IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction) **Civil Case No. 195 of 2006**

BETWEEN: GILBERT DINH
Claimant

AND: MENZIES SAMUEL ,VALUER-GENERAL
First Defendant

AND: DIRECTOR OF LANDS, SURVEY AND RECORDS
Second defendant

AND: SILVER HOLDINGS LIMITED
Third Defendant

AND: TAHE PAMAVARI as Executor of the Estate of John Pamavari (Deceased)
Fourth Defendant

AND: ALLEN PALMER AND GEORGE PALMER
Fifth Defendant

AND: URELAPA LIMITED
Sixth Defendant

Hearing:	***23, 24 September 2014***
Submissions:	***26, 29, 30 September 2014***
Judgment:	***13 October 2014***
Before:	***Justice Stephen Harrop***
Appearances:	***Felix Laumae for the Claimant***
	Frederic Gilu and Jenifer Warren (SLO) for the First and Second Defendants
	Nigel Morrison and Jennifer La'au for the Third Defendant
	George Boar for the Fourth, Fifth and Sixth Defendants

RESERVED JUDGMENT OF JUSTICE SM HARROP

Introduction

1. On 3 June 1994, John Pamavari as lessor and Gilbert Dinh as lessee signed a commercial lease of leasehold title 04/2952/002 *("the 002 lease")* in respect of Urelapa Island, South

Santo. Mr Dinh paid Mr Pamavari Vt 7.5 million as rent in advance for the duration of the 75-year lease at the rate of Vt 100,000 per annum.

2. A key provision in the lease, clause 2(b)(i), was that Mr Dinh would build a tourist resort on the island together with ancillary facilities. He agreed to complete the construction of the first stage of the resort and to open it for business no later than five years from the date of the signing of the lease, so by 3 June 1999. That stage was to include at least six new bungalows, a restaurant, kitchen, water supply and additional infrastructure. There was provision for an annual rent to be paid from the fifth anniversary of the commencement of the lease for the remainder of the term at the rate of 2% of the gross turnover of the resort business.

3. Mr Dinh did not construct any part of the tourist resort within the five-year period, or subsequently. From 2000 onwards, Mr Pamavari and later his son and authorised attorney Allen Palmer complained about this fundamental breach of the lease and issued notices before forfeiture on 3 April 2000, 30 December 2000 and 13 April 2005, though none of these was pursued to enforcement.

4. Mr Dinh took steps to develop the island as an eco-tourism base by providing coconut crabs, fish, livestock and other wildlife. He also constructed an airstrip -without authority the lessor says- to allow tourists to fly in directly. At that time he owned and operated an airline. However he says that because of the economic situation then affecting Vanuatu, which led to the Vanuatu National Provident Fund riot in 1998, his financial position was substantially affected and he could not build the resort. His businesses were targets for rioting and looting and he lost "hundreds of millions of vatu".

5. On 3 April 2000, when the first notice before forfeiture was served, Mr Pamavari complained of a number of breaches as well as the obvious one of failing to complete the construction of the tourist resort within five years. He says his numerous requests to Mr Dinh about this and related breaches had had no effect.

6. Mr Dinh replied by letter 5 April 2000 and explained some of the reasons for his not having complied with the obligations. He pointed out he had paid the rent in advance for 75 years.

Even though he did not accept Mr Pamavari's points he said he would be glad to defend his position either before the Land's Referee or the Supreme Court. He suggested an extension of four years for completion of his obligation to build the resort.

7. On 30 December 2000, Mr Pamavari issued another notice to forfeit the 002 lease. The main point of the letter which accompanied that notice was that the lessor was missing out on the annual rent of 2% of the gross turnover of the tourism resort business which Mr Dinh ought by then to have constructed.

8. On 22 May 2002, Mr Pamavari signed a power of attorney in favour of his sons, Allen and George Palmer, in respect of any matters arising in respect of the 002 lease.

9. Prior to that, on 27 February 2002, Mr Pamavari had demanded Vt40 million to buy the lease back in light of the various breaches by Mr Dinh. On 20 May 2002, Mr Dinh counteroffered Vt 2 million and this was accepted, leading to a signed settlement agreement dated 24 May 2002, the full terms of which appear later in this judgment (at paragraph 104).

10. Mr Dinh paid the Vt 2 million but he still did not commence work on the construction of the resort. That led to a letter being sent by Pacific Lawyers on behalf of Mr Pamavari enclosing a further notice before forfeiture dated 13 April 2005.

11. Mr Dinh replied by letter of 27 April 2005, complaining that the breach as to not constructing the resort was not in reality remediable because the resort would not be economically viable. He claimed that delaying the construction of a resort was not a breach and said that the bad relationship between the parties over the years had restricted his using his rights to apply for variation of the lease "to conform with real-life tourism operation on that unpopular tourist destination". He again referred to his building of an airstrip and rejected the complaint of destruction of vegetation, as that was ancillary to the use and occupation of the land for tourist purposes. He said that his obligation to allow the custom owners to purchase up to the 10% of the capital shares and to pay rent-related turnover only arose once the resort had begun business. In respect of compensation claims for loss of coconut and natora and other trees, he pointed out that he had already made the compensation payment of Vt2 million in 2002.

12. On 13 February 2006, pursuant to the power of attorney Allen Palmer wrote to Mr Dinh offering him a final goodwill payment of Vt30 million to surrender the lease and return the land. There had earlier been an offer of Vt25.5 million which Mr Dinh had rejected.

13. Mr Dinh instructed a law firm, Edward Nalyal and Partners to reply on 16 February 2006 rejecting this offer but indicating that Mr Dinh intended to sell the land for Vt 81,200,000 and that he was prepared to offer the lessor the first option to purchase.

14. A fourth notice before forfeiture was served on Mr Dinh on 15 March 2006. It informed him that he had to make a compensation payment of Vt 20 million for his breaches of the lease by 15 May 2006. It warned that if no such payment were made the lessor would exercise his rights under section 43 (1) of the Land Leases Act [Cap. 163] *("the Act")* to forfeit the lease. This would either be done by re-entry pursuant to section 43 (2) (a) or by reference to the Valuer-General under section 43 (2) (b).

15. The notice clearly drew Mr Dinh's attention to section 46 of the Act whereby he could, if he wished, apply to the Valuer-General for relief against forfeiture.

16. Mr Dinh did not communicate with the lessor between 15 March and 15 May 2006. Nor did he apply to the Valuer-General for relief.

17. In an undated letter Mr Pamavari wrote to Mr Dinh attaching a copy of his final decision forfeiting the lease. The letter attached a notice, which was dated 17 May 2006, and both documents were signed by Allen Palmer pursuant to his power of attorney. The notice was entitled **ENFORCEMENT OF LESSOR'S RIGHT OF FOREFEITURE** (sic).

18. The notice stated that Mr Pamavari through his attorney Mr Palmer declared that the 002 lease was hereby forfeited and that he was referring the matter to the Valuer-General, exercising the role of Lands Referee, requiring him to enforce the right of forfeiture pursuant to section 43 (2) (b) of the Act.

19. Although there is no direct proof of service of that notice on Mr Dinh, it purported to be hand delivered and must have been received by him at least by 24 May 2006. That is so because on that day his solicitors, Trans-Melanesian lawyers, wrote to the first defendant, the Valuer-General Mr Samuel. Critically however that letter was not received at the Valuer-General's office until 4:15 pm on 31 May 2006 and was not seen by Mr Samuel himself until the following morning.

20. On 23 May 2006, Mr Samuel had received from Mr Palmer the lease, the power of attorney from Mr Pamavari in favour of Mr Palmer, the notice before forfeiture, proof of service of that notice and the declaration of forfeiture and application for enforcement by reference to the Valuer-General.

21. The letter from Trans-Melanesian Lawyers referred to the notice before forfeiture and to the undated letter which presumably enclosed the 17 May notice. It did not expressly apply for relief against forfeiture but said Mr Dinh denied fundamentally breaching the conditions of the lease as alleged. It asserted that the attempted forfeiture of the lease was driven by Allen Palmer and resulted from an unsuccessful attempt by Mr Palmer to buy the lease from Mr Dinh. It added that the attempted forfeiture was being done with an ulterior motive and must not be enforced by the Valuer-General.

22. The letter went on to request withholding of enforcement of the forfeiture and arranging of a round table meeting to look into the circumstances surrounding the purported forfeiture of the lease. The lawyers said they were prepared to make submissions on behalf of Mr Dinh for Mr Samuel's consideration if he required that and noted that they had instructions to apply for an injunction to stop any forfeiture of the lease if the lessor pressed on with forfeiture.

23. At a time on 31 May 2006 *prior to* receipt of the lawyer's letter at 4:15 pm, Mr Samuel had however signed and issued a written determination confirming forfeiture. It noted that there had been no application for relief against forfeiture submitted to him by Mr Dinh. The determination was:

"That the said lease be forfeited for failure to build the tourism resort within the time specified in condition 2 (b) (1) in the lease schedule and the breach of the other covenants as consequences of failing to build the tourist resort".

