IN THE COURT OF APPEAL

OF SOLOMON ISLANDS **Civil Appeal 34 of 2014**

Civil Jurisdiction

BETWEEN:	**SMM SOLOMON LIMITED**	**First Appellant**
AND:	**ALFRED JOLO** (representing the trustees and members of the Anika Thai clan)	**Second Appellant**
AND:	**HUGO BUGORO AND WILLIE DENIMANA** (representing the Trustees and members of the Thavia clan)	**Third Appellant**
AND:	**HENRY VASULA RAOGA** (representing the trustees and members of the Vihuvunagi tribe)	**Fourth Appellant**
AND:	**BEN SALUSU (**representing the trustees and members of the Vihuvunagi tribe in respect of the Chogea and Beajong land Area within Takata	**Fifth Appellant**
AND:	**PAUL FOTAMANA** (representing the trustees and members of the Veronica Lona clan)	**Sixth Appellant**
AND:	**AXIOM KB LIMITED**	**First Respondent**
AND:	**ROBERT MALO, FRANCIS SELO, LEONARD BAVA, REV. WILSON MAPURU AND ELLIOT CORTEZ**	**Second Respondents**
AND:	**THE ATTORNEY GENERAL** (representing the Minerals Board and the Minister of Mines, Energy and Rural Electrification)	**Third Respondent**
AND:	**COMMISSIONER OF LANDS**	**Fourth Respondent**
AND:	**REGISTRAR OF TITLES**	**Fifth Respondent**
AND:	**THE ATTORNEY GENERAL**	**Sixth Respondent**

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Introduction

1. Lying along the Pacific Rim of Fire, the Solomon Islands are thought to have rich mineral deposits. Eagerness to unlock the economic potential of nickel reserves in Isabel Province led to dispute between two groups of individuals claiming to represent customary landowners and intense commercial competition between two mining companies. These intersecting conflicts culminated in this litigation, which began when a claim was filed on 18 July 2011.

2. The appellants, claimants before the High Court, were SMM Solomon Limited ("SMMS") and a group of customary landowners ("the land appellants"). They sought relief in relation to decisions of the Minerals Board ("the Board"), the Minister of Mines, Energy and Rural Electrification ("the Minister"), the Commissioner of Lands and the Registrar of Titles, as well as injunctive relief against the first respondent ("Axiom KB") and the second respondents who comprised the other group of customary landowners ("the land respondents"). Axiom KB cross-claimed for injunctive and declaratory relief against SMMS. The Attorney-General, the Commissioner of Lands and the Registrar of Titles were also parties to the proceedings at trial and on appeal.

3. In September 2011 the High Court granted SMMS interlocutory injunctions against Axiom KB in *SMM Solomon Limited v Attorney General & Ors*. [2011] SBHC 98. Those orders were upheld on appeal in *Axiom KB Limited v SMM Solomon Limited & Ors*. [2012] SBCA 22.

4. The trial before the Hon. Commissioner JR Brown extended over 95 sitting days. The Commissioner delivered judgment on 24 September 2014, dismissing the claims by SMMS and the land appellants and discharging the injunctions. He granted permanent injunctions against SMMS as well as declaratory relief.

5. SMMS and the land appellants have appealed against the Commissioner's decision. The notice of appeal was filed on 24 October 2014 and amended on 16 December 2014. On 7 November 2014, Axiom KB and the land respondents filed a notice of contention.

FACTUAL OVERVIEW

Kolosori

6. Takata is an area of land of between 60 and 65 square kilometres in the south eastern part of the island of Santa Isabel. The island of San Jorge lies offshore from Takata. Prior to February 2011 all of Takata and San Jorge were customary land.

7. Kolosori is sometimes used as an alternative name for Takata. More accurately, it is that part of Takata between the Takata and Havihua rivers. Its customary owners belonged to three tribes - the Thogakama, the Vihuvunaghi and the Posomogo. There were sub-tribes and clans within the tribes, including the Thavia sub-tribe or clan of the Thogakama and the Veronica Lona clan of the Posomogo.

8. From about 1991, Bughotu Nickel Limited ("BNL") wanted to prospect for nickel in Kolosori.

9. At all material times, dealings in customary land have been restricted by the *Land and Titles Act (Cap 133)*. Apart from transactions permitted by customary law between Solomon Islanders, the only authorised dealings with customary land are compulsory

acquisitions for public purposes (under Part V Division 2) and sales or leases to the Commissioner of Lands or a Provincial Assembly (under Part V Division 1).

10. In 1992 the Commissioner of Lands commenced a process to acquire Kolosori land under Part V Division 1 of the *Land and Titles Act* with a view to facilitating prospecting by BNL. It was envisaged that the Commissioner of Lands would appoint an Acquisition Officer to act as his agent. The Acquisition Officer would demarcate the boundaries of the land and enter an agreement for lease with representatives of the customary landowners (who would be duly authorised in custom). The Commissioner of Lands would then vest the perpetual estate in the land in those representatives, who would execute a lease in favour of the Commissioner of Lands. Pursuant to the agreement for lease, the Commissioner of Lands would transfer the lease to BNL.

11. In 1992 the Commissioner of Lands appointed Laury Penrose Palmer ("Palmer") as the Acquisition Officer. Palmer described the land concerned in the acquisition as "Kolosori land", "in fact the land area from Takata to Ghahirasethe". He identified six different blocks within it, which he called G1 – G6. With the exception of the G2 land, referred to as "the Three Brothers' Land", all of the land was transmitted in accordance with a matrilineal system of customary land ownership. The Three Brothers' Land had earlier been purchased in custom, and was transmitted in accordance with a patrilineal system.

12. Palmer held two public meetings, on 3 and 30 October 1992, to hear and determine claims to the land and to identify up to five persons to represent the various customary owners. By the conclusion of the second meeting, he had identified five persons he referred to as "trustees" in his Acquisition Report - Joel Malo (from the G1 area), Hugo Bugoro (G2), Levi Likoho (G3), Lonsdale Manase (G4) and Joseph Bengere (G6). There was no-one identified from the G5 area.

13. An agreement was made between those five persons as lessors and Palmer for the Commissioner of Lands as lessee for the lease of "land at Takata known as from Takata to Ghahirasethe area" edged in red on a plan that was part of the agreement. The term of the lease was 35 years starting on 1 March 1993. Although it bore the date 4 October 1992 when it was signed by some of the trustees, it was not concluded until after the second meeting when Manase and Palmer signed it.

14. Several appeals against Palmer's determinations were brought, with mixed success. The appeal process was concluded by 2002. In the result, there were four representatives of the customary owners authorised to sign a lease to the Commissioner of Lands: Joel Malo, Martin Tango (in lieu of Bugoro), Lonsdale Manase and Joseph Bengere.

15. Time passed, and the country was embroiled in ethnic and political tensions for some years. BNL disappeared from the scene, and Bengere died in 2003. Meanwhile, nothing was done to progress the acquisition process that had been commenced in 1992.

16. Over a period of about five years from 2003, Pacrim Resources Ltd, SMMS and Axiom Mining Limited ("Axiom Mining") showed interest in prospecting for nickel in Isabel Province, and a number of persons emerged as putative representatives of the customary owners of the relevant lands.

17. Two meetings of customary owners took place at the Iron Bottom Sound Hotel on 23 April 2008 ("the IBS meetings").

18. The first IBS meeting was attended by 23 persons, including the land respondents. It resolved to replace the trustees identified by Palmer with new trustees, who were to take the leading role in effecting "registration of Kolosori customary land into a perpetual estate". They were to be persons who bore "the same status and standing in custom" as those they were replacing and who were "primary owner[s] of Kolosori customary land". It resolved to make these replacements –

New appointee	*in lieu of*
Robert Malo	Joel Malo
Leonard Bava	Hugo Bugoro
Elliot Cortez	Levi Likoho
Francis Selo	Lonsdale Manase
Wilson Maparu	Joseph Bengere

Of course, as a result of the appeals process, Bugoro had already been replaced by Tango and Likoho had been removed. In addition, Bengere had died. The new appointees are the present land respondents.

