with respect have not been able to accede to the submission that he had the power to make a valid allocation capable of having a binding effect on the Government, or of conferring rights on the allocatee. He may have been making allocations of land in the past, but the qualification that must be added is that until they were taken up by the COL and acted upon, they would not, in my respectful view have been binding on the Government. As oft repeated, it is the COL who has been given that specific power. If the MOL has an interest in the allocation of land, in this case to DJG, and I must point out here clearly, that the letter of DJG of 29 August, 1994 to the MOL, in my respectful view does not contain anything improper or was improperly done, then he would have been obliged to consult the COL, obtain all the necessary

information concerning the said lots, appraise himself fully of SIPA's interest, and then make a reasoned and informed response to that letter, short of making any promises of allocation or offer, and then directing DJG to get in touch or communicate with the COL. This, however, is not what the MOL did. By letter of the 6 September, 1994 and 9 September, 1994, he purported to make an allocation of a fixed-term estate in the said lots (*147 and 127*) to DJG. With respect, he had no power to make a binding allocation of the said lots in favour of DJG, capable of conferring any interests or rights on DJG.

Such a promise would have amounted to nothing more than a mere promise to allocate, subject to the COL power, to hold and deal in interests in land, for and on behalf of the Government. In the circumstances, it is my respectful view that what the MOL could have done, is to accept the letter of DJG of the 29 August 1994, and promise to provide assistance *(where possible, and it must be noted that that was all that DJG was asking for, assistance to acquire lots 147 and 127 - but they got, so they assert, more than what they asked for - a direct allocation from the MOL)* then consult with the COL if DJG's request for assistance could be accommodated.

As pointed out, the functions and powers of the COL and the MOL under the provisions of the Land and Titles Act have been defined or designed in my respectful view, on the presumption that those persons or Offices, being in the same Ministry, and machinery of the Government, and to that extent would be pursuing common goals, would be working closely together, and where there are differences, to be able to sort these out amongst themselves, rather than portraying a confused or mixed-up state of affairs.

But even if the MOL had power to allocate such land, there are other significant points which would need to be addressed. First, the allocation done by the COL to SIPA **prior** to the allocation by the MOL, must be considered and its status and effect ruled upon *(this point will be expounded on later)*. Secondly, if an allocation has been made by the MOL, does it bind the Government *(this has already been addressed and answered in the negative)*, and thirdly, has valuable consideration been provided for that allocation?

Further, it is my view that a relevant question to ask would be whether an offer has been made by the MOL, in the manner done by the COL in his offer of a grant of the fixed-term estate in parcel 191-022-83 to SIPA? If so, when, and when was acceptance made to show a legally binding contract between the MOL and DJG. Much questioning was done by Mr Traczyk in cross-examination of Mr Cherry Tanito and Nicholas Constantine regarding the revised offer of the COL in the letter of the 14 September, 1994. However, he has not been able to point to any similar substantive evidence of even the existence of an offer to DJG. It may be argued that it was in the pipeline, and would have been made had the COL not refused to comply with the

directives of the MOL. I accept that would be correct to a certain extent, but it only goes to show and to prove very clearly in my view, that the dealings between the MOL and DJG at the most, were negotiations and promises to do something, or an agreement on the part of the MOL, to transfer the said lots. As already pointed out, the MOL had no power to do that and even if he had, it would not be binding on the Government, especially when there had already been a prior, valid allocation, and no consideration given for that promise of the MOL.

If it was the MOL who had such powers to make a valid and binding allocation of land, plus over-riding powers of allocation and revocation, then why in all those years, from 1978 to 1994, through successive ruling Governments, Ministers and Commissioners of Lands, and Government legal advisors, was SIPA never told or advised that the correct or right persons to be dealing with, regarding the allocation of land was the Minister responsible? After all those years and through so much, SIPA's interest should suddenly be obliterated by the stroke of a pen. I do not think that such an argument supports the view that the MOL had such powers of allocation.

This brings me to address briefly the collateral question posed and already dealt with in this judgment to some extent.

(b) (i) Does the COL have power to allocate a fixed-term estate in the said lots to SIPA that is capable of being binding on the Government and for conferring rights or interest on SIPA?

As has been stated by this Court, when dealing with the submissions on the meaning of the word *"to deal"*, I am satisfied that the COL had the necessary power to allocate land and to enter into an agreement to transfer or grant. I also pointed out that such actions in the exercise of the power to hold and deal in interests in land were capable of being binding on the Government and of conferring rights.

(ii) The next question to consider is, was there an allocation of a fixed-term estate in the said lots made in favour of SIPA?

I do not think it can be seriously disputed if at all, that Lots 147 and 128 had been allocated to SIPA **prior** to September of 1994 *(see Bundle of Documents marked "CT1", in particular documents "C", "D", "E", "F" and "I" and document "CT2").* Those documents not only identify clearly the area of land that has been allocated, but also are evidence of the existence of such an allocation.

Document *"C"* is a copy of a minute by the former COL, Mr Riogano, of his discussions with the then Minister of Commerce and Primary Industries, whose portfolio at that time included the Ministry of Agriculture and Lands as it was then known. That minute was dated 3 April, 1991. At paragraph 1 the records read:

> "The Commissioner of Lands informed the Minister that all the land east of Commonwealth Avenue and West of the Shell depot bounded with Mendana Avenue including the old Ministry of Education Office, Marine Headquarter Office has been reserved by SIG for Port Development. The road alignment however should be confirmed so that the actual land can be granted."

Document *"D"* is a copy of the letter dated 5 November 1991 from the General Manager of SIPA to the Commissioner of Lands and reads:

> "We request you to proceed with the transfer of the plot of land between Shell depot and Commonwealth St. in parcel 191-022 to the Authority but excluding the Marine Division Headquarters from the sub-division in view of the objections raised by the Ministry of Transport."

Both document *"C"* and *"D"* show clearly in my view that as far back as 1991, it was clearly recognised and understood by both the then Commissioner of Lands and SIPA, that the land comprising Lots 147 and 127 had been allocated to SIPA, or that the COL had agreed to sell the said land to SIPA.