24. On 14 June 2006, the cancellation of the lease was registered pursuant to the determination of the Valuer-General.

25. Subsequently a new lease over the same land, numbered 04/2952/004 ("the 004 lease"), was signed, on 13 November 2006, with John Pamavari as lessor and his two younger sons Allen and George Palmer as lessees. The following day, 14 November 2006, that lease was transferred to Silver Holdings Ltd, the third defendant ("SHL"). That company through its representative Robert Herd (who is through his family trust an equal shareholder in the company) says that it acquired the 004 lease without knowledge of any claim against that title or of any issue about the validity of the forfeiture of the 002 lease. Nor was it aware of any Court proceedings or injunction preventing the dealing with the title to the island. Had it been so aware, Mr Herd says that SHL would not have settled the transfer transaction, which occurred on 15 December 2006.

26. When Mr Dinh learnt of the determination, he approached the then Minister of Lands, Mr Maxim Carlot Korman, and asked him not to approve any new lease over the Urelapa Island because he wished to challenge the forfeiture in Court. He says the Minister assured him that he would not do so. He also met Mr George Kerby, a Senior Enforcement Officer of the Land's Department. He requested that he also ensure that no new lease be issued in respect of Urelapa Island.

27. Mr Dinh then filed, on 21 June 2006, a Supreme Court claim, which was allocated number CC 19 of 2006, seeking rectification and declarations. That case was later superseded by this one, filed on 24 October 2006.

28. Despite the assurance that Mr Dinh had apparently received, the Minister approved a new lease title, the 004 lease, and by the end of 2006 SHL was the registered lessee.

29. This case was renumbered CC 9 of 2009 and heard by Justice Saksak at Luganville. The Court dismissed Mr Dinh's claim but he appealed to the Court of Appeal which ruled on 30 April 2010 that because SHL had not clearly been served with the claim and its interests would obviously be affected if Mr Dinh's claim succeeded. It was also not present at the

appeal, so that could not fairly be dealt with either. The appeal was allowed and the case remitted to this Court for hearing. Regrettably it has taken over four years for it to be reheard.

30. On 18 March 2011, the Director of Lands cancelled SHL's 004 lease. This decision has been challenged by SHL in Land Leases Act Case No. 4 of 2012. SHL says the cancellation was invalid because in February 2010 Justice Fatiaki had made restraining orders in another case (CC 147 of 2009) which involved a dispute over the assets of SHL principally between Mr Herd and Terry Hannam. SHL claims that the Director of Lands wrongly regarded SHL as being a deregistered company and in any event acted in breach of the restraining order. That claim remains unresolved and is stayed pending the outcome of this case.

31. After cancellation of the 004 lease, a new lease title, 005, was issued over Urelapa Island in favour of Urelapa Ltd, the sixth defendant in this proceeding. Its directors are the fifth defendants, Allen and George Palmer. In CC 34 of 2011, Justice Saksak granted an application for specific performance and directed the registration of that new lease title. The State appealed and on 18 April 2013 (in CAC 47-12) the Court of Appeal by consent ordered that cases this case, 04/2012 and 34/2011 be consolidated. The orders made by Justice Saksak in CC 34/2011 were stayed. An order was made that no further lease be registered with respect to the land which is the subject of lease titles 002, 004 and 005. The appeal was then adjourned sine die.

The pleadings

32. In his further amended claim for judicial review filed on 27 February 2014 Mr Dinh seeks orders or declarations:

    a) that forfeiture of the 002 lease by the fourth defendant which was enforced by the first defendant by his determination of 31 May 2006 "is invalid and of no effect";
    b) quashing the first defendant's decision dated 31 May 2006 to enforce the forfeiture notice;
    c) compelling the second defendant to reinstate Mr Dinh's 002 lease;
    d) that his costs be paid by the first, second, fourth and fifth defendants.

33. At paragraph 10 of the claim the reasons why the claimant says the first defendant's determination of 31 May 2006 is of no effect are set out:

a) The first defendant had no power by law, specifically under section 45 of the Land Leases Act (Cap. 163), to enforce forfeiture of lease whereby he had acted ultra vires;

b) The first defendant ignored the claimant's letter dated 24 May 2006 thereby denying the claimant's right to respond to allegations of breaches made against him;

c) At all material times the first defendant failed to visit the lease property to carry out independent inspection of the alleged breaches to satisfy himself to make a proper and lawful determination of the alleged breaches of the lease conditions;

d) At all material times the first defendant failed to disclose how he came to formulate or give reasons for his decision.

34. Mr Dinh further alleges that in purporting to enforce the forfeiture without notice to him Mr Samuel acted in breach of the principles of natural justice and fairness. In this Mr Dinh refers again to the first defendant's ignoring of his solicitors' letter of 24 May 2006.

35. Mr Dinh further pleads that the first defendant made the determination contrary to section 43 (1) of the Act which provides that the lessor's power to forfeit is subject to provisions contained in the lease. He cites clause 7 of the lease which states:

> *"**Determination of Disputes***
>
> *If any dispute or difference shall arise between the lessor and lessee concerning any matter within this lease and they are unable to resolve it in a spirit of mutual cooperation then the dispute or difference shall be referred to the LAND'S REFEREE ACT CAP. 148."*

Mr Dinh pleads that the first defendant wrongfully or mistakenly enforced the forfeiture notice, contrary to clause 7. He says that the first defendant *"was barred by clause 7 of the lease from forfeiting claimant's lease as he was bound to follow process he agreed to with the claimant in clause 7 of the [002 lease]"*.

36. In the alternative, Mr Dinh pleads that the purported forfeiture notice was baseless and without reasonable grounds because the breach relied on did not warrant a right to forfeiture, Mr Dinh had paid annual land rent in advance for 75 years and he had developed the land by building an airstrip worth over Vt 40 million. Reference is also made to Mr Dinh having raised livestock and developing tourist attractions such as the presence of wildlife, fish farming and coconut crabs.

37. By way of further alternative, Mr Dinh alleges the first defendant acted in bad faith, relying on the points made earlier, but adding that the first defendant exercised his powers for improper motives reflecting his wish to benefit John Pamavari and Allen Palmer and those associated with them, they having been negotiating with foreigners to purchase Mr Dinh's lease.

38. In paragraph 22 of the claim there is an assertion that loss and damage has been suffered by Mr Dinh as a result of the first defendant's unlawful actions but there is no prayer for relief in that respect.

39. As is evident from the fact that this is a judicial review claim, the focus is on the legitimacy of the Valuer-General's determination of 31 May 2006 to enforce the forfeiture notice. No relief is sought against the third, fourth, fifth or sixth defendants and the only reason for including the second defendant is because an order is sought that he reinstate the 002 lease.

40. The reason for the inclusion of the third to sixth defendants is because their interests would or might be affected if the claim against the first defendant succeeds and if relief is granted by way of quashing the determination and reinstating the 002 lease.

41. The first defendant's defence is straightforward. He says he acted properly in all respects and in accordance with the relevant statutory provisions on the information available to him on the morning of 31 May 2006. That information did not include the letter of 24 May 2006 from Trans-Melanesian Lawyers and there was no application for relief against forfeiture made by Mr Dinh despite his having been clearly told of his right to make such an application.

42. The third defendant, SHL, does not respond directly to the claim because nothing is pleaded against it and no relief is sought against it. However, by way of counterclaim it seeks a declaration as against the claimant that it is a bona fide lessee and holder of lease title 004 and that its title should be preferred at law to that of Mr Dinh. In an unopposed amendment made the week before the trial, Mr Morrison added an alternative claim that if Mr Dinh's claim succeeded then SHL sought damages from the fifth defendants in an amount to be assessed.

43. Despite their peripheral involvement in the legal issues arising, the fourth, fifth and sixth defendants filed a detailed amended defence on 27 March 2014. Essentially they support the validity of the Valuer-General's decision and say the notice before forfeiture was entirely justified because of the breaches of lease committed by Mr Dinh including breaches after the settlement agreement of 24 May 2002 (discussed below). They further say that clause 7 was, by March 2006, no longer relevant because Mr Dinh's conduct showed that resorting to clause 7 discussions would be pointless and they were entitled to follow the notice before forfeiture procedure. They go on to plead that even if the claim is found to have substance, they have lawfully entered into further transactions subsequently which Mr Dinh did nothing to prevent by way of obtaining an injunction and no relief should be granted to him..

44. Mr Dinh filed a detailed reply to that defence. This raises a particular point that the agreement of 24 May 2002 between the fifth defendants (on behalf of the fourth) and him resolved all issues between the parties, both present and future, in relation to the lease. Mr Dinh therefore asserts that the defendants were not entitled to issue a notice before forfeiture and should be held estopped from doing so. Mr Dinh also pleads that if, as he should have, the first defendant had enquired into the allegations of breach he would have come across the agreement of 24 May 2002 as well as clause 7 and that either discovery ought to have led him to conclude that the notice before forfeiture had been issued wrongly. Although these allegations appeared for the first time in Mr Dinh's reply I propose, as I mentioned at the hearing, to treat them as part of the claim or as supporting it. There is no prejudice to the other parties in taking that approach since they have engaged on that issue both in evidence and in submissions.

The Evidence

45. Extensive evidence, much of it not ultimately relevant to the fundamental issues in this case, was filed. Sworn statements were provided by Mr Dinh (2), Mr Samuel, Mr Herd, Tahe Pamavari (2) and Allen Palmer. All of those witnesses were cross-examined. In Mr Herd's case this was done by Skype from Australia because he has recently been deported from Vanuatu. I will refer to relevant aspects of the evidence in discussing the issues.