19. The second IBS meeting was attended by twelve persons, only four of whom (Bava, Cortez, Selo and Maparu) had been at the first meeting. Without any reference to the outcome of the first meeting, it resolved that the Takata landowners withdraw from Bugotu Landowners Association, a body formed in 2003 to negotiate with one or more mining companies, and that Daniel Webb, an associate of Graeme Stace of Nautilus Utility Company Limited ("Nautilus"), be appointed as a consultant to pursue funding for their activities.

20. Kolosori Holdings Limited ("KHL") was incorporated on 20 May 2008. At all material times its shareholders and directors were four of the land respondents – Bava, Cortez, Selo, and Mapuru. The land respondents, through Selo and with the financial assistance of Nautilus, arranged for the Kolosori land to be surveyed. This was completed by January 2010. On 30 August 2012 KHL was changed to a community company and it changed its name to Kolosori Holdings Community Company Limited.

International tender

21. All minerals in Solomon Islands vest in the people and government of the nation: *Mines and Minerals Act (Cap 42)* s 2(1). No one may prospect for minerals without a prospecting licence issued by the Minister: ss 2(2) and 19. Applications for Prospecting Licences are dealt with in section 20 of that Act. When advised by the Board that an application is acceptable, the Minister informs the applicant of his intent to issue the Prospecting Licence subject to the applicant's obtaining the relevant landowners' permission to enter on to the land (Surface Access Agreement) to access minerals from the surface: s 21.

22. There are three separate nickel/cobalt deposits in Isabel Province – the Takata and Jejevo deposits on the island of Santa Isabel and the San Jorge deposit on San Jorge island. On 23 July 2010 the Caretaker Minister of Mines issued a document entitled "The Isabel Nickel Deposit International Tender – The Tender Document" to parties who had responded to an advertisement to tender for Prospecting Licences for laterite nickel in

part of Takata and part of Jejevo on Santa Isabel and on San Jorge ("the tender specification").

23. The specified area of Takata included Kolosori land the subject of the Palmer acquisition process.

The SMMS tender award and Letter of Intent

24. SMMS had been conducting nickel prospecting in other parts of Santa Isabel and Choiseul since 2006. It was currently holding at least three other Prospecting Licences over other areas without having applied for a mining lease or commenced mining in at least one of them.

25. On 15 September 2010 SMMS submitted a tender ("the tender document") for parts of the areas identified in the tender specification: the entire specified area of Takata, part of the specified area of Jejevo, and the majority of the specified area of San Jorge.

26. On 27 and 28 September 2010 a Tender Screening Committee considered the tender bids received, and identified the SMMS bid as the most favourable. On 30 September 2010 the Board –

> "…. resolved to endorse the Tender Screening Committee's final report and the selection of SMM as the winning bidder of the Isabel Nickel International Tender, and considered that the period of time for a 'Letter of Intent' to be granted be for 12 months to SMM and the Minister be cordially and accordingly advised."

27. The Minister, Mr. Mark Kemakeza, signed two letters addressed to SMMS - one dated 4 October 2010 and the other 23 November 2010. Both letters were received by SMMS on 4 December 2010. In the first letter, the Minister told SMMS that its tender submission for the Isabel Nickel Deposits (San Jorge, Takata and Jejevo) had been successful. He said –

> "This Letter now serve as the formal Notification of Award of the Isabel Nickel Tender to your SMM Solomon Limited which will be valid for 15 days from the date of receipt of this notification of success.
>
> Your fulfilment of Section 20 of the Mines and Minerals Act 1990 *(The Act)* is hereby requested in the next 30 days from the date of receipt of your acceptance of the award.
>
> Section 21(1) of the Act will automatically be effected once Section 20 of the Act is fully and successfully complied with."

In the second letter, he said he intended to issue a Prospecting Licence over the Takata, San Jorge and Jejevo areas as defined in the International Tender to the company, subject to its acquiring surface access rights from the landowners ("the SMMS Letter of Intent").

28. SMMS replied by letter dated and delivered on 6 December 2010, accepting the tender award, noting the contents of the Letter of Intent and undertaking to comply with the relevant sections of the *Mines and Minerals Act* as soon as possible.

29. On 14 December 2010 the Director of Mines and chairman of the Board, Peter Auga, signed a document acknowledging and confirming –

> "…. that I have waived the requirement under the notification of award dated 4 October, 2010 that SMM Solomon Limited as Tenderer is required to lodge application for prospecting licence within 30 days from the date of receipt of the notification of award, since the process under section 20 of the Mines and Minerals Act has already been complied with under international tender process held for the San Jorge, Takata, and Jejevo Nickel deposits."

30. By letter to SMMS dated 17 January 2011 but not delivered until about 14 March 2011, the Minister cancelled the award of the tender and withdrew his intention to grant the Prospecting Licence.

Axiom KB

31. Meanwhile, Axiom Mining's interest in prospecting for nickel in Isabel Province had been re-enlivened.

32. Soon after a change in control of the company in mid-2010, Stace of Nautilus contacted the new chairman Stephen Williams and the new managing director and CEO Ryan Mount, and the company renewed its interest in Takata and San Jorge. Stace facilitated a meeting attended by Williams and Mount, the land respondents and customary landowners from San Jorge at which the exploitation of the nickel reserves was discussed.

33. On 15 October 2010 an Option Deed was executed by the Kolosori Landowner Trustees (the land respondents, Mapuru being represented by his daughter) and the Bumusule Landowner Trustees (purportedly on behalf of the San Jorge landowners) as grantors, Axiom Nickel Pty Limited ("Axiom Nickel") as grantee, and Axiom Mining as guarantor. Axiom Nickel was a wholly owned subsidiary of Axiom Mining. The Option Deed contemplated a joint venture in which Axiom Nickel would hold an 80% interest and a company representing the two landowner groups (ultimately KB Minerals Ltd) would hold 20%. A company would be incorporated to act as the joint venture vehicle (ultimately Axiom KB) and there would be significant milestone payments to each group of landowners.

34. Axiom KB was incorporated in Solomon Islands on 17 December 2010.

35. A deed varying the Option Deed was executed in February 2011.

Perpetual estate in Kolosori land

36. On 2 December 2010 the Commissioner of Lands executed an order vesting the perpetual estate in "that Land known as Kolosori Land situated in East Bugotu Isabel Province of an area comprising 4,506 hectares otherwise known as LR 1063" as shown edged in orange on certain plans in "Kolosori Holders Limited (for and on behalf of all the land Holding groups) free from all other Interest". The order recited that the land respondents (who were individually named) had signed an agreement for the lease of the land under s 61 (since renumbered as s 62) of the *Land and Titles Act* on 30 October 1992. In his reasons for judgment the Commissioner observed that that order appeared to have lapsed or to have been subsumed in the later vesting order made on 11 February 2011.

37. Elliot Cortez (one of the land respondents) wrote to the Registrar of Titles, sending a copy to the Commissioner of Lands, wishing "to clarify" that the persons whose names appeared on the Acquisition Report were to be replaced by those whose names appeared

on the vesting order in accordance with a general consensus at a general meeting on 23 April 2008 ("the Cortez letter").

38. On 11 February 2011 the Commissioner of Lands made an order vesting the perpetual estate in that land in the land respondents for and on behalf of KHL ("the vesting order"). The land was not precisely that demarcated in the Palmer acquisition process, although largely so. The vesting order recited that the Commissioner of Lands did so in exercise of powers granted by certain provisions in Part V Division 1 of the *Land and Titles Act.* It contained a number of incorrect recitals including that the Acquisition Officer had made an agreement for lease with the five land respondents on 30 October 1992, that the Acquisition Officer had determined that the land respondents were the rightful owners to lease the land and receive the rent on behalf of KHL, and that there had not been any appeal against the Acquisition Officer's determination.