Document *"E"* is a letter from the then Secretary to the Honiara Town and Country Planning Board, dated 26 August 1992, at paragraph 5 of page 2, stated:

> "Meanwhile for your information, the area between Commonwealth Street and, Shell Depo *(sic)* (see attached) have been prioritised for Ports related activities by Commissioner of Lands and, already Ports Authority is working on Development Plan of the site."

Document *"F"* is a letter from the Chief Physical Planner dated 11 March 1993 and addressed to the Commissioner of Lands. It identifies the site as *"Lot 84, 115 (Part) 116, 117 and 128 Honiara Proposed Development Ex-Education Building Site"*.

At paragraph 4, it reads:

"I have no hesitation to recommend that you grant the land requested for this massive investment."

Documents *"G"* and *"H"* also confirm that an allocation had been made to SIPA.

Following on from that allocation, an offer *(Document marked Exhibit "I")* dated 24 January, 1994 was formally made to SIPA.

I think it should now become obvious why Mr Traczyk is obliged to take a restrictive interpretation of the COL's powers to hold and deal interests in land. The evidence is overwhelming, that an allocation to SIPA by the COL, of the land between Commonwealth Street and the Shell Depot, pre-dates the purported allocation of lots 147 and 127 by the MOL, by at least three years *(note that in the affidavit of Nicholas Constantine, he says that it went as far back as 1978. In the affidavit of Cherry Tanito, he says it went as far back as the early 1980s).* Such an allocation as I have ruled, falls squarely within the powers of the COL, and is a valid exercise of his powers and capable of becoming binding on the Government and conferring rights on SIPA. So already we can see and note that the COL for and on behalf of the Government, had already made an allocation of the fixed-term estate in the said land *(inclusive of lots 147 and 127)* to SIPA. That allocation would have been binding on the Government.

What the MOL therefore purported to do in September of 1994, was to re-allocate land that had already been allocated by the Government to SIPA. As already stated, he had no power to do that, but even if he had, it would have been a meaningless or bare allocation. Some argument has been raised as to the correct identity of the said lots allocated to SIPA. I do not think any thing of significance can be raised on this. The evidence adduced is clear and unequivocal as to the identity of the said land, and any suggestions otherwise have no basis.

One of the other arguments raised by Mr Traczyk against the actions of the COL, which he says brings his actions outside the scope of his powers to act for and on behalf of the Government, is his submissions on the stated Government Policy. Mr Traczyk argues strongly that the MOL had stated clearly on evidence before this Court that his decision to allocate the fixed-term estate to DJG was in line with Government Policy to promote tourism and commercial enterprise. On the other hand, he argues that no firm or binding government policy had been expressed or formulated, prior to the MOL in this case making his decision to allocate a fixed-term estate to DJG. There has been some reference to a Cabinet Document, marked exhibit *'B'*, contained in the files of the COL and filed in Court as containing some references to stated Government intention and indicative of the Government Policy of the day. Whilst it has been correctly submitted that Document *"B"* is but a discussion paper for Cabinet, and that it had not been

adopted by Cabinet, its relevance is that it does show the interest that SIPA had in the said area of land, and the willingness of the Government of the day to allocate and set aside that land for SIPA. It is important to note that there is no evidence to show that the actions of the COL were inconsistent with the Government Policy of the day, or unlawful or ultra vires. No issue on Government Policy was raised in all those years. It only became an issue when the MOL had purported to make a re-allocation of the same area of land, and then to justify his actions on grounds of Government Policy.

The submissions pertaining to the requirement of a Cabinet paper or Cabinet approval, in my respectful view is not fatal. If the same requirement is imposed on the MOL, it is with respect that I find no evidence whatsoever of any Cabinet paper or approval, or even of a Cabinet discussion paper, on the said lots, and in particular over the said land. There is however, at least evidence of a Cabinet Paper on the use of the said land in favour of SIPA. The learned Solicitor-General has correctly pointed out that a mere statement without more is not conclusive proof of what has been alleged. Where are the documents showing the Cabinet Paper on approval or policy, on the land use of the area of land between Shell Depot and Commonwealth Avenue?

There is however a more important reason which supports the COL's actions. The question is not so much whether there is in existence a Cabinet Paper or document verifying the actions of the COL, as to whether his actions can be described as unlawful or ultra vires, and therefore not binding on the Government. If as a matter practice, there is a requirement that the COL must always only act in the presence of a Cabinet Paper, then well and good, and I do not see any difficulties with that because after all they are all pursuing a common cause. There is however no evidence of such a practice in existence and applicable in this case.

No evidence to the contrary has been shown that the actions of the COL were unlawful or ultra vires. The COL dealings with SIPA had been going on for a good number of years, even as far back as 1978 *(some 16 years)* and in all that period of time, not one scintilla of objection had been raised against what was going on, by the appropriate authorities in Government. The negotiations, discussions and dealings between SIPA and the COL were never held or done in secret. All relevant authorities exercising some sort of power over the use of the said land, had rather given their express support and approval to the proposed grant, or offer to sell the land to SIPA. I think there is more than enough evidence before this Court to satisfy me that the allegation raised by Mr Traczyk, that the COL was not acting for and on behalf of the Government, cannot be sustained.

(ii) Does the MOL have power under section 4(4) Land and Titles Act to revoke the prior, valid allocation made to SIPA by the COL, and be binding on the Government.

The power of the MOL to revoke would have been correlative to the power to allocate or make an offer, *(if there had been any)*. I have already found that there was no valid power capable of being binding on the Government to make an allocation of land or offer, and accordingly, it only stands to reason that there is no consequential power to revoke.

But even if he had such a power to revoke, it would not be a proper exercise of such a power, and would be invalid, in view of the circumstances where valuable consideration had been provided by SIPA for that allocation or promise to make a grant of a fixed-term estate, *(this will be discussed in more detail later)*. In such a situation, a binding agreement would have been in existence and rights conferred on SIPA, if not in law, then in equity.

Further, all things being equal, it is my respectful view that SIPA would have had a better claim in priority over DJG.

(iii) Does the MOL have power to direct the COL to revoke the allocation and offer made to SIPA, and is the COL legally bound to comply with such direction. Also, does he have power to direct the COL to allocate land to DJG?