The Issues

46. The fundamental issue in this case may be simply stated: In reaching and issuing his determination of 31 May 2006 to enforce forfeiture of the 002 lease did the Valuer-General act in accordance with his powers and with any duty of natural justice and fairness, in good faith and on a legitimate basis?

47. Other issues will need to be considered if the decision is, in itself, a legitimate one. Was the lessor's Notice before Forfeiture invalid either because of the effect of the 24 May 2002 agreement, or of clause 7 in the lease, or both? If so, what impact, if any, does that have on the prima facie validity of the Valuer-General's determination?

48. If for any reason the determination is held to have been invalid, should Mr Dinh be granted relief and, if so, what relief?

49. Finally, is SHL is entitled to the declaration it seeks in its counterclaim?

Submissions

50. I do not propose to traverse the submissions but will refer to relevant points when discussing the issues. I record however that I have reached this judgment without submissions from Mr Laumae. That is solely because of his default in complying with timetable directions. I do not consider it unfair to Mr Dinh to proceed without these, having provided a full and fair opportunity for submissions to be filed and because I well understand the case he puts forward. It is clear from his own detailed evidence, the detailed claim and reply and from the way Mr Laumae conducted the hearing.

51. All parties were directed to file submissions by 4pm on Friday 26 September so that I could consider them while the evidence given at the hearing was fresh in my mind. All counsel indicated they could comply. Mr Boar filed detailed submissions in time. Mr Gilu did not but only because he was unwell; he was granted a short extension and duly filed his on Tuesday 30 September. Mr Morrison went overseas just before the hearing finished but with leave Ms La'au on his behalf filed brief submissions for SHL on 29 and 30 September.

52. Mr Laumae advised by email on the evening of Friday 26 September that due to "an unforeseen situation", the nature of which was not disclosed, he had been unable to file his submissions that day. He did not ask for more time but said he would provide them before flying to the Solomon Islands on the Sunday.

53. No submissions were however filed and efforts by my Associate to contact Mr Laumae directly and through his office achieved no response. No request for extension has been sought nor has an explanation for the non-compliance been provided.

54. I issued a Minute on 1 October saying that it was unfair to other counsel to have been put under pressure to complete their submissions yet to allow Mr Laumae much longer to do so. I directed that if his submissions were not filed by 4pm on Friday 3 October (so I could work on this judgment over the long Constitution Day weekend) I would proceed to determine the case without them.

55. No further communication, still less submissions, has even now (13 October) been received from Mr Laumae. I have therefore finalised my judgment without his submissions, as I said I would.

The Statutory Framework

56. The Valuer-General's power to enforce forfeiture of a lease is a statutory one and accordingly the starting point in considering whether he acted within his jurisdiction must be the statutory provisions involved.

57. Sections 43 to 46 of the Act provide:

*"**LESSOR'S RIGHT OF FORFEITURE***

43. *(1) Subject to the provisions of section 45 and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease.*

(2) The right of forfeiture may be-

> *(a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or*
> *(b) enforced by a reference to the Referee.*

(3) The right of forfeiture shall be taken to have been waived if-

> *(a) the lessor accepts rent which has become due since the breach of the agreement or condition which entitled the lessor to forfeit the lease or has by any other positive Act shown an intention to treat the lease as subsisting; and*
> *(b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:*

Provided that the acceptance of rent after the lessor has commenced a reference to the Referee under subsection (2) shall not operate as a waiver.

EFFECT OF FORFEITURE ON SUBLEASES

44. *The forfeiture of a lease determines every sublease and every other registered interest relating to that lease, but-*

> *(a) where the forfeiture is set aside by the Referee on the grounds that it was procured by the lessor in fraud of the sublessee; or*
>
> *(b) where the Referee grants relief against the forfeiture under section 46;*

every such sublease and other interest shall be deemed not to have determined.

NOTICE BEFORE FORFEITURE

45. *Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee and every other person shown by the register to have an interest a notice in writing which-*

> *(a) shall specify the particular breach complained of; and*

(b) if the breach is capable of remedy, shall require the lessee to remedy the breach within such reasonable period as is specified in the notice; and

(c) in any case other than non-payment of rent may require the lessee to make compensation in money for the breach;

and the lessee has failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money if so required.

RELIEF AGAINST FORFEITURE

46. *(1) A lessee or other person upon whom a notice has been served under section 45, or against whom the lessor is proceeding, by reference to the Referee or by re-entry, to enforce his right of forfeiture, may apply to the Referee for relief; and the Referee may grant or refuse relief, as the Referee having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if he grants relief, may grant it on such terms as he thinks fit.*

(2) The Referee, on application by any person claiming as sublessee or mortgagee of the land or part of the land comprised in the lease forfeited or sought to be forfeited, may make an order vesting the leased land or such part in such sublessee or mortgagee for the remainder of the term of the lease or any less period, upon such conditions as the Referee in the circumstances thinks fit:

Provided that nothing in this subsection shall apply in the case of a forfeiture arising from a breach to which the sublessee is a party, or from the breach of an express agreement or condition against subleasing, parting with the possession of or disposing of the land leased.

(3) This section shall have effect notwithstanding any stipulation or agreement to the contrary and whether the lease is registered or not."

58. It will be noted that there is nothing within these provisions which provides power for the Valuer-General to confirm or enforce a lessor's forfeiture. Section 43 (2)(b) simply says such a right of forfeiture may be enforced *"by a reference to the Valuer-General"* but there is no provision in the Act which addresses the Valuer-General's powers on receipt of such a reference from a lessor. Some guidance is given by the Valuation of Land Act [Cap.288] which establishes the office of Valuer-General (replacing the office of Land Referee) and describes his functions and jurisdictions.

59. Part 2 of that Act contains the relevant provisions:

DIVISION 1 – VALUER GENERAL

2. ***Valuer-General***

(1) The President is on the advice of the Judicial Services Commission to appoint a Valuer-General.

(2) The Judicial Services Commission must not recommend a person for appointment as Valuer-General unless the person is, or is eligible to become, a registered land valuer.

(3) Schedule 1 has effect in respect of the Valuer-General.

3. ***Role of Valuer-General***

The general role of the Valuer-General is:

(a) to exercise functions with respect to the valuation of land in Vanuatu; and

(b) to ensure the integrity of valuations under this Act; and

(c) to Act as a land referee in disputes regarding rentals and land values.

DIVISION 2 – GENERAL FUNCTIONS OF VALUER GENERAL

4. ***Functions of Valuer General***

The functions of the Valuer-General include the following:

(a) to resolve disputes regarding valuations of land as required by or under this or any other Act;

(b) to deal with objections and appeals against valuations under this Act;

(c) subject to this Act, such other functions conferred or imposed on the Valuer-General by or under this or any other Act or law.

DIVISION 3 – VALUER GENERAL'S ROLE AS A LAND REFEREE

5 Valuer-General's land referee jurisdiction

The Valuer-General has jurisdiction to determine the following matters:

(a) the amount of rent payable for a lease of land whether originally or on periodic reassessment;

(b) disputes relating to the value of improvements on or to land;

(c) any matter referred to the Valuer-General by any party to a lease of land relating to the interpretation of a provision in the lease;

(d) any matter which is by any other Act or law directed to be determined by the Valuer-General.

6 Referee to Act as expert and not as arbitrator

(1) In exercising jurisdiction under paragraphs 5 (a) and (b), the Valuer-General is to Act as an expert and not as an arbitrator. The Valuer-General must consider any valuation and reasons submitted to him or her by the parties to an application but is not in any way limited or fettered by that valuation and is to reach his or her decision in accordance with his or her own judgement.

(2) In exercising jurisdiction under paragraphs 5 (c) and (d), the Valuer-General may Act as arbitrator."

60. There is some ambiguity within these provisions as to whether the power to act on a reference by a forfeiting lessor comes within the general functions of the Valuer-General or rather within his role as a land referee.

61. Section 4 (c) is wide enough to cover the function conferred by section 43 (2)(b). If that is correct then there is no further statutory indication of the way in which that function ought to be discharged.

62. It is also arguable however that the power to enforce a forfeiture by reference comes within section 5 (d). This seems the better view because the other aspects of jurisdiction referred to in sections 5 (a) and (c), if not (b), relate to issues arising in respect of a lease of land. Section 5 (c) expressly addresses another form of reference to the Valuer-General.

63. Accordingly I take the view that a reference under section 43 (2)(b) is within the Valuer-General's land referee jurisdiction. More particularly it is within the catchall phrase in section 5 (d) of the Valuation of Land Act in that it is a matter which by another Act is directed to be determined by the Valuer-General..

64. This conclusion means that section 6(2) becomes relevant: in exercising his power on a lessor's reference the Valuer-General *may* act as an arbitrator. Self-evidently the corollary of that is that he also may not.

65. Beyond that there is no statutory guidance provided as to how the Valuer-General ought to exercise his power to enforce a lessor's notice of forfeiture.