39. On 15 February 2011 the Registrar of Titles registered the land respondents as joint owners of the perpetual estate in the land the subject of the vesting order ("Parcel 130-004-1"). That registration was noted on the relevant perpetual estate register (which was a leaf in the land register) as the "First Registration under Part V, Division 1 of the *Land and Titles Act* (Cap 133)". It was effected prior to the preparation of a registry map of the land.

40. A lease of Parcel 130-004-1 by the land respondents as lessors and Axiom KB as lessee was executed by Axiom KB on 22 February 2011 and by the land respondents the next day ("the Axiom lease"). It was for 50 years from 22 February 2011.

41. The Axiom lease was registered on 23 February 2011.

Prospecting licence issued to Axiom KB

42. On 29 March 2011 Axiom KB lodged applications for Prospecting Licences over part of Takata and part of San Jorge. The Takata application covered part of the registered land (i.e. part of Parcel 130-004-1, the subject of the Axiom lease), customary land that was part of the land in another Prospecting Licence issued to SMMS in July 2007 and renewed in 2010 and 2012, and other customary land. In other words, it was not co-extensive with the Kolosori land the subject of the SMMS tender bid.

43. At an extraordinary meeting on 12 April 2011 the Board resolved to advise the Minister to issue a Letter of Intent to Axiom KB over the areas it had applied for in Takata and San Jorge, allowing Axiom KB 12 months to reach a Surface Access Agreement with landowners.

44. On the same day, 12 April 2011, the Minister issued a Letter of Intent in the terms recommended by the Board.

45. Axiom KB reached a Surface Access Agreement with the "Landowners and Trustees" of the land in its Takata application. That agreement was dated 15 April 2011 ("the Axiom Surface Access Agreement").

46. On the same day, 15 April 2011, the Minister granted Axiom KB a Prospecting Licence over the land in its Takata application ("the Axiom Prospecting Licence").

THE COMMISSIONER'S DECISION

Relief sought

47. This was not a case where some relief was claimed by SMMS and other relief was sought by the land appellants. Rather, all of the various forms of relief were sought by both SMMS and the land appellants.

48. The appellants sought judicial review of the following –
    (a) the Minister's cancellation of the award of the tender to SMMS and the SMMS Letter of Intent;
    (b) the Commissioner of Lands' making the vesting order in favour of the land respondents;
    (c) the Registrar of Titles' registration of the perpetual estate in favour of the land respondents;
    (d) the Registrar of Titles' registration of the Axiom lease;
    (e) the Board's cancellation or adoption of the Minister's purported cancellation of the award of the tender and the SMMS Letter of Intent, and its decision to recommend to the Minister the issue of a Letter of Intent in respect of Takata and San Jorge to Axiom KB; and
    (f) the Minister's issue of a Letter of Intent and subsequently a Prospecting Licence to Axiom KB.

    They sought various consequential orders, including an order for an account of all moneys paid by Axiom KB to the land respondents.

49. In the alternative, the appellants sought an order in favour of SMMS for specific performance of an agreement between the Solomon Islands Government (represented by the Board and the Minister) and SMMS, comprised of or evidenced by the International Tender, the SMMS Tender, the Award, SMMS's acceptance of the Award and the SMMS Letter of Intent.

50. In the alternative to judicial review of the acts of the Commissioner of Lands and the Registrar of Titles, they sought rectification of the land register by the cancellation of both registrations and declaratory relief.

51. In the further alternative, they sought a declaration pursuant to s 18 of the *Constitution* that ss 109 and 110 of the *Land and Titles Act* were partially invalid.

Abuse of process

52. The Commissioner considered that there had been a conflation of causes of action, judicial review and contractual claims, in violation of the principle in *O'Reilly v Mackman* [1983] 2 AC 237. There were also claims for relief under the *Land and Titles Act*, which might be classified as statutory claims. In the Commissioner's view, as repeatedly set out in his reasons, the conduct of the trial as a hybrid claim was an abuse of process.

Cancellation of SMMS Letter of Intent

53. The Commissioner gave a number of reasons for refusing judicial review of the Minister's cancellation of the SMMS Letter of Intent.
    (i) The cancellation of the SMMS Letter of Intent did not have a sufficient public law element to give rise to a right to judicial review. The tender was a commercial

tender, and any rights SMMS may have had arose from the contractual relations, if any, which followed it.

(ii) An applicant for judicial review must show what the Commissioner variously described as "uberrima fides", "good faith" and "clean hands". The Commissioner considered that SMMS failed this test because of the deceitful and dishonest conduct of its managing director, Mr. Yoritoshi Ochi, and that SMMS's claim for judicial review was thus an abuse of process.

(iii) The provisions of s 20(5) of the *Mines and Minerals Act* affected an application for a Prospecting Licence whether it arose from a tender process or it was made in accordance with s 20(1). Since SMMS already held three Prospecting Licences, the Director of Mines should have refused its tender bid as non-compliant with s 20(5).

(iv) The Minister had no power to issue a Letter of Intent in the absence of an application for a Prospecting Licence. SMMS neither submitted an application for a Prospecting Licence with its tender bid nor lodged an application "within 30 days of notification of acceptance of the tender" as required by clause 1.8(4) of the tender specification. The Board had not opined that there was an acceptable application for a Prospecting Licence; it had merely advised on an appropriate period for a Letter of Intent.

(v) The Minister had power to issue a Letter of Intent in two circumstances: (1) where an application for a Prospecting Licence was made in accordance with s 20(1), and (2) where a successful tenderer had offered to comply with the terms of its tender bid to carry out the prospecting work. In the latter case, a Letter of Intent issued before receipt of that advice from the successful tenderer would be an escrow until the advice was received. Neither of those circumstances had arisen when the Minister issued the SMMS Letter of Intent.

(vi) The Minister issued the SMMS Letter of Intent on the false premise that he was obliged to do so on notification of the successful tender bid. The tender specification was an invitation to treat. SMMS accepted that invitation when it submitted its tender bid. Pursuant to clause 1.8(3) of the tender specification, upon being advised that its tender bid was successful, SMMS had 15 days in which to inform the Minister that it agreed to undertake exploration activities as specified in its tender bid. The tender process would culminate in an agreement when it did so.

(vii) Auga could not waive the requirement in the tender specification to apply for a Prospecting Licence.

(viii) The Minister had power to cancel a Letter of Intent pursuant to s 36(a) of the *Interpretation and General Provisions Act (cap 85)*. That power was unfettered.

(ix) The Minister's cancellation of the SMMS Letter of Intent was not susceptible to judicial review because it relied on a Cabinet decision.

(x) SMMS had no right to be heard before the Minister cancelled the SMMS Letter of Intent for two reasons. (1) The conduct of Mr. Ochi was such that any expectation of procedural fairness was not a legitimate expectation. (2) The Legislature intended to abrogate any right to procedural fairness in the cancellation of a Letter of Intent. This was apparent from s 71 of the *Mines and Minerals Act* which provided for a show cause procedure when the Minister proposed to suspend or cancel a permit, licence or lease, but was silent about proposed cancellation of a Letter of Intent.

(xi) Even if quashing orders were open in the circumstances, the Court could not compel the Board or the Minister to exercise a discretion in favour of SMMS.

(xii) The land appellants did not have a sufficient interest to seek judicial review of the cancellation of the SMMS Letter of Intent. Moreover, they had not exhausted the remedy in s 229 of the *Land and Titles Act.* Their joinder in SMMS's application for judicial review was an abuse of process.