In the normal course of events, the MOL would be working closely with the COL and vice versa, and that therefore it would not have been necessary for the MOL to be placed in such a position or be forced to make a directive to the COL. There is nothing in subsection 4(4) Land and Titles Act which says that the MOL cannot issue directives on the COL. And so, in answer to the first part of the question posed above, the MOL can issue as many directives as he wants on the COL. However, and this is what distinguishes in my respectful view the powers of the COL as provided for in the first part of subsection 4(4) Land and Titles Act from the second part. In the first part, there is <u>no lawful requirement</u> on the COL to comply with such directives. The most that can be described of the COL responsibility towards such direction is that it can be described as a matter within his discretion. The COL is obliged to take that directive into account in the exercise of his discretion, but whether he complies with it or not, is a matter that he alone must make. He is not bound by law to comply with it.

There is however, a more fundamental reason, and this has already been adverted to, why even, if the MOL had such a power to direct the COL to revoke the allocation to SIPA, the COL would not be in a position to do so, on the grounds that SIPA had already provided valuable consideration, for that allocation, or promise or agreement to make a grant, and that therefore it would be inequitable for him to do so, or be in breach of such an agreement. SIPA, on the other hand would have acquired an interest or right, if not in law, then in equity. The Government therefore would have been bound by the actions of the COL to proceed with the Agreement to make a grant of the fixed-term estate in the said lots, to SIPA. There is clear evidence which showed that in reliance on the promise of the Government to sell the said land to SIPA, it had acted to its detriment, by expending time, effort and money in getting the relevant authorities informed and approval obtained where necessary. These included the Physical Planning Division, Honiara Town Council, and the Honiara Town and Country Planning Board. Further, when the former Ministry of Education buildings were destroyed by fire in December 1993, the then Commissioner of Lands authorised SIPA to demolish the buildings and remove debris from the site. They have expended time money and effort to do this. SIPA had also expended money in having a concept plan for the site drawn up. In May of 1994, SIPA had also paid a ten percent deposit on the original offer made in January of 1994. The above is sufficient evidence in my view that there is a clear intention shown or demonstrated in the conduct of the parties, SIPA and the COL, to enter into a legally binding relationship, and evidence of consideration having been provided for the promise to sell or make a grant of the fixed-term estate in the said land.

There is also an exception, if one wants to call it that, in my respectful view, where the COL would not be required to comply with such directions. And this is where the directions issued are unlawful and or ultra vires. *(This point will be expanded on later).*

The same arguments above apply to the question whether the MOL had power to direct the COL to allocate the said lots to DJG.

(iv) Does the MOL have power to direct the COL to prepare a grant instrument in favour of DJG for execution? Is the COL bound to comply with such direction?

This is not only an interesting question but a much more complicated question to deal with, and brings me to consider the second .part of the powers of the COL under section 4(4) Land and Titles Act.

> "The Commissioner shall have power ...., and, subject to any general or special directions from the Minister, to execute for and on behalf of the Government any instrument relating to an interest in land."

The relevant directions of the MOL for consideration reads as follows:

> ".... the Commissioner of Lands is hereby directed to prepare the grant instrument for your execution......"

Mr Traczyk argues strongly that the MOL had given clear directions that the COL must not execute any instrument in favour of SIPA, and a further clear direction that the COL must execute an instrument in favour of DJG. The COL therefore was lawfully bound to comply with the directions of the MOL. He had refused to do that and therefore was acting ultra vires his powers when he purported to accept the payment of fees by SIPA on the 16th or 19th of September, 1994, as consideration for the offer made on the 14 September, 1994.

The effect of that direction

It is not disputed by learned Counsels for SIPA and the COL, that the MOL has express powers to issue general or special directions to the COL, on the question of execution of instruments. Their main contention here is that the direction of the MOL was unlawful and, or ultra vires, and therefore a nullity.

I think it is important to identify the true meaning or import of that direction. The true import of that direction as issued on the 15 September 1994, would be to require the COL to prepare a grant instrument, but, in the absence of any allocation having been made in favour of DJG, and of any offer having been made and concluded between them. This would also mean the preparation of a grant instrument in favour of DJG, in the absence of any rights or interest having been acquired by it. There is no evidence of any such interest or right having been acquired by DJG.

In those circumstances, the exercise of that power produced a bare direction, devoid of substance. The exercise of such a power in my view was therefore improper, and contrary to the purposes and intents of subsection 4(4) of the Land and Titles Act. The context within which the exercise of that power to issue general or special directions in subsection 4(4) must be borne in mind. It arises at the point of execution of instruments. In the normal course of events, and it is my respectful view that section 4(4) was enacted on the basis or assumption that, there would be no major or continuing conflicts on the part of the Government in the initial or prior stages before the stage is reached for the execution of documents. Any prior or

preliminary matters in conflict therefore would have been sorted out before the execution stage is reached; which normally is the last or final thing to be concluded. What this means is that normally the relevant officers and or authorised persons in the machinery of Government would be or should be working and consulting closely together, pulling their heads together, rather than against each other. The actions of the Government therefore should be and must be seen to be operating consistently from beginning to end. In the facts of this case however, the very opposite seems to have been sought to be done, with a direction to do the final or last thing first when there are substantive matters yet to be agreed upon. It is my respectful view that that was clearly an improper exercise of such a power and therefore unlawful.

Under cross-examination, the MOL confirmed that what in effect he meant by that direction was for the COL to sell the land to DJG. The COL therefore was to negotiate with DJG on the premium, annual rental, the term of years and other terms and conditions of sale of the land. The COL would then have to make an offer to DJG, and if accepted, then consideration would have to be paid. After these have been concluded, a grant instrument would be prepared for execution by the parties. In this case, none of the above had even been commenced. This is quite an unusual state of affairs because all the essential matters needed to be agreed upon before a grant instrument is prepared for execution had not been done. There is therefore in existence a lot of uncertainty between the parties and anything could happen in between. Mr Radclyffe has correctly pointed out that even if the COL had been willing it was not possible for the COL to comply with the directive.

The learned Solicitor-General has also correctly pointed out, that the direction to the COL to prepare a grant instrument for execution was in effect a direction to the COL *"to deal in"* interests in land; that is, to sell the land to DJG. Such a direction brings the matter within the powers of the COL to hold and deal in interests in land as contained in the first part of subsection 4(4) Land and Titles Act. The effect of this therefore would be to bring it within his discretion, whether to comply or not. As has already been pointed out, he was not legally bound to comply with such a direction. In this case he had exercised his discretion against complying with the directive of the MOL and it has not been shown to my satisfaction that he had acted unlawfully or ultra vires. That signals the end of the matter.