66. In summary, the process envisaged by sections 43 to 46 of the Act is as follows:

a) Subject to section 43 and to any provision to the contrary in the lease any lessor has the right to forfeit a lease if the lessee commits a relevant breach;

b) The lessor has a choice about how to exercise that right of forfeiture: it may either be by re-entry if the lessee is not in occupation or it may be by reference to the Valuer-General;

c) Before any forfeiture may occur section 45 must be complied with: a notice before forfeiture must be served on the lessee setting out the particular breach complained of and if the breach is capable of remedy stating a deadline for compliance. Except where non-payment of rent is the basis for the notice it may require the lessee to make monetary compensation;

d) A further precondition to the right to forfeit is that the lessee must have failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money if so required by the notice;

e) If all of those threshold criteria are met the lessor is then in a position under section 43 (a) or (b) to forfeit the lease;

f) When a lessee who has been served with a notice before forfeiture, or against whom the lessor is proceeding by reference to the Valuer-General *or* by re-entry to enforce his right of forfeiture, the lessee may apply to the Valuer-General for relief. On receipt of such an application the Valuer-General may grant or refuse relief as the Valuer-General, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit and, if he grants relief, may grant it on such terms as he thinks fit.

g) I note there is no requirement that a lessor inform the lessee of his right to apply for relief; presumably a lessee, like everyone else, is deemed to know the law.

67. It is clear then that a lessee may interrupt the process outlined above at any point after receiving the notice before forfeiture, whether before or after there has been a reference to the Valuer-General by the lessor. In other words the application for relief against forfeiture may be made before a reasonable time for compliance with the breach has expired, or it may be made after that, provided that no decision has been made following an ex parte reference to the Valuer-General by the lessor under section 43 (2)(b).

68. It is noticeable that where an application for relief against forfeiture is filed then there *are*, in s46(1), statutory guidelines as to how the Valuer-General may deal with that application. By contrast, there is no indication, apart from the rather vague and discretionary advice in section 6 (2) of the Valuation of Land Act, as to what he may do if called on to enforce a notice before forfeiture by reference to him.

69. It may be that, if there is an application for relief against forfeiture, it is declined. In that event the Valuer-General will at least be aware that the exercise of the right to forfeiture by reference is challenged by the lessee and, accordingly, when considering whether the notice before forfeiture should be enforced he will have considerably more information than on an ex parte reference. It is conceivable that he might decide to decline to enforce a right of forfeiture having earlier declined an application for relief against forfeiture, although it is difficult to imagine circumstances in which that would happen ; if there is a good reason for declining to enforce the lessor's forfeiture on a reference, then surely the Valuer-General would have granted relief against forfeiture.

Assessment of the Valuer-General's determination

70. What happened in this case, and the material facts are not disputed, is that Mr Dinh was served with the notice before forfeiture on 15 March 2006. That notice told him that he had two months, until precisely 4:30 pm on 15 May 2006, to comply with the notice otherwise Mr Pamavari by his agent Mr Allen Palmer was immediately going to forfeit the lease and

exercise his rights either under section 43 (2)(a) or (b). Even though not required, Mr Dinh's attention was expressly drawn to section 46: "*You may if you wish to, apply to the Valuer-General for relief*".

71. For whatever reason, Mr Dinh did not communicate with either the lessor or the Valuer-General at any time during that two-month period. In particular, he made no application to the Valuer-General for relief against forfeiture.

72. He was then served with a further letter and declaration of forfeiture dated 17 May 2006. This declared that the lease was forfeited and that the matter was being referred to the Land's Referee to "**ENFORCE MY RIGHT OF FOREFEITURE"** (sic).

73. Although it is not clear exactly when that document was served on Mr Dinh, it must at the latest have been on 24 May 2006, fully seven days before Mr Samuel's confirmation forfeiture by his determination of 31 May 2006.

74. It remained open to Mr Dinh to apply for relief against forfeiture after receiving notice that the lessor was proceeding to enforce his right to forfeiture, but he still did not do that before the Valuer-General made his decision. Taking a generous view, the Trans-Melanesian Lawyer's letter of 24 May might be seen as a form of application for relief against forfeiture, but importantly the letter was not received by Mr Samuel until after he had made his decision.

75. In my view the clear meaning of section 46 (1) is that the right to apply for relief against forfeiture *ends* when the Valuer-General has made a determination (or upon re-entry). That is because there is a temporal reference in section 46 (1). It refers to "*against whom the lessor **is proceeding**, by reference to the Valuer-General… to enforce his right of forfeiture…..*" (emphasis added).. Self-evidently once the Valuer-General has concluded his determination following reference to him the lessor is no longer proceed**ing** to enforce his right of forfeiture but has proceed**ed** to do so. The process has been completed.

76. I therefore conclude that Mr Samuel had no obligation to do anything once he saw the Trans-Melanesian Lawyers' letter on the morning of 1 June 2006. As I observed to him when he

was giving evidence, it might have been courteous for him to respond to the letter explaining what had transpired but in my view there was nothing improper in his ignoring the letter in these circumstances.

77. On the morning of 31 May 2006, Mr Samuel had before him the lease, a letter he had sent to Mr Pamavari on 25 January 2006 pointing out deficiencies in an earlier notice before forfeiture served on Mr Dinh on 4 January 2006, a power of attorney issued by Mr Pamavari in favour of Allen Palmer, the notice before forfeiture of 15 March 2006, proof of service of that notice on 15 March 2006, and the notice of 17 May 2006 declaring the lease to be forfeited and stating that reference to the Valuer-General was about to occur.

78. Those documents were all filed at the Valuer-General's office on 23 May 2006. At this point Mr Dinh ought to have realised that at any time the Valuer-General might issue a determination confirming enforcement of the declared forfeiture. Assuming that he may not have been served until the day the documents were filed at the Valuer-General's office, 23 May, it appears Mr Dinh realised he needed to act quickly because the Trans-Melanesian Lawyers' letter is dated the following day. However, it is surprising to say the least that that letter dated 24 May was not hand delivered immediately to the Valuer-General's office but rather was not received until 31 May. It is unclear why that substantial delay occurred.

79. Regardless of the reason, the Valuer-General's determination can, in the first instance, only be considered in light of the information that he had. He had received a clear notice before forfeiture which had been served on Mr Dinh on the day it was issued and it gave him arguably a very reasonable period of time to comply with the demand, namely two months. If Mr Dinh thought that the notice was unjustified for any reason or if he thought he needed more time to comply with it he had two months to communicate with the lessor and/or the Valuer-General. He was expressly told that he had the right to apply to the Valuer-General for relief against forfeiture. Although he may have preferred to attempt to deal with this situation informally, it would have been a simple additional precaution for him to lodge an application under section 46 so that the process was interrupted and so that it could not continue without his application being considered. He failed to do so.

80. Accordingly the Valuer-General was faced with a situation where a notice before forfeiture which on the face of it was valid and properly-served had not been challenged in any way over a lengthy period by the lessee. He did not rush to make a determination but instead waited for eight days after the documents were filed. Still there was no application for relief against forfeiture.

81. Mr Laumae submits that in these circumstances Mr Samuel had an obligation founded in natural justice and fairness to give notice to Mr Dinh of the application being made. He also submits he was required to carry out an independent inspection of the alleged breaches (and indeed of the land itself) to satisfy himself that they had occurred and to consider section 7 of the lease.

82. I reject this submission. In my view the Valuer-General has no obligation to look behind a notice of forfeiture which on its face has been validly issued, and which has been served but not responded to. It is the lessee who knows whether or not there have been breaches and, for example, whether there have been appropriate efforts to resolve disputes in terms of clause 7. If the lessee himself makes no issue of any of these things then why should the Valuer-General make it his business to enquire?

83. There is an analogy here with an application for default judgment based on a properly-served claim in the Supreme Court. The Court has no discretion about whether or not to grant default judgment, at least as to liability, if there is proof of service of what appears to be a tenable claim and the 28-day period for filing a defence has expired. The way the Court system works is that a defendant is deemed not to oppose what is sought by the claimant if he takes no step by way of filing a defence, as the notice with which the claim is served tells him to. The same must apply here in respect of the notice before forfeiture: that clearly explained to Mr Dinh what he needed to do if he wanted to apply for relief against forfeiture, for whatever reason that may have been.

84. I do not accept that there is any requirement of natural justice or fairness involved in the Valuer-General's decision-making process when the lessee, having been expressly advised of his right to do so, does nothing to involve himself in it. Obviously if a lessee communicates with the Valuer-General and applies for relief against forfeiture, both parties must then be treated fairly. But until that point no such obligation arises. The Valuer-General surely

cannot have a higher obligation of fairness than a Supreme Court judge dealing with an application for default judgment.

85. In short, the Valuer-General had all the information he needed to enforce the forfeiture on reference to him and that is what he did. He also relied, as he was entitled to, on what he did *not* have; an application for relief from Mr Dinh. He gave a decision which recited the relevant history. That shows that he had studied the papers filed. What he was dealing with was an undefended application for enforcement of forfeiture. It would indeed have been surprising had he declined the application because there was no reason for him to do so. He could have faced action from the lessor seeking an order in the nature of *mandamus* had he declined to act as he did.

86. The final aspect of Mr Dinh's criticism of the Valuer-General is that he acted in bad faith. Mr Laumae cross-examined Mr Samuel along the lines that he had acted corruptly in processing the reference to him following receipt of money from the fourth and fifth defendants. This was a very serious allegation to make of any witness, never mind an independent and longstanding senior Government official. These contentions were roundly rejected by Mr Samuel who was clearly offended by them. Mr Laumae called no evidence whatever on behalf of Mr Dinh to substantiate any such impropriety. Questions in cross-examination are not evidence unless they are adopted by the witness. Accordingly there is simply no evidence whatever on which I could possibly find that Mr Samuel acted other than in entirely good faith. I therefore dismiss Mr Dinh's allegations of bad faith.