No contract

54. The Commissioner found that there was no contract between SMMS and the Solomon Islands Government. Even if there was one, SMMS was not entitled to specific performance. The land appellants were not parties to any such contract and had no right to seek specific performance of it.

Standing to bring land claim

55. Several issues of standing arose in relation to the land claim – the standing of SMMS, the standing of the clans the land appellants purported to represent ("the clans' locus standi"), and the land appellants' standing to represent those clans in the proceedings pursuant to *Civil Procedure Rules* r 3.42 ("the land appellants' representative standing").

56. The Commissioner held that SMMS lacked standing as it was not a Solomon Islander.

57. The Commissioner was not satisfied either of the clans' locus standi or of the land appellants' representative standing, observing that if ownership in custom were relied on, the High Court had no jurisdiction to determine the issue.

58. The Commissioner opined that SMMS's funding of the land appellants amounted to maintenance**.**

Indefeasibility

59. The land respondents and Axiom KB claimed to have indefeasible title to the perpetual estate and the leasehold interest respectively.

60. Section 109 of the *Land and Titles Act* sets out the rights that vest in, relevantly, an owner of a perpetual estate and an owner of a lease upon registration. Those rights are vested subject to the provisions of the Act. Section 110 provides that the rights of an owner of a registered interest are indefeasible except as provided by the Act and are to be held by the owner subject (inter alia) to restrictions and conditions implied by the Act. Section 117(1) provides that no registered interest can be created except in accordance with the Act*.*

61. The appellants submitted to the Commissioner (and on appeal) that there had been non-compliance with Part V Division 1, with the consequence that the vesting order dated 11 February 2011 was not made under s 69, as well as with other provisions of the *Land and Titles Act* such as s 195(3). It followed, they submitted, that there was no "registration" within the meaning of the Act and thus no "registered interest" which attracted the indefeasibility principle.

62. The Commissioner rejected the appellants' submission.

Acquisition, vesting and registration

63. In relation to the acquisition process, the Commissioner reasoned as follows -

    (i) The purpose of the acquisition was to facilitate the registration of the land and thus to extinguish its customary nature and imbue it with statutory indicia as registered land, subject to all the provisions of the *Land and Titles Act*.
    (ii) Palmer recognised that the land belonged in custom to the tribes and clans associated with the six blocks he identified. Customary ownership was not in issue at the IBS meeting or in these proceedings.
    (iii) The duly authorised representatives of the customary owners referred to in s 62(b) of the *Land and Titles Act* ("the statutory representatives") were proxies for their tribes or groups for the purpose of the acquisition and no other. Their appointment did not detract from the status accorded others in custom – for example, chiefs. The statutory representatives had obligations in custom, which were recognised by the Acquisition Officer's determination and accepted by them in signing the lease agreement.
    (iv) The lease agreement created the statutory representatives and changed the characterisation of the process from one concerned with custom to one concerned with the statutory position of those representatives and the adopted common law and equity affecting agreements. Once that agreement was executed and rights of appeal were exhausted, the privative clause in s 66(4) of the *Land and Titles Act* effectively extinguished any rights in the customary landowners to argue custom issues further, including the right to stand as statutory representatives under the lease or other matters arising out of the acquisition process.
    (v) The acquisition process neither lapsed nor was abandoned.
    (vi) The appellants' argument that the purported appointment of replacement trustees at the first IBS meeting was ultra vires necessarily failed because it relied on what was done being contrary to custom.
    (vii) The statutory representatives as named in the lease agreement and subsequently varied on appeal were replaced by the land respondents. That replacement was effected by a series of acts amounting to assignment and ratification and not solely by any supposed customary transfer at the IBS meeting.

64. The Commissioner was satisfied that the Commissioner of Lands acted on the relevant material in making the vesting order. He held that even if there were mistakes made (and he was not minded to accept that there were any), the land respondents had the benefit of immediate indefeasibility upon registration: *Land and Titles Act* ss 109, 110; *Lever Solomon Ltd v AG* [2013] SBCA 11. There was no place for any concept of deferred indefeasibility which would allow argument as to matters before registration.

65. The Commissioner considered that upon registration the statutory representatives held the perpetual estate on statutory trusts "for all the groups named G1–G6 by the Acquisition Officer". He said –

> "This phrase 'statutory trusts' expressly recognises a different type of trust to that understood elsewhere in the common law for instance and must relate to the changed nature of the interest, from customary interest as a person entitled as a landowner, to that interest afforded by the *Land and Titles Act* and subject

> to the obligation to accord recognition to groups whose land has been registered but whose representatives had not made it onto the vesting order or register."

66. The Commissioner observed that the lease to BNL envisaged at the time of the lease agreement in 1992 never eventuated. That lease agreement dealt only with the major matter of the vesting and registration, albeit recognising its purpose was the benefit accruing to the owners from the later introduction of the miner. As owners (of the perpetual estate) under the *Land and Titles Act*, the land respondents were entitled to make a contract for lease with a miner, in this case Axiom KB.

Exception to indefeasibility recognised in *Emas Estate*

67. The appellants relied on an exception to indefeasibility recognised by the Supreme Court of Papua New Guinea in *Emas Estate Development Pty Ltd v Mea & Ors* [1993] PGSC 7, viz that an individual ought not to be deprived of his or her title to land to the advantage of a private corporation by irregularities or illegalities on the part of the State not amounting to fraud. The Commissioner rejected the submission. He considered the doctrine to be contrary to the principle of immediate indefeasibility in Solomon Islands law, and further, that the facts of the present case were distinguishable from those in *Emas Estate*.

Section 241 of *Land and Titles Act*

68. By s 241(1) of the *Land and Titles Act*, except to the extent the contrary is expressly provided in the Act, no person other than a Solomon Islander may hold an interest in customary land. By s 241(3), every contract, agreement or arrangement, so far as it has the purpose or effect of defeating, evading or preventing the operation of subsection (1), is void and of no effect.

69. The appellants submitted to the Commissioner –
    (a) that the agreement or arrangement between the land respondents and Axiom Mining, and later Axiom KB, evidenced inter alia by the Option Deed executed in October 2010 and conduct, had the purpose or effect of creating interests in, over or affecting customary land in non-Solomon Islanders (KHL and Axiom KB), other than as expressly provided for in the *Land and Titles Act*, thereby defeating, evading or preventing the operation of the prohibition in s 241(1); and
    (b) that pursuant to s 241(3) the Option Deed, the vesting order and the registration of the perpetual estate and the Axiom lease were all utterly void and of no effect because they were steps or transactions intended to further the purpose or effect of the agreement or arrangement.

70. The Commissioner dismissed the appellants' submission. In doing so, he held –
    (i) that s 241 could have no application to customary land and could not be read to imply further inquiry into the process leading to registration;
    (ii) that the Kolosori land had become registered land and was no longer customary land;
    (iii) that the Option Deed was an agreement to create corporate structures to realise the intentions of the parties to it, and not an agreement to create an interest in land;

(iv) that either Nautilus or Stace provided funds to Selo (one of the land respondents) to obtain registration of the Kolosori land before Williams and Mount were first introduced to the land respondents;
(v) that Axiom KB was incorporated after the Option Deed, as the vehicle for the joint venture between Axiom Mining and the land respondents (through KHL), intended by them to apply for a Prospecting Licence over Takata (including the Kolosori land) and ultimately to mine**;**
(vi) that the parties to the "later agreement" were Axiom KB and the land respondents (i.e. they were different from the parties to the Option Deed), and that it contained an entire agreement clause, 14.3. [The Commissioner was apparently referring to the "Variation Deed" executed in February 2011. However, the parties to it were the same as the parties to the Option Deed];
(vii) that the "new agreement" was for the lease of the perpetual estate for a term of years subject to the *Mines and Minerals Act*; it related to registered land**.** [This may be a reference to clause 3.1 of the Variation Deed, or alternatively to the Axiom lease];
(viii) that only the Commissioner of Lands could institute proceedings pursuant to s 241(3), and he had not done so;
(ix) that the appellants' submission was unmeritorious and without basis in fact or law**.**

Relief under the *Constitution*

71. One of the alternative forms of relief claimed by the appellants was a declaration that ss 109 and 110 of the *Land and Titles Act* were partially inconsistent with ss 8 and 112 of the *Constitution* and that to the extent of the inconsistency they were void pursuant to s 2 of the *Constitution.*

72. The appellants submitted that there had been substantial non-compliance with Part V Division 1 of the *Land and Titles Act* resulting in the land appellants being deprived of their customary proprietary interests in the land without compensation. They submitted that for ss 109 and 110 of the *Land and Titles Act* to afford the land respondents and Axiom KB indefeasible title in the circumstances of this case would be contrary to the land appellants' fundamental rights and freedoms that were protected by ss 3 and 8 of the *Constitution.* They submitted that ss 109 and 110 of the *Land and Titles Act* were, to the extent of that inconsistency, void pursuant to s 2 of the *Constitution*.