A more substantial reason has been submitted by learned Counsels for SIPA and the COL as to why in their view the directions of the MOL even if it could be argued in this particular case that he had the power to make it, should not be complied with. They argue that whatever general or special direction is given must be a real direction. In support, they refer to the well-established principles enunciated in the English case of *Associated Picture Houses -v- Wednesbury Corporation [1947} 2 All. E.R. 680.* The above principles have been cited with approval by this

Court many times, including in the case of *Waiwori -v- The Attorney General* CC.191 of 1990. At page 14 of his submissions, the learned Solicitor-General has conveniently set out the principles within which the exercise of the discretion is made. They are as follows:

"(a) there must be a real exercise of the discretionary power;

(b) look at the statute conferring the discretionary power to see whether there are matters to be taken into account and matters not to be taken into account;

(c) bad faith;

(d) dishonestly;

(e) unreasonableness;

(f) attention given to extraneous circumstances;

(g) public policy.

At pages 14, 15 and 16 of the submissions of the learned Solicitor-General, he argues that the MOL had exceeded his powers. Mr. Radclyffe has also set out at pages 9-11of his submissions, similar reasons in support.

The Court's View

The above submissions are crucial to the final determination of the outcome of this case. The reason is because even if it could be argued that the COL's power "to hold and deal in interests in land" was subject to any general or special directions from the MOL, the same arguments raised above would also be relevant in such instance. *(Note that I had ruled that the MOL did not have such power).*

Was the direction to the COL to revoke the allocation made to SIPA ultra vires the powers of the MOL? Has a real direction according to the principles enunciated in the Wednesbury case *(ibid)* been made?

I have carefully considered the reasoned submissions of learned Counsels for and against the question of whether the MOL had acted ultra vires his powers when he issued the directives to the COL. In my respectful view the principles enunciated in the Wednesbury case *(ibid),* also apply here. It must be an accepted fact, that whatever directions are issued by the MOL, must

be lawful. It cannot be contemplated that the MOL would issue unlawful directions and expect the COL to comply with that. That would make the COL a party to the unlawful directions of the MOL.

Does the MOL have a discretion in the exercise of that power to issue directions?

The answer in my respectful view is yes. The submissions of the learned Solicitor-General on the meaning of the phrase *"subject to"* is correct. He cited the statement of Megarry J in the English case *C and G Block Ltd -v- Inland Revenue Commissioner* [1973] 2 All E.R. 513 cited by this Court in the case of *Bjannar Pty Ltd and Roberts -v- Comptroller of Customs and Excise* CC. No. 279 of 1992, at page 10;

> "In my judgment the phrase *'subject to'* is a simple provision which merely subjects the provisions of one subject subsections to the provision of the master subsection. Where there is no clash, the phrase does nothing: if there is a collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision."

The decision whether to issue directions or not is a matter for the MOL to decide. If he decides to issue directions however, it does not necessarily mean that there will be a conflict. It is only where a conflict has arisen, as a result of that direction, that the COL is required to comply with the MOL's direction. That direction however may be impugned if it is discovered to have been made in excess of the powers of the MOL.

(i) <u>Taking into account an irrelevant and unlawful matter</u>

The learned Solicitor-General submits under this ground that the MOL had taken into account an irrelevant and unlawful matter when he exercised his discretion, based on his prior *'allocation'* to DJG, and prior directions to revoke the allocation and offer to SIPA simultaneously. In evidence it was confirmed by the MOL that the main reason for directing the COL to revoke the offer to SIPA and preparing a grant instrument was because of his own *"allocation"* to DJG, and therefore he felt bound by that commitment.

Mr Traczyk points out that it was perfectly proper for the MOL to take into account any earlier decisions that he had made.

However, that would only have been correct had a valid allocation been made. As has been ruled upon, there was no valid allocation to DJG, that would be or is binding on the Government. I have discussed this matter already and so do not need to go into detail about it.

I am satisfied in those circumstances that the MOL did consider an irrelevant matter.

Mr Traczyk also submits that it was an entirely appropriate matter to take into account by a Minister representing a Government that clearly wishes to encourage economic development.

Again the problem with this submission is that it assumes that the MOL had the power to make allocations to DJG. And secondly, even if he had such powers it would have been impugned as being cultra vires. The fact therefore that it would have been on entirely appropriate matter, even if true, would have been immaterial.

(ii) Failing to take into account relevant matters

The learned Solicitor-General points out that the COL had not been consulted at any time prior to the MOL making his decision. Had he done so he would have been fully appraised of the whole situation regarding the said land.

Mr Traczyk on the other hand submits that the MOL had a full appreciation of SIPA's interest and also the history of the land. He also submits that the MOL had set out specific reasons for his decision and that as a matter of law it was not necessary for him to consult the COL.

With respect, the above submission of Mr Traczyk overlooks the simple fact that prior to that letter of the 15 September, 1994, the MOL had purported to re-allocate the said lots to DJG. If one takes the time to think about that action, then it is possible to conclude that the Government is kind of acting funny; allocating land here and then re-allocating the same land there. Had the MOL consulted the COL, which I say, should, and was an absolutely necessary obligation, the MOL would have been fully appraised of the prior valid allocation and offers to sell the land to SIPA.

With respect, such actions *(of the MOL)* can only produce confusion and uncertainty, and which would be contrary to the policy and objectives of the Land and Titles Act. One of the very reasons in my respectful view, for the enactment of section 4(4) Land and Titles Act in the way it was done, was to avoid such situations of confusion and uncertainty.

Had consultation been done, the MOL would have been told about the long standing relationship between SIPA and the COL. He would have been told about the prior, valid binding allocation made to SIPA. There is no evidence to show that the said actions of the COL were unlawful and, or ultra vires. He would have been told about the fact that SIPA had provided valuable consideration for that allocation or promise to offer the land in which the said lots were, to SIPA, prior to September 1994. He would have been told or made aware that SIPA had acquired rights if not in law then in equity, and if there had been any doubts then he may have

been advised by the COL to go and see the Attorney General. He would have been made aware of the fact that in reliance on that allocation or promise, SIPA had acted to its detriment, in expending time, effort and money, including a part payment towards an offer made in January of 1994 of a ten percent deposit in May 1994. The simple fact of the matter is that his failure to consult with COL, had resulted in him making an uninformed decision, as correctly submitted by Mr Radclyffe, ignorant of the facts and law.