87. For these reasons, I am satisfied that the Valuer-General's determination was, in isolation, entirely justified, lawful and in accordance with the jurisdiction he was exercising. It also contained sufficient reasoning explaining why the determination was reached. All of the grounds pleaded at paragraph 10 of the amended claim are therefore rejected. That is, on the face of it, sufficient to determine the claim against the first defendant. There can be no question of relief being granted because no basis for judicial review of the determination has been established.

88. However, what about the alleged invalidity of the notice before forfeiture? Mr Dinh contends that, albeit unknown to the Valuer-General, the fourth defendant wrongly issued the notice before forfeiture because:-

a) effectively clause 7 of the lease meant that there could be no such forfeiture and reference to the Valuer-General pursuant to the Act until the parties had conscientiously engaged in the process contemplated by clause 7; and/or

b) the settlement agreement of 24 May 2002 precluded any action being taken against Mr Dinh in respect of any issue arising from the 002 lease.

89. If he is right on either of these points I will need to consider the impact, if any, on the Valuer-Generals' determination.

The effect of clause 7 of the lease

90. For convenience I repeat clause 7 here : "***Determination of Disputes***

If any dispute or difference shall arise between the lessor and lessee concerning any matter within this lease and they are unable to resolve it in a spirit of mutual cooperation then the dispute or difference shall be referred to the LAND'S REFEREE ACT CAP. 148."

91. Mr Dinh contends that the parties to the lease were required to follow this process before any notice before forfeiture could be issued. The lessor, through Mr Boar, says that because the 24 May 2002 settlement agreement had not resolved the key problem of the resort not being built, he was entitled to conclude that there was no longer any obligation to try to resolve it *"in a spirit of mutual cooperation"*.

92. During the 2005 to 2006 period there was an ongoing dispute between Mr Dinh and Mr Pamavari/his attorney about Mr Dinh's continuing failure to build the resort and about other breaches of the lease. Mr Dinh asserted that he was not in breach of the lease or at least had reasons why he should not be held accountable for them but the lessor was complaining about the various breaches and about its loss of turnover-based rental.

93. On the face of it, regardless of whether some or all of this dispute had allegedly been resolved in 2002, it was a matter to which clause 7 applied. That meant both parties were obliged to attempt to resolve it in the spirit of mutual cooperation. The correspondence to which I have referred earlier during 2005 and 2006, together with any discussions there may have been, arguably amounted to an unsuccessful attempt to resolve them in the requisite spirit. That, on the face of it, meant that the dispute or difference had to be referred to the *"Land's Referee Act [Cap.148]"*.

94. This Act was in force at the time when the lease was signed but from 10 March 2003 it was repealed and replaced by the Valuation of Land Act [Cap.288] to which I have earlier referred. Section 37 of the latter Act said that *"A reference in any other act or instrument to the Land's Referee is taken to be a reference to the Valuer-General."*

95. That said, the intention of the parties as to the application of clause 7 must in the first instance be determined in the light of the terms of the Land's Referee Act since that is the legislation under which a referral was required in the event of a stalemate.

96. Section 2 of the Land's Referee Act set out the jurisdiction of the Referee; it was in nearly identical terms to section 5 of the Valuation of Land Act. The only differences were that section 2 (b) gave jurisdiction in respect of *"the value of improvements on or to land"* whereas section 5 provides jurisdiction to determine *"disputes relating to the value of improvements on or to land"*. Further, section 2 (d) gave jurisdiction in respect of *"any matter which is by any Act or Order directed to be determined by him."* whereas section 5 (d) referred to *"any matter which is by any other act or law directed to be determined by the Valuer-General"*.

97. Of significance for present purposes is that the Referee (and indeed the Valuer-General) had no jurisdiction to determine a dispute about the performance or failure of performance of any covenant in a lease by either the lessor or the lessee. His jurisdiction on referral was limited to an issue "*relating to the* ***interpretation of a provision*** *in a lease"* (emphasis added).

98. The dispute between Mr Dinh and the lessor was however not on the face of it about what any of the provisions in the lease *meant* but simply about whether he had complied with

them, or ought to be held responsible for any breach he had committed, given the circumstances which he had faced and his realisation about the reality of developing a tourist resort on Urelapa Island.

99. In my view the Referee, or a Valuer-General, had no jurisdiction to resolve this kind of dispute. Clause 7 was therefore of no practical effect in relation to *this* dispute or difference. I therefore do not accept that the presence of clause 7 prevented the lessor issuing a notice before forfeiture and, if it were not complied with, seeking to enforce it through the Valuer-General's jurisdiction under section 5 (d).

100. The irony of course is that Mr Dinh is complaining that the lessor should have referred his concerns to the Valuer-General wearing one hat and that instead he referred those concerns to the same person wearing another. Indeed it might be said that following correspondence which attempted to resolve the issues, the lessor *complied with* clause 7, at least in practical terms and via a different route than that contemplated.

101. Further, clear language would have been needed to abrogate the lessor's statutory right to forfeit the lease, especially given that the person who would be involved in enforcement , if there was no re-entry, was the same person whom the parties entrusted to resolve any dispute they could not themselves resolve. That is reinforced by the point that reference to the Valuer-General allowed full involvement of the lessee by way of application for relief against forfeiture but he did not partake. Given that Mr Dinh did not engage in the process under direct threats of, then a declaration of, forfeiture the question has to be asked: if the lessor had invoked clause 7, would Mr Dinh have bothered to engage in that process?

102. If Mr Dinh thought that clause 7 meant that a notice before forfeiture could not properly be issued by the lessor then all he needed to do was to raise that with the Valuer-General. He did not do so. I am sure that the reason he did not is that reliance on clause 7 is something that has only retrospectively been considered, with the benefit of legal advice, as presenting a possible obstruction to the lessor's action. I note that no stage in any of the correspondence by Mr Dinh, or by Mr Nalyal when writing on his behalf on 16 February 2006, was there any suggestion that clause 7 precluded the issue of the three notices before forfeiture which had been issued in 2000 and 2005; nor was it mentioned in Mr Laumae's letter of 24 May 2006.

103. I reject Mr Dinh's argument that clause 7 of the lease "barred" the lessor from forfeiting the lease.

The effect of the 24 May 2002 agreement

104. As the original was in Bislama, counsel helpfully provided me with a certified translation of the 24 May 2002 settlement agreement which states **:**

> ***AGREEMENT***
> ***BETWEEN: DINH GILBERT***
> ***AND: ALLEN PAMA***
> ***GEORGE PAMA***
> ***(on behalf of John Pamavari)***
>
> *Further to a letter from John Pamavari dated 27 February 2002 in relation to a claim in the sum of Vt 40,000,000 for land on Urelapa Island, Title No. 04/2952/002; further to an offer by Dinh Gilbert in a letter dated 20 May 2002 for the sum of Vt 2,000,000 in response to said claim; and further to the Power or Attorney given by Mr. John Pamavari to Allen and George Pama in relation to this same matter,*
>
> ***THE TWO PARTIES AGREE AS FOLLOWS:***
> *1- Allen and George Pama accept the offer of Dinh Gilbert in the sum of Vt 2,000,000 by way of settlement to establish a good relationship between all parties;*
> *2- Allen and George Pama accept that there can be no further dispute or any other claim or anything else regarding Title No. 04/2952/002 on Urelapa Island that can arise once this agreement is signed;*
> *3- Dinh Gilbert will pay the full amount of Vt 2,000,000 to Allen and George Pama in instalments of Vt 500,000 at the end of every month commencing May 2002 through to August 2002.*
> *4- Allen and George Pama agree that if Dinh Gilbert wishes to sell title No. 04/2952/002 on Urelapa Island to another person, then Dinh Gilbert may proceed with the negotiations and Allen and George Pama will receive a small profit therefrom.*
> *5- Allen and George Pama agree that when Dinh Gilbert does proceed to arrange for the sale of Urelapa Island, there will be no interference on the part of Allen and George Pama or any other person.*
>
> *This agreement was made on the 24th day of May 2002 at Port Vila.*
>
> | | | |
> |---|---|---|
> | *Allen Pama* | *George Pama* | *Dinh Gilbert* |
> | *(Signature illegible)* | *(Signature illegible)* | *(Signature illegible)* |

105. If one looks at clause 2 of this agreement objectively and in isolation the only sensible conclusion is that the lessor's representatives were accepting that there could be no further dispute or claim raised by them in respect of *any matter* relating to the 002 lease. On the face of it, it is an agreement on their part to waive all existing and any future disputes.

106. This is certainly the interpretation which Mr Dinh contends should be applied and he says it follows that there could be no notice before forfeiture issued subsequently. Accordingly that which was issued on 15 March 2006 and led to the Valuer-General's determination of the lease was invalid and in breach of this agreement.

107. Both Mr Boar and Mr Gilu however, submit the agreement has to be looked at in context both as to what happened before and after it ; in particular they contend that it can only be seen as a settlement of past disputes rather than of any continuing breaches or future breaches and disputes.