73. The Commissioner rejected the appellants' submission and refused relief under the *Constitution*. In doing so the Commissioner found –
    (i) that none of the appellants had standing to seek this relief;
    (ii) that the land appellants had not adduced any evidence of their interest or right over property that might be susceptible to deprivation or compulsory acquisition;
    (iii) that the claim stemmed from a false premise that the land was compulsorily acquired, when in fact the acquisition was by way of voluntary agreement (i.e. the lease agreement made in 1992);
    (iv) that if he were wrong, s 230 of the *Land and Titles Act* provided sufficient redress for damage suffered by reason of mistake or error in the land register.

Section 229 of the *Land and Titles Act*

74. By s 229 of the *Land and Titles Act*, the High Court may order rectification of the land register where it is satisfied that registration was obtained or made by fraud or mistake. If the owner is in possession and acquired his or her interest for valuable consideration, the land register shall not be rectified so as to affect the owner's title unless he or she had knowledge of the fraud or mistake or substantially contributed to it.

75. The Commissioner dismissed the claim for rectification. These were his reasons for doing so–
    (i) The discretion to order rectification was not enlivened because neither fraud nor mistake had been proved.
    (ii) Axiom KB acquired its interest for valuable consideration.
    (iii) The appellants bore the onus of proving that Axiom KB was not in possession within the meaning of s 229 of the *Land and Titles Act*, and did not discharge that onus.
    (iv) The appellants submitted that the land respondents' registration as owners of the perpetual estate was procured by the fraudulent representation in the Cortez letter of 9 February 2011 that there had been a valid replacement of trustees at the first IBS meeting. They submitted that the purported replacement of trustees at that meeting was invalid, and that Cortez was aware of that fact when he sought the vesting order by his letter. The Commissioner found that there was no basis for the claim of fraud and that the Commissioner of Lands was not misled by the letter.
    (v) One of the mistakes relied on was the Assistant Commissioner of Lands' insertion of incorrect recitals in the vesting order, viz that the Acquisition Officer had determined that the land respondents were the rightful owners to lease the land and receive the rent on behalf of KHL, and that there had not been any appeal against that determination. The Commissioner found that those named by the Acquisition Officer and the land respondents had agreed that any mistake in the vesting order was of no consequence, as evidenced by the assignment and ratification process by which the land respondents were substituted for those named by the Acquisition Officer, and concluded that "the claim of fraud and mistake giving rise to a right to rectify" had not been made out.
    (vi) The Commissioner of Lands did not err in making the vesting order because the land respondents were legally entitled to stand in place of those persons named in the agreement (presumably the lease agreement prepared by Palmer).
    (vii) When the vesting order was presented to him, the Registrar of Titles acted in accordance with his obligation in registering the land respondents as joint owners of the perpetual estate.
    (viii) Any mistake by the Registrar in proceeding in the absence of "particular documents concerning the survey" did not warrant the exercise of his discretion to rectify. This was apparently a reference to registration of the perpetual estate being effected prior to the preparation of a registry map of the land.
    (ix) Axiom KB and the Registrar were "protected from enquiry" as to mistake by the Registrar in registering the Axiom lease by ss 118 and 119 of the *Land and Titles Act* respectively.

Judicial review of Axiom KB's prospecting rights

76. The Commissioner refused judicial review of the Board's decisions on 12 April 2011. In doing so, he made these points –
    (i) Presumptions of regularity in the constitution of a quorum and decision-making had not been rebutted;
    (ii) The SMMS Letter of Intent had been cancelled by the Minister in reliance on a Cabinet decision. It was not a matter for review by the Board.
    (iii) SMMS's assertion that the Board could not reasonably or honestly have formed the opinion it did in recommending that the Minister issue a Letter of Intent to Axiom KB was unfounded.
    (iv) The Board's recommendation was not invalidated by the absence of an express statement that Axiom KB's application accorded with s 20 of the *Mines and Minerals Act.* The Commissioner found there was an applicable presumption of fact which had not been rebutted – viz that where an act can only be done after the performance of some prior act, proof of the later act carries with it a presumption of the due performance of the prior act.

77. The Commissioner went on to refuse judicial review of the Minister's decisions to issue a Letter of Intent and subsequently a Prospecting Licence to Axiom KB. In doing so, he held –
    (i) The Letter of Intent issued to Axiom KB was not invalidated by non-compliance with regulation 5 of the *Mines and Minerals Regulations 1996* ("*MM Regulations*") as the regulation was outside the rule-making power in s 80 of the *Mines and Minerals Act* and void.
    (ii) Axiom KB's Surface Access Agreement was not invalidated by non-compliance with regulation 9 of the *MM Regulations* as the regulation was outside the rule-making power in s 80 of the *Mines and Minerals Act* and void.

THE APPEAL

78. The notice of appeal raised 278 grounds of appeal, and the notice of contention contained 40 paragraphs. The parties' written submissions exceeded 1,000 pages and their oral submissions were received over 10 days.

79. The disposition of the appeal turns on the resolution of the principal issues which can be identified in the Commissioner's reasons for judgment and the parties' submissions. These are considered under the following headings:
    1) Leave to appeal pursuant to s 257(4)(c) of the *Land and Titles Act*;
    2) Issues of standing;
    3) The scheme of the *Mines and Minerals Act,* its amendment by the *Mines and Minerals (Amendment) Act 2008*, and the commencement of that amending legislation;
    4) The relief that may be obtained in judicial review, the discretion to refuse such relief and the rule in *O'Reilly v Mackman* [1983] 2 AC 237;
    5) The cancellation of the SMMS Letter of Intent, including the 3 Prospecting Licence rule and other failures to comply with the tender process;
    6) The scheme of the *Land and Titles Act* including provisions in respect of customary land, the adjudication process under Part V Division 1, failures to comply with the

requirements of Part V Division 1, consequences of those failures, the *Emas Estate* doctrine and the Axiom lease.

7) The validity of the Axiom Surface Access Agreement and the Axiom Prospecting Licence;
8) The appellants' claim for an account of moneys received by the land respondents, KHL or Kolosori Holdings Community Company Limited from any of the Axiom group of companies.

Leave to appeal

80. Appeals from the High Court to the Court of Appeal are governed by the *Court of Appeal Act* [Cap 6]. Made pursuant to that legislation are the Court of Appeal Rules. Part III of the Act sets out the provisions for appeals in civil cases. It provides that an appeal shall lie under Part III in any cause or matter, not being a criminal proceeding, to the Court of Appeal from any decision of the High Court sitting in first instance, including any decision of a Judge in Chambers; s 11 (1) (a).