Other arguments against Mr Traczyk's submissions are as follows. First, despite the fact that the letter of the 15 September, 1994, gave the impression that he had a full appreciation of SIPA's interest and also the history of the land in question, the simple fact remains that he had already made up his mind prior to the 15 September 1994, and that the reasons given were simply to justify his decision to allocate the said lots to DJG. There is a world of difference between taking all relevant matters into account before making a decision, and making a decision then coming up with reasons to justify it.

Secondly, I do not think Mr Traczyk's submission can be taken seriously when as a matter of fact, a full appreciation of SIPA's interest and history of the land cannot be obtained other than from the COL himself. I've already touched on this. It may be argued however, that the MOL can have direct access to documents and files from the Office of the COL without actually consulting him, and that may have been the means how he may have gotten his information; bearing in mind that he was ignorant of SIPA's interest prior to the 14 September, 1994. If that was the case, then why didn't he consult the COL personally and get his views and or advice. Why the arms-length approach towards the COL, when both of them are supposed to be on the same side when dealing with applications from outside interests?

Fourthly, if Mr Traczyk's submission is taken seriously and followed through, it could produce a somewhat interesting situation; even to the stage where it may be suggested that the MOL might as well take over the functions of the COL himself and run that Office as well. I do not think the MOL would subscribe to that suggestion.

Fifthly, the functions, powers and duties of the COL are so intertwined with the whole tenure of the Land and Titles Act that it is virtually impossible to divorce him from any proceedings pertaining to land, whether in the initial or final stages.

Sixthly, the necessity to consult with the COL is made even doubly important, where the decision of the MOL runs counter to the COL prior decisions and had bound, or are binding on the Government.

(iii) Bad Faith

(a) In his submissions on the exercise of the MOL's discretion, Mr Radclyffe also points out that in Tanito's evidence he had stated that in other cases the MOL deliberately gave allocation letters to junior officials so that the COL did not see them till later. He submits that this is evidence of bad faith.

In view of the way this Court has rules on the power of allocation of the MOL, I do not think it is necessary to consider this point.

(b) Mr Radclyffe also points out that if the Court should accept Tanito's evidence that the Minister did know about SIPA's interest when they were both members of Honiara Town and Country Planning Board, then that was evidence of bad faith.

The MOL had denied knowledge about SIPA's interest prior to his decision in purporting to allocate the said lots to DJG. That could very well be correct. The fact that he was a member of the Honiara Town and Country Planning Board does not necessarily mean that he was aware of SIPA's interest. And even if he had been aware, it is possible that he may totally have forgotten about it. I am not satisfied on the evidence that bad faith is a relevant consideration here, but more so, for the same reasons given above.

(iv) Failure to get legal advice at the time. Letter of 4th April, 1995 is evidence that Minister unsure of the law.

This has come about only because of the apparent conflict that had arisen between the MOL and the COL. Had the basics been complied with, such conflicts may have been averted, minimised and settled or before any further decisions were made.

(v) Failure to enquire whether DJG has resources to develop the land

I do not think this is an overly important point. Had the normal procedures been followed, then those are administrative matters within the Office of the COL to assess and determine, together with all other relevant matters before any decisions would be made to allocate such land to DJG. The point however, has been made, that the normal procedures appear to have been ignored.

(vi) Failure to check with the Planning Division. If he had done so he would have realised that part of the land zoned for Port's use.

I think this point is closely connected with the point raised earlier concerning the failure to consult the COL. Had he consulted the COL, he would have been told inter alia that part of the said land had been zoned for Port's use.

(vii) **If the Court accepts the Minister's evidence that he only found out later about SIPA's interest he should have revoked the application to DJG. He clearly believed he had power to revoke as he had done so to KPF Consultancy *(See Exhibit CT4).***

I think there is some merit in this argument. The MOL did concede in evidence before this Court that had he known about SIPA's interest, he would not have allocated the land to DJG. However, after he had been informed by the COL's about the Government's commitment to SIPA, he persisted in his decision to allocate the said land to DJG. If what he had said on oath correctly reflected his true frame of mind, then all things being equal *(which, I say is not at that point of time, because the scale is more heavily weighted in favour of SIPA)*, he would have been obliged to revoke the *"offer"* or *"allocation"* made to DJG. By all comparison methods, that allocation to DJG would have been the least costly to unravel, as compared with SIPA's. And if he was unsure, then legal advice should have been sought from the Office of the Attorney General.

(viii) **Breach of natural justice**

The crucial submission of Mr Radclyffe is that SIPA had acquired a sufficient interest in the said land giving rise to rights, or a legitimate expectation that the fixed-term estate in the said land would be granted to it. The learned Solicitor-General describes SIPA as an *"affected party"* and thereby entitling it to a right to be heard.

On the other hand, Mr Traczyk submits that at the time the MOL made his decision, SIPA had no legally enforceable interest in the land.

A number of cases have been referred to by Mr Radclyffe on the issue of a *"legitimate expectation"* which he says would be sufficient to entitle a person to treatment in accordance with the principles of natural justice.

The first case referred to is *Schmidt -v- Secretary of State* [1969] 1 All E.R. 8904 at page 909. The relevant statements of Lord Denning M.R. read as follows:

> "The speeches in Ridge v. Baldwin [1963] 2 All E.R.66, show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has

some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive without hearing what he has to say." *(paragraph c, p.909).*

His Lordship then went on to compare the rights of a Commonwealth citizen who had a right to be admitted into England if he was *(as he claimed to be)* under the age of 16, with the rights of a Commonwealth citizen who wanted to enter the country to marry a girl there. In the former there was a right to be heard but not in the latter. He also pointed out in that case that an alien who had been given leave to reside in the country for a permitted time had a legitimate expectation to remain for that period, but not longer.

The second case referred to was *Breen -v- Amalgamated Engineering Union* [1971] 1 All E.R. 1148 at page 1154. In that case Lord Denning M.R. also made the following pertinent statements:

"If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given.