108. The first point to note is that the preamble records that Mr Pamavari in a letter of 27 February 2002 had demanded Vt 40 million from Mr Dinh for breaches of the lease. That letter is unfortunately not in evidence and nor is the response from Mr Dinh dated 20 May in which he apparently counteroffers the sum of Vt 2 million. In view of the notices before forfeiture issued in April and December 2000 and the level of demand made by Mr Pamavari on 27 February 2002, it is surprising, to say the least that the relatively small sum of Vt 2 million was seen as acceptable. It is even more surprising that it would be accepted in settlement of both existing and any future disputes. However, the overall flavor of the agreement seems to be in contemplation of a sale of the lease by Mr Dinh. The offer and counteroffer seem to have been "exit" payments rather than directly as compensation for breaches. The Vt2 million payment itself is not said to be compensation for breaches but rather to establish a good relationship.

109. Traditionally the approach of the Courts to contractual interpretation was that the evidence of the conduct of the parties after the making of a contract was not admissible to construe it. See for example, McLaren v. Waikato Regional Council [1993] 1 NZLR 710. That approach has now been laid to rest, at least in New Zealand, by the Supreme Court (that country's highest court) decision in Gibbons Holdings Ltd v. Wholesale Distributors Ltd [2008]

1NZLR277. Justice Tipping said: "*If the Court can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.*"

110. The majority of the Supreme Court judges thought it was only possible to look at mutual conduct but I respectfully see force in what Justice Thomas said at [135], namely that the conduct of one party alone could be relevant if it was inconsistent with the interpretation the party was arguing before the Court.

111. On this basis I consider it is appropriate to look at the way that the parties conducted themselves after the agreement of 24 May 2002 was signed in order to assist with the assessment of what it objectively meant.

112. The first step taken, apparently at odds with the agreement was the letter of 13 April 2005, sent by Mr Pamavari, through his then lawyer George Nakou of Pacific Lawyers, enclosing a notice of forfeiture relating to ongoing breaches of the 002 lease. Certainly Mr Pamavari did not see himself as in any way constrained by the 24 May 2002 agreement from taking this action.

113. Mr Dinh's response by letter of 27 April 2005 is significant in this context. He *does* refer to the Vt2 million compensation payment made in 2002 but only in the context of responding to a claim for compensation for damage to trees. He does not attempt to say that whole claim is compromised by the settlement agreement. If he thought that there had been an agreement in full and final settlement of all matters relating to the lease, one would expect him to have responded with a one sentence letter referring to the agreement and saying that the notice before forfeiture could not properly be issued. I consider it significant that he did not do so. His argument now is not one he raised then.

114. It is clear from Mr Pamavari's letter that the lessors expected that the obligation on Mr Dinh to build the tourist resort remained. They did not see the 2002 agreement as relieving him of that obligation. Indeed the agreement does not purport to do that, nor has there been a formal variation of the lease under section 47 (1) of the Act. Negotiations about the issues arising under the lease, what payments should be made for surrender and to address the breaches

continued in the early part of 2006. Mr Dinh wrote to Mr Palmer on 9 February 2006 (although the letter is mistakenly dated 9 February 2003). Mr Dinh in that letter was seeking a payment of Vt 52,500 in order to surrender the lease. It is the response to a letter dated 8 February 2006 which is not in evidence.

115. Mr Palmer responded with a counteroffer of Vt 30 million in the letter of 13 February 2006. There followed Mr Nalyal's letter of 16 February 2006 where the offer of Vt 52,500 was repeated.

116. There followed the 15 March 2006 notice before forfeiture and the failure of Mr Dinh to respond in any way. Again, if he thought that the 24 May 2002 agreement prevented the issue of any notice before forfeiture he would surely have applied for relief against forfeiture and said so.

117. It is significant too that although Mr Dinh in his further amended claim expressly pleaded that clause 7 of the lease prevented the issue of the notice before forfeiture, but said nothing in that document about the 24 May 2002 agreement. He certainly did refer to it in his later reply but it is surprising to say the least that this was not raised immediately and indeed mentioned in the letter to the Valuer-General dated 24 May 2006. I do note that Mr Dinh in his sworn statement of 11 October 2013 referred to the settlement agreement and annexed a copy but he did not himself say at any stage that he regarded that as finalising all matters between the parties.

118. As Mr Boar and Mr Gilu have submitted, it is inconceivable that any landlord (or tenant) would agree to compromise any future dispute only 8 years into a 75-year lease. That commercially sensible point reinforces that there was no intention to compromise future disputes.

119. It is also doubtful that there was any real consideration for the settlement which was reached. The Vt 2 million figure is relatively small compared with what the consequences of the breaches were said to be worth by Mr Pamavari in his letter of 27 February 2002 and indeed in the notices before forfeiture which were issued in 2005 and 2006. The Vt2 million is referred to in a separate paragraph and purports to be for a different reason namely to

establish a good relationship between all parties rather than being any sort of tangible recognition of the real loss to the lessor arising from the breaches. Objectively the losses suffered by the lessor from Mr Dinh's failure to build the tourist resort must have been very substantial and ongoing because they were to receive 2% of the gross turnover for the entire duration of the lease after the first five years.

120. Neither party it seems treated the 2002 agreement as finally resolving much at all. Even Mr Dinh seemed to regard it only as relating to some out of pocket losses relating to the trees that had been removed in the course of the developments he had done.

121. Standing back and looking at the agreement in full context including the way in which the parties treated it afterwards, I am not satisfied that clause 2 can properly be interpreted in the way that Mr Dinh (now) contends. It does not constitute a formal variation of the lease and clear words would have been required to abrogate the lessor's statutory right to forfeit the lease. Even though it can be said that the breaches which lay behind the notice before forfeiture issued on 15 March 2006 pre-dated the 2002 agreement, it makes sense that all that the lessor was accepting was a delay in that being done beyond the five years which had been stipulated. Mr Dinh had asked for a four-year extension and although this is not referred to in the agreement, it is notable that it was about four years after the settlement agreement was signed that the notice before forfeiture with which this case is concerned was issued.

122. I am therefore not satisfied that the lessor was precluded by the 24 May 2002 agreement from issuing his notice before forfeiture on 15 March 2006.

If the notice before forfeiture was invalid, what impact, if any, would this have on the validity of the Valuer-General's determination of 31 May 2006?

123. In case I am wrong in either of my conclusions about the effect of clause 7 of the lease or the settlement agreement dated 24 May 2002, I turn to consider what impact, if any, that would have on my earlier conclusion that, in itself, the Valuer-General's determination was a proper one?

124. Mr Gilu submits that if the notice before forfeiture was invalidly issued and served by the lessor then that would render the enforcement of the forfeiture *void ab initio*. In other words he submits that if the precursor to the Valuer-General's decision was invalid then the step taken in reliance on its validity by the Valuer-General must equally be invalid; it was fatally tainted. No doubt Mr Laumae would support that view.

125. Mr Gilu provides no reasoning or authority for his submission.

126. Mr Boar submits that the validity of a Valuer-General's decision would be unaffected. He submits that as a general proposition the illegality of a contract or agreement does not prevent the enforcement of such a contract where that would not contravene an existing law. He refers to two judgments of the Court of Appeal of Fiji. With respect, because of the different circumstances I do not find those judgments helpful in the present context which deals not with the validity of a contract but with judicial review of a decision which it is said had a procedurally-flawed history of which the decision-maker was unaware.

127. Mr Boar submitted that because Mr Dinh had not pleaded any ground bearing on the invalidity of the notice before forfeiture, there is no material challenge to the Valuer-General's decision. I do not accept this point because clearly Mr Dinh has alleged that as a result of either clause 7 of the lease or the 24 May 2002 agreement the notice before forfeiture was invalidly issued and that this taints the Valuer-General's decision.

128. For the purposes of this discussion I shall assume that the lessor's issuing of the notice before forfeiture was in breach of a statutory provision, namely section 45 of the Act. That, as earlier discussed, provides that no lessor is entitled to exercise a right of forfeiture for breach of a condition in a lease until a notice before forfeiture had been issued. It is implicit in this that such a notice is *validly* issued and that no provision in the lease or other agreement between the parties constrains the lessor from doing so. Here I shall proceed on the basis that the lessor did not serve a *valid* notice either because of the effect of clause 7 or of the 24 May 2002 agreement.

129. What then is the effect in law of a failure to comply with a statutory provision?

130. Historically the Courts drew a distinction between procedural requirements which were *"mandatory"* and those which merely *"directory"*; there were many cases where the Courts tried to establish where the *"bright line"* between these two lay: see for example Montreal Street Railway Co. v. Normandin [1917] AC 170 (PC).

131. This historical categorization approach has given way in recent times to an assessment of the substance of each case. The classic modern statement of the approach to considering breach of a statutory requirement for the exercise of legal authority is that of Lord Hailsham, the Lord Chancellor in London and Clydeside Estates Limited v. Aberdeen District Council [1979] 3 All ER 876 where it was said that the appropriate analysis: *"…… is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of the spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect and procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect and procedure may be so nugatory or trivial that the authority can safely proceed with remedial action confident that, if the subject is so misguided as to rely on the fault, the Courts will decline to listen to his complaint."* (see page 883).