81. It further provides that no appeal shall lie, *inter alia* from the decision of the High Court or of any judge thereof where it is provided by any enactment that such decision is to be final; s 11 (2) (c).

82. Earlier in section 10 there is provision for appeals under enactments of, or in force in Solomon Islands other than the *Court of Appeal Act*, which provides that the jurisdiction, powers and authorities of the Court of Appeal shall be subject to the provisions of such other enactments.

83. Part of this appeal falls within the *Land and Titles Act,* section 257 of which provides:-

> "(1) Except as expressly provided in this Act, the High Court shall have exclusive jurisdiction in all matters and proceedings of a civil nature arising under this Act or involving its interpretation.
>
> (2) If in any matter or proceeding before any court, person, body or tribunal, other than a local court exercising its jurisdiction under section 254, the matter or proceeding cannot be determined without deciding a question involving the interpretation of this Act, that court, person, body or tribunal may, and if requested by any party to the matter or proceeding shall, state the question in the form of a case for determination by the High Court and adjourn the matter or proceeding until the question shall have been determined.
>
> (3) Except where otherwise expressly provided, a decision, whether given in an original proceeding or on appeal, of the High Court given in any matter or proceeding arising under this Act or involving its interpretation, shall, subject to the provisions of subsection (4), be final and conclusive and not subject to any appeal.
>
> (4) Any person aggrieved by any such decision as is referred to in subsection (3), may, within three months after the issue of the decision, appeal to the Court of Appeal, if, and only if-
>
> *LN 88 of 1978*
> (a) the decision was not given by the Court in exercise of its jurisdiction under sections 19, 57, 66, 115(6) or 140(2); and

(b) some question other than a question of fact is raised by the appeal; and

(c) the person aggrieved obtains leave to appeal either from the High Court or from the Court of Appeal."

84. The appeal was filed inside the time limit of three months but no leave to appeal was either sought or granted. The point appears not to have been taken by any party until a few days prior to this hearing. That hearing was several months after the original notice of appeal and followed several appearances before a single judge for directions and appearances before the full Court on interlocutory matters.

85. There has been no discussion of the extent to which this appeal is caught by these provisions. Suffice to say that the majority of the appeal, concerning as it did an application for Judicial Review, is not so caught. Nevertheless part of the appeal falls within the *Land and Titles Act* and no leave to appeal was obtained within three months of the decision being handed down. Can that part of this appeal continue? The Land appellants in particular are affected.

86. The sections referred to above [19, 57, 66, 115(6) and 140(2)] provide for decisions that are final and conclusive and cannot be the subject of any appeal. That would appear to oust any jurisdiction of the Court of Appeal when read in conjunction with section 11 (2) (c) of the *Court of Appeal Act*. This appeal does not fall within that category of final and conclusive decisions and so an appeal is available. The question arises as to whether non-compliance with the express provisions of section 257 (4) has the effect of removing that right of appeal.

87. It has often been said that a notice of an appeal for which leave is required but has not been sought is not an effective notice of appeal. At the same time it is often the case that when the requirement for leave receives attention, most often at or immediately prior to the full hearing, leave is considered and granted or refused, and in the former case the earlier filed notice of appeal is deemed to be an effective notice. This is regardless of the fact that time for filing a notice of appeal or notice of application for leave to appeal has long past.

88. In civil appeals section 16 of the Act provides that notwithstanding anything therein before contained, the Court of Appeal may entertain an appeal made under the provisions of Part III of the Act on any terms which it thinks just.

89. Thus the Court may condone failure to comply with conditions precedent described in section 15 of the Act (which provides that subject to the provisions of the next succeeding section, the Court of Appeal shall not entertain any appeal made under the provisions of this Part of this Act unless the appellant has fulfilled all the conditions of appeal as prescribed by rules of Court.) in the exercise of its discretion 'for good cause'.

90. Counsel for the Respondents sought to argue that the relevant part of this appeal was not brought under Part III of the Act and therefore was not amenable to section 16. In that submission it was suggested that there exist three categories of appeal, civil under Part III, criminal under Part IV and a separate category brought under other legislation following the provisions of section 10 of the Act.

91. We do not accept that submission. Section 10 does not create a separate category of appeal beyond civil and criminal. It does nothing more than indicate that, in appeals brought under enactments other than Cap 6, the Court of Appeal is subject to the provisions of those other

enactments in terms of jurisdiction, powers and authorities. Section 257 (4) of the *Land and Titles* Act sets out those appeals which may be brought, excluding those where the decision is elsewhere described as final, and the circumstances that must exist for the appeal, that is to say some question other than a question of fact is involved and leave is obtained either from the High Court or the Court of Appeal. It is correct, as counsel for the Land appellants submits, that there is no direct indication that leave must be obtained within the three months allowed, only that the appeal must be filed within three months after the decision of the High Court is announced. Indeed it may not even be possible to obtain leave within that three months if, for example, leave is refused by a single Justice of the Court of Appeal and the applicant seeks, as they are entitled to do, to renew that application to the full Court.

92. It is important to note that whilst section 10 of Cap 6 seeks to limit the jurisdiction powers and authority of the Court of Appeal to that set out in other legislation, it does not otherwise remove those powers that, in civil appeals, Part III or, in criminal appeals, Part IV prescribe. It is only where the other legislation in specific terms removes the applicability of those provisions that they can be said not to apply. Thus the power, for example, contained in section 16 may be applied to an appeal brought under section 10.

93. Where a provision, such as that contained in section 19 (7) *Land and Titles Act* provides for no appeal to the Court of Appeal (and similarly in the case of the other sections referred to in section 257 (4) (a)) then that goes to the question of jurisdiction of the Court of Appeal. When the provision does not go to jurisdiction but to procedure then, in the absence of a particular provision removing those discretionary powers available to the Court of Appeal (as for example in section 16 of Cap 6) the Court of Appeal can deal with an appeal before it on terms that it thinks just.

94. It may be that section 257, worded as it is and not specifically requiring that leave be granted within the three month period but requiring that the appeal be commenced within that period, failed to acknowledge the general rule that without leave an appeal by leave is not properly commenced until that leave is obtained. Be that as it may, in the absence of a clear and unambiguous provision that leave must be obtained within the three month period, it would, in our view, be wrong to remove the right of appeal when in all other respects there is provision for that appeal.

95. After hearing submissions on this question we indicated to counsel that we granted leave for the appeal to the extent that it is necessary under section 257 (4) (c) and that the reasons for that decision would be incorporated into the final judgment on the appeal. The conditions precedent referred to in section 15 of Cap 6 have not been complied with but in the exercise of the discretion under section 16 the appeal is entertained by granting leave outside the three months referred to in section 257 *Land and Titles Act* and by deeming the notice of appeal filed on 24 October 2014 to have been filed with leave for the reasons set out above

Issues of standing

96. The Commissioner found that SMMS lacked standing as regards the land issues, as opposed to the issues relating to the Letter of Intent. He also found that the land appellants lacked standing with regard to the Acquisition Process, consequent land registration exercise and the consequences which followed. We take a simple view that in order to make a determination there is no merit in exhaustively considering each appellant to the exclusion of another. In our view it suffices that at least one person has standing to bring any particular claim. It may be

correct that, as a non-Solomon Islander not entitled to own customary land, SMMS lacked standing in the land matter but we have not considered that matter further. One outcome of that might be as to eventual costs orders in the event that the Land Appellants have standing to bring that claim.

97. As regards the land claim, the land appellants, claimants at first instance are Alfred Jolo (Anika Thai Clan) Willie Denimana and Hugo Bughoro (Thavia clan) Henry Raoga (Vihuvunagi tribe) Ben Salusu (Vihuvunagi tribe) Mafa Pagu (Thogokama clan) and Paul Fotamana (Veronica clan).