But, if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration. Again take Padfield's case. The diary farmers had no right to have their complaint referred to a committee of investigation, but they had a legitimate expectation that it would. The House made it clear that if the Minister rejected their request without reason, the Court might infer that he had no good reason: and, that if he gave a bad reason, it might vitiate his decision."

The words *'legitimate expectation'* have not been defined in the above cases, but they have been used in addition to the words *"rights or interest."*

Can it be said, that SIPA had a legitimate expectation, to a grant of the fixed-term estate in the said land? First, I do not think SIPA had something akin to a privilege, and therefore no rights. I think it had something more substantial than that. To recap, there is undisputed evidence which showed that the said land had been reserved for Port use as far back as 1978 *(see affidavit of Nicholas Constantine, filed 12/6/95).* There is consistent evidence right up to 1994, that there had been an allocation of the said land to SIPA, and that SIPA had taken up that allocation, and acted upon it, to its detriment. It had expended much time, effort and money. I had also ruled

that it had provided valuable consideration for that allocation, or agreement to make a grant of the said fixed-term estate to it. In May of 1994, SIPA had gone as far as paying a ten percent deposit on the original offer of the purchase price, to demonstrate its willingness to be bound legally to that agreement, whilst negotiating further on the actual terms of the purchase price. They have with respect, acquired rights in the said land, which would entitle them to be heard and to make representations on any *"valid decision"* of the MOL to revoke the said allocation to them. If not rights or interests, then in my respectful view, they have a legitimate expectation to have the grant of the fixed-term estate in the said land to be made to them. That would clearly entitle them to the right to be heard. Having come so far, for so much, it would be unfair on SIPA to not be given an opportunity to be heard, before their allocation is revoked. In those circumstances, I am satisfied that even if the MOL had the necessary power to issue such a direction to the COL, it would have been vitiated on grounds of breach of the above rule of natural justice, and accordingly the COL would not have been bound to comply with such a direction.

1. ORDER OF CERTIORARI

The first order sought is for Certiorari to quash the decision of the Defendant (COL) on or about 16 January 1995 to seek registration of subdivision of perpetual estate in Parcel 191-022-83 and 191-022-87.

Apart from all the reasons and explanations given in this judgment, there is one further matter *(and I would say more of a procedural point)* which completes the argument against the granting of such an order. To a certain extent, I think the order sought here has been misconceived; if not, then it has been deliberately couched in such terms to circumvent a legal difficulty inherent in DJG's application right from the start.

Firstly, the decision to subdivide or to lodge an application for subdivision in the Registrar of Title's Office is irrelevant to the question of allocation of land, offer, sale and purchase of land, and disposition of land. Whether that order is granted or not will not affect the question of allocation, offer, sale and purchase of land. For instance, if the order is granted, then it will be to quash the decision of the COL to seek registration.

If does not address the question of his decision earlier made to allocate that land to SIPA, and accordingly, even if that order is granted, the allocation would not have been touched. The order sought therefore is somewhat meaningless.

However, I do not think that can be easily brushed aside as an inadvertent error of judgment. I think it was purposely phrased in those terms to circumvent a real difficulty facing DJG. From

the way the submissions have been presented on behalf of DJG, it is obvious that what should have been sought to be quashed, was the decision of the COL to allocate the said land to DJG. That is the bone of contention between the parties in this case. In his two sentence letter to DJG, dated 14 September 1994, the COL made it quite clear that the said lots <u>had been allocated</u> to SIPA. This same information was communicated to the MOL by a minute through the Permanent Secretary, Ministry of Lands on the same date. That minute read:

> "1. Please inform my Hon. Minister.
>
> 2. Refer to folio 19.
> Lot 147/128 have been allocated to Solomon Islands Ports Authority. Part payment (Deposit) has been made. The site Development Plan has been approved by Town and Country Planning Board.
>
> 3. This site including Shell and Mobil sites have been committed to Solomon Islands Ports Authority since 1978 by the Government during the acquisition of Loan for expansion of Ports facilities from the Asian Bank."

Whether the above minute was forwarded on to the MOL or not is not clear, but there is no evidence to say that it was not duly forwarded.

The difficulty that DJG would have encountered, is as to the question, when allocation had been made to SIPA. In the evidence of Cherry Tanito and Nicholas Constantine, the allocation was made as early as 1978 or the early 1980s. The documentary evidence produced in the affidavit of Cherry Tanito filed on 12 July, 1995 at least shows that allocation had been made prior to 1991. Definitely, it had been made prior to January 1994, when a formal offer was made to SIPA.

Order 61 of the High Court Civil Procedure Rules 1964 sets a time limit of 6 months from the date of the proceeding within which the application for leave should have been obtained. The application for orders of Certiorari were filed in April of 1995, and mainly because of the purported re-allocation of the same lots to DJG. At the time the allocation of the said land was made to SIPA, DJG had no interest whatsoever in the said land. It had no rights and cannot even say to be an affected party. It only became interested after a purported re-allocation of the same land to it by the MOL. It has not been shown to my satisfaction that the prior actions of the COL in dealing with SIPA were unlawful and, or, ultra vires. Leave therefore should not have been granted. In this case, I am satisfied that the orders for Certiorari sought should not be granted.

2. ORDER OF PROHIBITION

The submissions on this point have already been canvassed in this judgment and I do not need to repeat them. For the same reasons given above, an **Order of Prohibition** cannot issue against SIPA. There is just no basis for such an order.

3. ORDER OF MANDAMUS

Is there a public duty on the COL to transfer the said lots to DJG? If so, when did they arise?

With respect, I think the order sought has been misconceived. Also, the word *"transfer"* used is not the correct word. The more appropriate word is *"grant"*. There is no evidence of a statutory duty to grant the said land to DJG. As has been correctly submitted by the learned Solicitor-General, section 4(4) Land and Titles Act does not impose a duty on the COL, it merely empowers him. A duty or obligation to make a grant of a fixed-term estate arises only after a legally binding relationship is entered into between the COL and the Grantee. However, in such circumstances an order for a declaration of the rights of the parties would be the appropriate remedy, bearing in mind that the remedy of specific performance which would have been available between private persons is not available against the Crown *(section 18 of the Crown Proceedings Act).*

It appears to me that the reason why such an order has been sought is that it was based on the submission by Mr Traczyk that the COL was obliged to comply with the MOL's directions; and the MOL's directions was to effect a *"transfer"* of the fixed-term estate in the said lots to DJG. If that was indeed the basis on which the order has been sought, then it has been misconceived also. The remedy that would have been available is a declaration as to the question whether the COL was obliged to comply with the directions of the MOL. This has already been addressed fully in this judgment.