132. New Zealand's most esteemed Judge, Justice Cooke, said in New Zealand Institute of Agricultural Science Inc v. Ellesmere County [1976] 1 NZLR 630 at 636: *"Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."*

133. Without going into further detail, as there are many authorities across the common law wealth which have considered this issue, I note that a recent New Zealand text book, *Judicial Review: a New Zealand Perspective (*Third Edition, LexisNexis, Wellington 2014) says at paragraph 13.05, page 465, that the application of this modern approach considers:

1) *The place of the provision in the scheme of the enactment and its relative importance in the context of that scheme – the more important it is in that scheme, the less tolerant of breach a Court is likely to be;*

2) *The purpose of the provision viewed in isolation – the more important the purpose is to others, the less tolerant of breach a Court is likely to be;*

3) *The extent of the breach;*

4) *The actual effect of the breach on others – in both (3) and (4), the greater the breach and adverse effects of the breach, the less tolerant of breach is the Court likely to be;*

5) *The effect of holding that the action is unlawful because of non-compliance is assessed - here, the Court will look for ways of limiting the effects (often using the concept of relative nullity);*

6) *An overall assessment in light of the above five factors – has the intention of the legislature in the enactment as a whole and the provision concern been sufficiently met to excuse the breach?*

134. Adopting this approach I do not accept Mr Gilu's submission that the Valuer-General's decision is rendered *void ab initio* or irrevocably tainted, by an invalidity of the notice before forfeiture. Rather it is necessary to look at all the circumstances, both the statutory context and the wider context of this case.

135. Without going through each of the various stages identified above, I am satisfied that this breach had no ultimate causative effect on the Valuer-General's decision because there is no doubt that the notice before forfeiture was properly served and in plenty of time before it was acted on by the lessor and subsequently by the Valuer-General. In other words the effect of this breach on Mr Dinh was in practical terms nil because he had ample opportunity to apply for relief against forfeiture if he thought that the notice before forfeiture was invalidly issued. In effect his inaction was an intervening cause which allowed the Valuer-General to make a decision adverse to his interests. The invalidity of the notice (assumed for present purposes) would have had no causative effect at all if he had taken his clear opportunity to do something about it.

136. In these circumstances, I do not consider that the invalidity of the notice before forfeiture, which is assumed for present purposes, was such as to taint the Valuer-General's decision.

137. My view would have been different if the invalidity of the process which was discovered after the Valuer-General's decision had been that the notice was never served on Mr Dinh. That would have been in my view a fatal invalidity having a very serious adverse effect on a critical party namely Mr Dinh and in an important matter, his rights under a 75 –year commercial lease. Assessment of the relevant factors would have meant that the statutory breach by the lessor was inexcusable.

138. For these reasons I conclude that even if the notice before forfeiture was invalidly issued, then the Valuer-General's decision which in itself is otherwise invalid is not in the particular circumstances of this case liable to be set aside.

Relief ?

139. In case I am wrong in my conclusion that Mr Dinh's application for judicial review must fail, I turn to consider what, if any, relief, ought to have been granted had it succeeded.

140. Mr Gilu's submissions go no further than referring to the options available to the Court under rule 17.9 of the Civil Procedure Rules and suggesting that if a quashing order were made then under rule 17.9 (2) it may be appropriate to refer the matter back to the Valuer-General.

141. Mr Boar submits that no relief ought to be granted. He correctly points out that the granting of relief on a judicial review is a discretionary remedy. Even though a decision maker has erred in law, a claimant is not necessarily entitled to the remedy he seeks or indeed any remedy at all. He referred me to what Lord Justice Hobhouse said in Credit Suisse v. Allerdale Borough Council (1997) QB 306 at 355D: *"The discretion of the Court in deciding whether to grant any remedy is wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act."*

142. Mr Boar notes that the claimant seeks an order compelling the second defendant to reinstate the 002 lease. He submits the Director has no statutory power to do that, his powers being limited to those set out in sections 5, 6 and 8 of the Act. He refers to the Supreme Court judgment in Japhet v. Mata and Pierre, CC 187 of 2007 a judgment of Justice Fatiaki delivered on 22 March 2010. I do not find it necessary to consider this point.

143. Mr Boar further submits that Mr Dinh has not pleaded mistake or fraud so as to permit the Court to cancel SHL's 004 lease or Urelapa Ltd's 005 lease under section 100 (1) of the Act. He adds that Mr Dinh did not challenge decisions made in respect of the 004 and 005 leases so that in effect events have overtaken Mr Dinh's grievances.

144. Mr Boar also points out that there is a right of appeal to the Supreme Court against a Valuer-General's decision under s 27(1) of the Valuation of Land Act. However this right of appeal relates not to the determination of whether forfeiture should be enforced but rather to a decision in respect of an objection to a valuation.

145. Mr Boar says that if Mr Dinh has a legitimate complaint about the conduct of the Valuer-General then his remedy is to seek indemnity damages under section 101 of the Act.

146. There is no doubt that a remedy may be refused because a claimant has contributed towards the making of the error. Although the conduct of a claimant by way of acquiescence, estoppel and waiver does not relieve a decision maker of liability for an invalid decision, they are relevant to the discretion whether to grant a remedy. New Zealand authorities for these well-established propositions are Wislang v. Medical Practitioner's Disciplinary Committee [1974] 1 NZLR 29 and Electricity Corporation of NZ Limited v. Waimate District Council (High Court Christchurch CP47-90, 27 March 1992). However there are many similar authorities across the common law world.

147. The most common situation of acquiescence, estoppel or waiver in judicial review is failure to object to a breach of natural justice or other procedural invalidity at the time of the breach.

148. This is a case where in my view Mr Dinh must take responsibility for any error on the part of the Valuer-General. That is because he had a clear opportunity over a period of more than

two months to have input into the question of whether the forfeiture was invalid and whether it should be enforced by the Valuer-General. He did not take that opportunity and effectively waived his opportunity later to complain about the Valuer-General's decision. In short, he attacks the Valuer-General's decision after the event when he had plenty of time to do so before it was made.

149. In my view, that alone is sufficient to justify the refusal of any relief to which Mr Dinh might otherwise in principle have been entitled.

150. There is however another factor here: the combination of the passage of time and the issuing of not one but two new leases in respect of the same land. The reality is, as Mr Boar submits, that events have overtaken this case. Mr Dinh had the opportunity to obtain an injunction to prevent any dealings with the land while his complaints were heard by the Supreme Court but he did not do so. That allowed the issue of the 004 lease and later the 005 lease. While the situation may have been different if the only new lease was that to Urelapa Ltd, which has Mr Pamavari's younger sons as directors, here we also have SHL, an intervening purchaser on the face of it in good faith and for value without any notice of Mr Dinh's complaints about the Valuer-General's decision at the time that it acquired the 004 lease in late 2006.

151. For these reasons, it is now impossible to grant any practical remedy in respect of the land at Urelapa Island however deserving of that Mr Dinh might otherwise have been. A declaratory order quashing the Valuer-General's decision of 31 May 2006 may in principle be of value as a basis for a claim for indemnity damages under section 101 but I note that section 101 (2) says that no indemnity shall be payable *"to any person who has himself caused or substantially contributed to the damage by his fraud or negligence…."*

152. This is not a proceeding in which Mr Dinh claims damages from the fourth and fifth defendants for wrongfully issuing the notice before forfeiture and then wrongfully enforcing it by reference to the Valuer-General. If the lessor did act wrongfully then in principle Mr Dinh would have a right to claim damages from him. However any such claim would no doubt be met with the argument that even if that were correct, his losses were not caused by what the lessors did, but by what Mr Dinh failed to do, namely to draw the attention of the

Valuer-General to these points when he had a clearly reasonable period of time to do so and an express statutory basis on which he could do so under section 46 (1) of the Act.

153. Further, any such claim would now appear to be statute-barred since the relevant events occurred in 2006.

154. For these reasons even if Mr Dinh's judicial review application had succeeded on the merits I would have declined to grant any of the relief he seeks.

155. The claim by Mr Dinh is therefore dismissed in its entirety.

SHL's Counterclaim

156. The final issue is the counterclaim by SHL seeking a declaration that it is a bona fide lessee and holder of lease title 004 and that its title should be preferred at law to that of the claimant. Given that since the cancellation of the 002 lease title, which I have effectively upheld, Mr Dinh no longer has any title to Urelapa Island, there is no doubt that any title SHL has is better than that. However I will consider the evidence led on this issue, and Mr Morrison's submissions.

157. In his defence to the counterclaim Mr Dinh pleads that SHL through its principals Robert Herd and Terry Hannam had made enquiry and were told and fully aware of the current proceeding at some time prior to November 2006. He further alleges that SHL was aware of the dispute about Urelapa Island. He goes on to plead that Mr Herd had *"masterminded and funded"* the forfeiture of the 002 lease and the creation of 004 lease. Mr Dinh alleges that confirmatory of this is the fact that the signing of the transfer and its registration was done within less than 24 hours so as to defeat Mr Dinh's rights.

158. In his sworn statement of 10 July 2014, Mr Herd explained how SHL came to acquire the 004 lease. He said that he met Allen Palmer for the first time at a real estate agents office on about 11 July 2006. Mr Palmer advised Mr Herd of the forfeiture of Mr Dinh's lease and that there was no injunction or other impediment to a new lease being granted. Mr Palmer

provided proof of the cancellation of the lease and of the power of attorney under which he was operating on behalf of his father.