98. The Commissioner found as regards the land claim, after an extensive discussion of matters principally focussed on the witness Mr. Ochi and others who acted for SMMS, that they had been encouraged to take positions supportive of SMMS with the intention of benefitting SMMS. Underlying that decision is the notion that the positions were dishonest. He had earlier found no standing in the mining claim.

99. There is nothing within those discussions which touches on whether any individual claimant has any history with the land. There are references to decisions made on appeal against the decision of the Acquisition Officer Palmer which note that some of the claimants were successful in the High Court before Palmer J in claims against the Acquisition Officer's decision. There is a reference to the previous Court of Appeal decision upholding the interlocutory relief where standing (principally of SMMS) was earlier challenged. Given the decision on that appeal one might have thought that the matter could have been laid to rest.

100. The Commissioner did note that there exists the notion that to come before the High Court for injunctive relief whilst pursuing claims elsewhere in forestry or customary ownership matters requires something more than a mere assertion of ownership. Often in practice this will be a decision of a body of chiefs in favour of the claimant or a decision of the Provincial Executive or other like body. In this instance, where the land is said to have become Registered Land as opposed to customary land, none of those could make or give any decisions about the land since Registration, and so the general rule is likely to be displaced, given that it is a rule of practice and not of law. We do not accept that there exists any rule of law which provides that ownership must be evidenced by a decision as suggested in the Reasons for Judgment.

101. Such a decision is by far the simplest way to provide a court with evidence of entitlement. In many instances it may be the only way. Yet it cannot be elevated from a rule of practice to a rule of law – no decision, no standing. There will always be that case where there has never been such a decision yet.

102. It was important at this stage to consider each claimant and their individual position as regards the land which they purported to 'represent'. That was not done. Instead a broad approach was taken suggesting that the root of all claims was and is SMMS. In effect the Commissioner characterised the land claimants as acting in the interests of SMMS having been unduly, and wrongly, influenced by SMMS.

103. That, with respect, is not the correct approach. The correct approach is to consider each claimant as an individual and look at his or her evidence in support. Such was the approach taken when the appeals were heard against the Acquisition Officer's decision and some of these very same land appellants were successful. That statement itself is enough, in our view, to establish a sufficient interest. Taking the matter a little further, consideration of the replacement of trustees at the IBS meeting, which we set out in this judgment at paragraph

18, shows that some of the now named land appellants were originally named by Palmer but replaced. Replaced, according to the evidence, by persons of the same standing in custom.

104. In the High Court in addition to establishing a sufficient interest in the proceedings, when an individual seeks to represent the interests of a community, tribe, line or group on request that individual must provide proof of his entitlement in custom so to act.

105. For the purposes of this judgment we take it that there was a request for the individual land claimants to provide that proof as opposed to submissions being made on the question of sufficient interest. We only say that as there is nothing in the reasons for judgment which deals with this issue other than a passing reference to the provision of Rule 3.43 CPR.

106. Again it appears that the issue was not properly addressed. It may be that the Commissioner determined that he was not required to determine the matter given his decision on lack of standing.

Mines and Minerals Act

107. The *Mines and Minerals Act* [Cap 42] has been amended by three subsequent pieces of legislation. Those Acts were passed in 1996, 2008 and now 2014. We are not concerned with the Act passed in 2014 as the issues under appeal pre-date that legislation. After the 1996 amendment the stated purpose of the legislation as set out in the preamble is:-

> AN ACT TO PROVIDE FOR THE DEVELOPMENT OF MINING IN SOLOMON ISLANDS BY PRESCRIBING APPROPRIATE PROCEDURES FOR THE GRANT OF LICENCES, PERMITS OR LEASES, FOR THE ESTABLISHMENT OF A MINERALS BOARD TO REGULATE AND CONTROL MINING, TO REPEAL THE MINING ACT AND FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO.

108. The amendment having the most significant effect on these proceedings is that of 2008 and the commencement of that amendment is an issue dealt with below. Introduced into this appeal and the hearing at first instance was the National Parliament Paper No. 7 of 2008 being the Bills and Legislation Committee report on the amendment, the objects and reasons for the amendment and 9th April 2008 Hansard. The objects and reasons set out are:-

> "This Bill seeks to ensure that companies applying for reconnaissance permit, prospecting licences and mining leases are diligently checked by the Ministry and its officers.
>
> The Bill further seeks to restrict the issuance of prospecting licences through control made by the Director.
>
> International Tender has also been opened up by this Bill by placing land areas proposed for reconnaissance, prospecting or mining in the open market, whether domestically or internationally."

The extent to which the amendment achieved these objects is discussed later in this judgment.

Commencement of the *Mines and Minerals (Amendment) Act 2008*

109. The *Mines and Minerals (Amendment) Act 2008* was passed by the National Parliament on 9 April 2008 and assented to by the Governor-General on behalf of Her Majesty the Queen on 15 April 2008.

110. Section 59(3) of the *Constitution* provides –

> "No law shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and may make laws, subject to section 10(4) of this Constitution with retrospective effect."

111. Section 20 of the *Interpretation and General Provisions Act* provides –

> "20. (1) Every Act made after this Act shall be published in the Gazette.
>
> (2) A provision of an Act, made after this Act, comes into operation on the date of the publication of the Act in the Gazette or, if it is provided that the Act (including the provision) or the provision is to come into operation on some other date, on that other date.
>
> (3) Any provision of an Act, made after this Act, which makes provision with respect to the coming into operation of all or any of the other provisions of the Act comes into operation on the date of the publication of the Act in the Gazette.
>
> (4) When a provision of an Act comes into operation on a particular day, it is in operation as from the beginning of that day."

112. Section 1 of the *Mines and Minerals (Amendment) Act* provided relevantly -

> "This Act ….. shall come into force on such date as the Minister may appoint by Notice published in the Gazette."

That section came into force on the date the *Mines and Minerals (Amendment) Act* was published in the Gazette: *Interpretation and General Provisions Act* s 20(3).

113. On 23 July 2009 a commencement notice signed by the Minister was published in the Gazette, numbered Legal Notice 48. It was in these terms –

"MINES AND MINERALS (AMENDMENTS) ACT 2008

No. 2 of 2008

COMMENCEMENT NOTICE

In exercise of the powers conferred upon me by section 1 of the Mines and Minerals (Amendment) Act 2008, I appoint the day of July 2009, as the commencement date of the Mines and Minerals (Amendment) Act 2008.

DATED AT HONIARA this 21st day of July 2009."

114. On 17 June 2010 another notice signed by the Minister was published in the Gazette as Legal Notice No 48. It was in these terms –

"MINES AND MINERALS (AMENDMENT) ACT 2008

(ACT NO. 2 OF 2008)

COMMENCEMENT NOTICE

WHEREAS the Commencement Notice of the Mines and Mineral (Amendment) Act 2008 (Act No. 2 of 2008) was published as Legal Notice No. 48 of 2009 without specifying a commencement date.

WHEREAS the 23rd day of July was the intended commencement date of the Act;

THEREFORE IN exercise of the powers conferred upon me by section 1 of the Mines and Minerals (Amendment) Act 2008, the 23rd day of July 2009 is hereby confirmed as the commencement date of the Mines and Minerals (Amendment) Act 2008.

DATED AT HONIARA this fifteenth day of June, 2010."

115. On 21 July 2010 the *Mines and Minerals (Amendment) Regulations 2010* were made. Assuming the *Mines and Minerals (Amendment) Act* had come into force before then, those regulations commenced that day, as it was also the date of their publication in the Gazette: *Interpretation and General Provisions Act* s 61(1) (b).