If an order for Mandamus was to be sought then I think the more appropriate party to have brought that action would have been the MOL against the COL, because the duty alleged would have been a duty owing towards the MOL, to comply with his directions.

If DJG is to seek a remedy against the COL, then it could only be by way of a declaration of the parties rights. No statutory duty has been shown to exist towards DJG.

I am satisfied no **Order for Mandamus** should also be granted.

Civil Case 40 of 1995

The Plaintiff's claim (DJG) is for a declaration that the Second Defendant (SIPA) has no statutory or other power to engage in office retail and tourist development of the said land.

In an earlier interlocutory application by way of summons filed on 21 February, 1995, SIPA had sought to have the Writ of Summons filed struck out, on the grounds that it disclosed no cause of action in that the Plaintiff had no locus standi.

On the 12 April, 1995, this Court made an inchoate ruling that the Plaintiff had locus standi. However, now that the triable issues on which that inchoate ruling was based have been ruled upon, the position is now clear that DJG unfortunately, does not have *"sufficient interest"* to raise this claim against SIPA. Accordingly, it simply means that it has no locus standi and its claim should be dismissed.

However, since the parties have raised arguments for and against, I will deal with them briefly.

Plaintiffs Argument

The Plaintiff's argument is based almost entirely on the concept plan submitted to the Court as an Exhibit and described as a concept proposal for an office, retail and tourism development of that area of land. It argues that SIPA is not authorised under section 9 and 10 of the Ports Act to engage in such activities.

SIPA's Argument

The first crucial argument against the granting of such a declaration is that the powers given to the Minister under section 10(1)(u) of the Ports Act are very wide and that therefore the Court should not restrict the proper exercise of the Minister's discretionary power now or in the future.

Section 10 (1)(u) reads:

> "....the Authority may - engage in any other activity, whether similar to those heretofore specified or not, which may be sanctioned by order of the Minister."

I think there is a lot of plain common sense in the submission of Mr Radclyffe. The fact that the Minister responsible for the Ports Act has refused to sanction the above activities, which it was within his powers to do, is no grounds for the granting of a declaration. That Ministers power is not being challenged, and SIPA as I understand it, does not take issue with his refusal. That however, does not mean that he may not change or cannot change his decision at a later stage. The decision whether to sanction an activity or not, by the Minister, is a matter between SIPA

and its Minister. It has nothing to do with DJG. If the Minister refuses to sanction a particular activity, then it is only a simple matter for SIPA to change its activity and bring it within those stipulated in sections 9 and 10, or discuss further with the Minister as to which activities he would be prepared to sanction. The inherent difficulty in the application of the Plaintiff is that even if such a declaration is granted, SIPA can always change and bring its activities within its statutory powers or responsibilities. I am satisfied that no declaration should be granted and the claim should be dismissed.

Civil Case 164/1995

1. **Declaration that SIPA has the right to have the fixed-term estate in Lots 116, 117, 128 and 147 at Point Cruz, transferred to it.**

SIPA argues that there is a legally binding contract between it and the COL (the Government).

DJG on the other hand argues that there was no formal acceptance of the offer of the COL until the 16th of September 1994. Before that occurred however, the MOL had considered and accepted a proposal for the use of the land by DJG and had instructed the COL to *"proceed with the necessary formalities to effect registration"*. **(See letter of 9 September, Exhibit FO3 to affidavit of Francis Orodani).**

That letter was copied to the COL.

Mr Traczyk argues that by the 14 of September, 1994, the COL was well aware of the MOL's actions and direction, and yet chose not to comply with it. He says that at that point of time, whatever the powers of the COL may be, he was not acting *"for and on behalf of the Government"* and was not acting *"subject to special or general directions from the Minister"*.

The above submissions with respect are based on a number of assumptions.

(i) *That the MOL's action in allocating the said lots to DJG was valid and binding on the COL;*

(ii) *That the MOL's direction to "proceed with the necessary formalities to effect registration", was valid and binding on the COL.*

I have already dealt with the issue raised in paragraph (i) above and pointed out that the MOL had no powers to deal directly with persons, individuals or companies or whatever, in interests in land; which powers would include the question of allocation of land. That does not mean that

he can not communicate or deal with the COL. It is I think an accepted fact that in many instances he would represent the ruling Governments views as to the question of allocations of land in certain instances, and the ruling Governments Policy on land matters. However, these would have to be channelled through the COL for his action and implementation.

I should add here too that in certain instances, may be the MOL's actions would not have been challenged or not complied with. The COL would then simply take the allocation made by the MOL and act upon it. But until he does that, the MOL actions cannot bind the Government. DJG might have an action against the MOL, but not against the Government.

As to the second assumption, again the issues raised therein have been canvassed in this judgment. That second assumption or direction *"to proceed with the necessary formalities to effect registration"* is based on the assumption in turn, that the allocation by the MOL was valid and binding on the COL. So if the first assumption or the purported allocation of land by the MOL falls, then that direction would also fall with it. How can the COL comply with such a direction *"to proceed with the necessary formalities to effect registration",* when there had been,

(i) no valid allocation of the said lots to DJG; and

(ii) when the COL knows that he had already made or committed the Government to an allocation of the said lots to SIPA.

I have already dealt with the issues concerning the power of the MOL to issue directions, and contrasted these with the duty or requirement on the part of the COL to comply.

I had also given reasons as to why the COL would not have been bound to comply with the directions of the MOL. They also apply here.

Was there a legally binding contract?

On 14 September, 1994 a revised offer was made to SIPA, totalling $171,287.50. On 16 September, 1994, according to the evidence of Nicholas Constantine, the balance of $158,401.50 was paid by SIPA. A receipt, GTR. B428107 was then issued on 19 September, 1994. There can be no doubt or uncertainty about the fact that a legally binding contract for the purchase of the said land had been concluded between the parties.