159. Mr Herd said that he, and his fellow shareholder (through his family trust) Mr Hannam, had lost a significant amount of money in the previous twelve months dealing with other custom land owners so SHL only agreed to acquire the lease on the basis that it was registered and transferred properly so as to acquire the protection of the Act as bona fide purchasers for value without notice of any fraud.

160. Mr Herd said that he took no part in the preparation of the leases and that on about 14 November 2006 Mr Palmer advised him that the leases had been registered (there was another lease over Tuvana Island which was purchased by another company controlled by Mr Herd, Seascape Four Ltd). These were duly transferred to the purchasing companies. The new lease title number of Urelapa Island was that of the 004 lease.

161. Completion of the purchase was arranged for 15 December 2006 and that duly occurred. Mr Herd confirmed that SHL had not received any notification of any claim against that lease title or of any caution lodged against it by Mr Dinh or anyone else. Nor was SHL aware of any defect, omission, fraud or mistake in the registration of the transfer under which SHL became registered proprietor. Further, SHL was not aware of and had not been served with or given any notice of any injunction or other proceedings preventing the dealing with the title to Urelapa Island.

162. Prior to the trial, Mr Dinh had filed no evidence in response to this but Mr Laumae on his behalf sought and was granted leave to file a statement by Mr Dinh at the beginning of the trial, this being sworn on 22 September 2014.

163. Mr Dinh said that in early June 2006 he met with a Mr Steven Tahi, a former Director-General of the Ministry of Lands and with Mr Billiam Jeiock a former lease execution officer of the Department of Lands. Mr Jeiock told Mr Dinh that he was working with Mr Herd and Mr Hannam at Ocean Work in Port Vila. He said that Mr Jeiock said that Mr Herd had met with Allen Palmer about creating a new lease over Urelapa Island. Mr Dinh says he requested Mr Jeiock to advise Mr Herd and Mr Hannam not to deal with Mr Palmer or

anyone else in respect of the land because he had already filed a Supreme Court Claim alleging the wrongful forfeiture and the determination of the his lease.

164. Mr Dinh says that around the end of August or early December 2006, Mr Jeiock told him that he had advised *"his boss"* Mr Herd and Mr Hannam about Mr Dinh's case but that they had responded by saying that the lease was already cancelled. Mr Jeiock advised Mr Dinh that Mr Herd was working with the land owners to create a new lease replacing Mr Dinh's lease.

165. Mr Dinh says he went to his lawyer's office to ask him to press for his case to be heard and his lawyer said that he would file an urgent judicial review case. I note though that no injunction was sought let alone obtained then, or later.

166. Mr Dinh noted that Mr Jeiock had witnessed the execution of lease title 004 on 10 November 2006 and also witnessed the transfer of the 004 lease from Allen and George Palmer to SHL on 13 November 2006. Mr Dinh said that in his long experience of land transactions in Vanuatu it sometimes takes years before a lease is registered and that the speed at which the 004 lease was signed registered and transferred, within 24 hours, was very unusual and surprising.

167. It is on the basis of this combination of information that Mr Dinh asserts that it is very clear that Mr Herd and Mr Hannam masterminded the forfeiture and creation of the new lease and its transfer for their benefit and that SHL is not a bona fide purchaser.

168. Mr Herd was cross-examined by Mr Laumae. He confirmed that he knew Mr Jeiock (who apparently passed away in 2008) but denied that he had ever employed him. Rather from time to time he had been engaged as an independent contractor to do certain land-related work but he was not so engaged in relation to the transactions relevant to this case. Mr Herd accepted that Mr Jeiock had witnessed some signatures but that was not because he had been engaged by SHL in connection with these transactions. Mr Herd said he was not involved in the preparation and processing of the documents and that he had seen similar documentation processed in reasonably quick time.

169. Mr Herd said that his recollection was that he only became aware of this claim long after the settlement of the transfer of the lease in late 2006; he believes it was not until 2010.

170. Mr Herd confirmed that especially in view of recent difficulties in dealing with custom owners SHL would certainly not have settled the purchase of the lease had there been any indication of a problem or outstanding claim.

171. In his submissions Mr Morrison pointed out that Mr Dinh had offered no evidence as to why he took no steps to notify SHL, through his lawyer or otherwise, of his challenge to the forfeiture of his lease given that he says he was, as a result of what Mr Jeiock told him, aware in June 2006 of the interest of Mr Herd and Mr Hannam in Urelapa Island. When cross-examined Mr Dinh accepted that he had relied on his discussions with the Minister of Lands to protect his interest. He accepted that he knew Mr Hannam well although he had not met Mr Herd. He agreed he never spoke to Mr Hannam about his ongoing claim or interest in Urelapa Island.

172. Mr Morrison submitted that there was no evidence led to justify the pleaded assertion that Mr Herd had masterminded and funded the forfeiture of Mr Dinh's 002 lease title.

173. Mr Morrison further submitted that the only evidence substantiating the allegation of SHL being aware of the dispute prior to November 2006 of the dispute was hearsay, based on what Mr Jeiock had told Mr Dinh.

174. Mr Morrison submitted that there is no reliable or compelling evidence that SHL was other than a bona fide purchaser for value without notice of any challenge to the leasehold title being acquired. He further points out that SHL was entitled to rely on the registered interest of the vendors of the lease, this being the basis of the Torrens system of registration.

175. In his further submissions Mr Morrison pointed out that there was no evidence called from a witness from the Land Record's Office to support the allegation that this lease was registered and transferred in an unusually fast time.

176. Mr Morrison argues that SHL had acquired an indefeasible title as confirmed in section 100 (2) of the Act because it was a bona fide purchaser for value. There was no evidence in any event of fraud, omission or mistake in relation to the registration of the transfer to it, there was no notification of the claim by Mr Dinh prior to the registration of SHL's lease and SHL had gone into possession.

177. Mr Morrison referred to the principle espoused by the High Court of Australia in Breskvar v. Wall (1971) 126 CLR 376 that where a party with an equitable interest (party A) acquired it earlier in time to another party (party B) who subsequently acquires a legal interest, then party B's interest should be preferred notwithstanding that it is later in time. That is because party A by its failure to take steps to notify party B of its interest has caused party B, entitled to rely on the register, to believe that the purchase of the land for valuable consideration was free of any claim including any claim party A might have.

178. I have no hesitation in accepting all of Mr Morrison's submissions.

179. The assertion by Mr Dinh that Mr Herd not only knew about his claim before acquiring the 004 lease but in fact masterminded the forfeiture of the 002 lease was not supported by any admissible evidence at all. As I have earlier pointed out, questions in cross-examination are not evidence unless they are adopted by the witness. Mr Herd rejected all such criticisms and assertions made by Mr Laumae. Mr Dinh did not call any witness who was able to give direct evidence about these serious allegations.

180. The upshot is that I must and do accept Mr Herd's evidence, which was entirely unshaken in cross- examination, that SHL was a bona fide purchaser for value without notice of any claim or dispute with forfeiture by Mr Dinh. I also accept Mr Herd's pragmatic evidence that SHL would not have paid Vt 40 million for the lease if there had been any suggestion that the transaction might be challenged because of the circumstances relating to Mr Dinh's lease and its forfeiture.

181. Following that conclusion, and accepting the Breskvar v. Wall principle, there is no doubt that SHL acquired a bona fide leasehold title in November 2006 and is entitled to be protected from challenge by Mr Dinh by virtue of section 100 (2) of the Act. Even without

that statutory provision, the Breskvar v. Wall principle would apply in SHL's favour because Mr Dinh failed to take reasonable steps to ensure that SHL or any other prospective purchaser was aware of his claim. He could easily have lodged a caution against the title or obtained a Court injunction and served it on Mr Herd and Mr Hannam given that he says he was aware of their interest from June 2006. Furthermore, by the end of August or early September 2006, well before the critical transactions in mid-November 2006, Mr Dinh says he was aware that Mr Herd was working with the landowners to create a new lease replacing his lease. In the face of this tangible threat, he still did nothing to protect his claim or to inform SHL of it.

182. For these reasons I am satisfied that SHL is entitled to the declaration it seeks in paragraph 1 of its prayer for relief. I make an order accordingly.

Conclusions

183. For the above reasons I conclude that:

a) The Valuer-General's determination of 31 May 2006 to forfeit the 002 lease was, in itself, lawful and legitimate;

b) The notice before forfeiture dated 15 March 2006 was properly issued notwithstanding the presence in the lease of clause 7 and the signing of the settlement agreement of 24 May 2002;

c) If I am wrong in conclusion (b) I find this has no impact on the validity of the Valuer-General's determination of 31 May 2006;

d) If I am wrong in any of the above conclusions, Mr Dinh is not entitled to relief;

e) SHL acquired the 004 lease as a bona fide purchaser for value without notice of any defect in title, fraud or mistake and accordingly has a title preferable at law to any title, equitable or legal, which Mr Dinh may have had.

Result

184. Mr Dinh's claim is dismissed in its entirety and the counterclaim by SHL is upheld.

185. SHL is entitled to costs against Mr Dinh on the counterclaim and all defendants are entitled to costs against Mr Dinh on the claim. These may be taxed if they cannot be agreed.

186. There will be a conference **on Wednesday 10 December 2014 at 4pm** to discuss the future course of the other two proceedings which the Court of Appeal consolidated with this one (04/2012 and 34/2011), including what should be done about the adjourned appeal by the State to the Court of Appeal.

BY THE COURT