Declaration sought

(i) Mr Traczyk submits that SIPA does not come to Court with *"clean hands"* and that therefore the discretion to grant a declaration should be refused anyway.

With respect that submission can only be valid if there had been a valid allocation by the MOL and a valid direction to the COL *"to proceed with the formalities for registration"*. SIPA would then have had notice of those valid dealings by the MOL. In the circumstances of this case, they have little or no effect on the contract between SIPA and the COL.

(ii) The declaration is too wide and amounts to an order for specific performance.

Section 18(i) reads:

"In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that -

(a) Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;" **(emphasis added).**

SIPA is clearly not seeking an order for specific performance but a declaration of its rights. I have ruled that a legally binding contract exists between SIPA and the Government. Rights or interests therefore have been conferred on SIPA pursuant to that Agreement. Whatever, those rights are as against the Crown, SIPA is entitled under section 18(1)(b) to a declaration of them.

In my respectful view, the rights conferred are the rights to a grant of the fixed-term estates in the land bounded by the Commonwealth Street and the Shell Depot; which are more particularly described as Lots 116, 117, 128 and 147, Point Cruz, Honiara.

All that is now left is for the grant instrument to be drawn up by the COL and execution to be effected, subject to any general or special directions from the MOL.

One of the arguments that may be raised is, what if the MOL then directs the COL not to execute the grant instrument? First, in my respectful view, that would be an improper exercise of the MOL's power and therefore unlawful. Secondly, it could be impugned as being ultra vires his (MOL's) powers. Thirdly, even if the COL did comply with that direction, the COL's decision to comply with such a direction could be challenged also on grounds that it is ultra vires.

I am not satisfied that the declaration sought is too wide and amounts to an order for specific performance. Rather, it is but a declaration, and properly sought, of the rights of SIPA in all the confusing array of events that have occurred since September of 1994. The lawful decision of the COL to allocate the said land to SIPA had never been validly impugned. So even if the order for Certiorari had been granted, the only decision that would have been brought up to be quashed would be that decision to lodge an application for registration for the subdivision of parcel Nos. 191-022-83 and 191-022-87 on or about 16 January 1995. A binding contract however, had been concluded in or about 16-19 of September, 1994, some four months earlier, and thus would entitle SIPA to the declarations sought, in any event. I am clearly satisfied however, in all the circumstances that the declaration sought is valid, proper and should be granted.

(2) DECLARATION THAT THE MINISTER OF LANDS AND HOUSING HAS ACTED ULTRA VIRES IN THAT:-

(a) "HE HAS NO POWER UNDER SECTION 4 OF THE LAND AND TITLES ACT TO REVOKE OR OVERRIDE THE COMMISSIONER OF LAND'S DECISION TO ALLOCATE THE SAID LAND TO THE PLAINTIFF"

In view of the way I had ruled, I am satisfied the declaration sought here should also be granted.

(b) HE HAS NO POWER TO ALLOCATE THE SAID LAND OR ANY PART OF IT TO DJG.

The above declaration sought must be qualified to the extent that the MOL has no power to make a valid allocation of the said land or any part of it to DJG that would be binding on the Government. Any allocation that he makes would have been made in his personal capacity, and therefore not binding on the Government. If the ruling Government desires to allocate a

particular area of land to a specific person, then that desire should be communicated to the COL to implement; not the MOL to purport to implement it himself.

The above declaration can be granted with the above qualification.

(c) **"HE MADE THE DECISION WITHOUT CONSIDERING OF RELEVANT MATTER NAMELY THAT THE PLAINTIFF HAD ACCEPTED THE COMMISSIONER OF LANDS' OFFER AND HAD PAID THE FULL PURCHASE PRICE"**

In view of the way this Court has ruled it would be unnecessary to consider this declaration.

(d) **HE ACTED CONTRARY TO THE RULES OF NATURAL JUSTICE IN FAILING TO GIVE THE PLAINTIFF A RIGHT TO BE HEARD PRIOR TO HIS DECISION TO REVOKE THE ALLOCATION OF THE LAND TO THE PLAINTIFF, THE PLAINTIFF HAVING A LEGITIMATE EXPECTATION THAT TITLE WOULD BE TRANSFERRED TO IT.**

The submissions of Mr Traczyk on this point is that SIPA had not bothered to approach the MOL or seek a hearing from him when it became aware of the MOL's position by the 15th of September, 1994.

Unfortunately, by the 15th of September, 1994, there was no need to approach the MOL. By that time, the MOL had already made his decision. He had made an allocation or promised to make an allocation to DJG without the knowledge of SIPA and the COL, on the 6th of September, 1994. On the 9th of September, 1994, he had made a purported allocation to DJG. No opportunity was given to SIPA or to the COL to make representations.

The purported revocation of the offer by the COL to SIPA was made by letter of the 15 September, 1994 *("F09")*, but only after a purported allocation had been made to DJG. Normally, an opportunity would be given for representations to be heard before a decision is made whether to revoke the allocation or offer made, or not. Only if a revocation has been made, can a fresh allocation or offer be made. For the reasons given in this judgment I am satisfied that had it been ruled that the MOL had power to revoke the allocation to SIPA, then a declaration to the effect sought would have been granted. However, that is not necessary because of the way this Court had ruled on the MOL powers.

ORDERS OF THE COURT

A. CIVIL CASE 102/95

1. The Order of Certiorari sought is denied.
2. The Order of Prohibition sought is denied.
3. The Order of Mandamus sought is also denied.

B. CIVIL CASE 40/95

1. Order for a dismissal of the case.

C. CIVIL CASE 164/95

1. Order for a declaration under section 18 of the Crown Proceedings Act that the Plaintiff has the right to a grant in the fixed-term estate in Lots 116, 117, 128 and 147, Point Cruz, Honiara.

2. Order for a declaration that the MOL had acted ultra vires in that he had no power under section 4 of the Land and Titles Act to revoke or override the COL decision to allocate the said land to the Plaintiff.

3. Order for a declaration that under section 4 Land and Titles Act, the MOL has no power to make a valid allocation of the said land or any part of it to DJG that is binding on the Government.

4. Order for costs in all three cases in favour of SIPA and the COL to be borne by DJG.

ALBERT R. PALMER

A. R. PALMER

JUDGE