116. On 23 July 2010 the tender specification was issued, and on 15 September 2010 SMMS submitted its tender.

Submissions

117. Senior Counsel for SMMS submitted that on the proper construction of the first notice the Minister appointed the last day of July 2009 as the commencement date. He went on to submit that the second notice was valid and operative to appoint 23 July 2009 as the commencement date. If the first notice was inoperative because of uncertainty, the second notice was an exercise of the power conferred on the Minister by s 1 of the *Mines and Minerals (Amendment) Act*. Alternatively, if the first notice operated to appoint 31 July 2009 as the commencement date, the Minister replaced it with the second notice pursuant to s 36 of the *Interpretation and General Provisions Act*.

118. Counsel for the respondents' submissions were directed to whether the second notice was effective to appoint a retrospective commencement date.

119. The Solicitor-General made submissions relating to retrospectivity. He drew attention to the statement in Jones, *Bennion on Statutory Interpretation – A Code* (LexisNexis, 6th ed, c 2013) at 293 that the objectionable effect of retrospectivity is that it alters the legal nature of a past act or omission. Then he pointed out that none of the parties alleged (either at trial or before this Court) that the retrospective effect of the commencement of the *Mines and Minerals (Amendment) Act* by the second notice had had that objectionable effect. In his submission the second notice had a limited effect: it had a curative intent being passed simply to correct an oversight in the first notice. As such, he submitted, it fell into an unobjectionable category of retrospective legislation, referring to an article by Palmer and Sampford, "Retrospective Legislation in Australia: Looking Back at the 1980s" (1994) 22 *Federal Law Review* 217 at 238.

Discussion

120. By s 1 of the *Mines and Minerals (Amendment) Act* the Minister was empowered to appoint the "date" the Act should come into force by notice published in the Gazette.

121. The need for precision in expressing the date when a statute is to commence cannot be gainsaid. In this context "date" clearly imports the day of the month as well as the month and the year.

122. Unless the particular day in July 2009 when the *Mines and Minerals (Amendment) Act* was to commence can be ascertained on the proper construction of the first notice, the Minister did not exercise the power in s 1 of the *Mines and Minerals (Amendment) Act* by that notice, which was of no effect. See *King Gee Clothing Co Pty Ltd v The Commonwealth* [1945] 71 CLR 184 at 194 per Dixon J; *Cann's Pty Ltd v The Commonwealth* [1946] 71 CLR 210 at 217. See also Pearce and Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) at [22.4].

123. In some other jurisdictions the need for an order in council or a commencement notice where legislation contains a provision such as s 1 of the *Mines and Minerals (Amendment) Act* has occasionally been overlooked, with the result that the legislation has never come into operation. See, for example, *R v Kynaston* [1926] 19 Cr App Rep 180 at 181; Jones, *Bennion on Statutory Interpretation – A Code* at 167, 258; Bennion, *Constitutional Law of Ghana* (Butterworths, 1962) at 380, www.francisbennion.com/1962/001/ch8.htm .

124. In construing a commencement notice, the Court does not look for the subjective intention of the Minister. Rather, it looks for the intention that can be objectively gleaned from the words used. In doing so, it is important to consider the context in which those words were used.

125. Section 16(1) of the *Interpretation and General Provisions Act* provides that in an Act –

> "'subsidiary legislation' means <u>any legislative provision</u> (including a delegation of powers or duties) <u>made in exercise of any power in that behalf conferred by any Act</u>, <u>by way of</u> by-law, <u>notice</u>, order, proclamation, regulation, rule of court <u>or other instrument</u>." (*Emphasis added*.)

126. A commencement notice is "subsidiary legislation" within the meaning of the *Interpretation and General Provisions Act*, as it is a "notice" by which a legislative provision is made in exercise of a power conferred by the *Mines and Minerals (Amendment) Act.* By s 61 (1) (b) of that Act, it comes into operation on the date it is published in the Gazette.

127. The first commencement notice was dated 21 July 2009 and published in the Gazette on 23 July 2009. Counsel for SMMS did not explain why, on the proper construction of the first commencement notice, 31 July 2009 was to be preferred to 21 or 23 July 2009 as the intended commencement date.

128. Parliament has power to make laws with retrospective effect: *Constitution* s 59(3). However, there is a general presumption against the retrospective operation of a statute. The following passage from *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th ed, 1969) at 215 is quoted in *Bennion on Statutory Interpretation – A Code* at 292 –

> "It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

See also *Maxwell v Murphy* [1957] 96 CLR 261 at 267 per Dixon CJ.

129. Even if Parliament's power to make laws with retrospective effect extends to making laws empowering a Minister to make subsidiary legislation with retrospective effect, such a grant of power would ordinarily be express and in very clear terms – attributes missing from s 1 of the *Mines and Minerals (Amendment) Act*. Further, the notice came into effect not on the day it was made, but on the day it was published in the Gazette. These are strong indicators that 21 July 2009 was not intended to be the commencement date.

130. An analogy can be drawn with documents which take effect on delivery rather than execution– for example, a deed. In *Styles v Wardle* [1825] 4 B & C 908 at 911, 107 ER 1297 at 1298 Bayley J said –

> "A deed has no operation until delivery, and there may be cases in which, ut res valeat, it is necessary to construe date, delivery. When there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery."

See generally the discussion in Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, Thomson Reuters, 5th ed, 2011) at [10.03].

131. There is no readily apparent reason for construing the appointed date as 31 July, which was seven days after the commencement notice came into effect, other than that it was the last day of the month. While that time lag is apparently of no consequence to any of the parties to this litigation, the Court cannot speculate on the basis upon which other persons may have acted during it. Moreover, it was fortuitous that the period of uncertainty was as short as a week: had the commencement notice been made and published earlier in the month, the uncertainty would have been prolonged.

132. In all the circumstances, the Court considers that on the proper construction of the first commencement notice the Minister appointed 23 July 2009 (the date of publication in the Gazette) as the date on which the *Mines and Minerals (Amendment) Act* was to come into force. It has reached this conclusion without regard to the second commencement notice.

133. Had the commencement date appointed in the first notice been 31 July 2009, it would have been necessary to consider the effect of the second notice.

134. The Minister did not expressly appoint a commencement date by the second notice. He recited that the first notice had not specified a commencement date and that "the 23rd day of July" had been the intended commencement date. He continued –

> "THEREFORE IN exercise of the powers conferred upon me by section 1 of the Mines and Minerals (Amendment) Act 2008, the 23rd day of July 2009 is hereby confirmed as the commencement date of the Mines and Minerals (Amendment) Act 2008." (*Emphasis added*.)

135. The first recital was no more than an expression of the Minister's opinion that the commencement date could not be ascertained by the proper construction of the first notice, and the second recital was a statement of his subjective intention. By s 1 of the *Mines and Minerals (Amendment) Act* he had power to "appoint" the date the Act was to come into force, but not to "confirm" his previously unexpressed intention as to when it was to do so.

136. The Minister's power to appoint the date on which the *Mines and Minerals (Amendment) Act* was to come into effect by notice published in the Gazette included power to amend the notice or to substitute another notice for one already issued, and counsel submitted that on its proper construction the second notice amended the first notice or was a substitute for it.

137. Section 36 of the *Interpretation and General Provisions Act* provides –

> "36. Where any Act confers power upon any person to make, grant, or issue any regulations or instruments, or to do anything for the purpose of the Act, such power shall include power –
>
> (a) to amend or suspend such regulation or instrument;
> (b) to substitute another regulation or instrument for the one already made, issued or approved;
> (c) to withdraw approval of any regulation or instrument so approved; and
> (d) to declare the date of coming into operation, and the period of operation, of any such regulation or instrument." (*Emphasis added*)

138. While there is no definition of "instrument" in the *Interpretation and General Provisions Act*, it is apparent from the words "or other instrument" in the definition of "subsidiary legislation" in s 16(1) that a "notice" by which a legislative provision is made in exercise of a power conferred by an Act (in this case, a commencement notice) is an "instrument" within the meaning of the *Interpretation and General Provisions Act*. This is consistent with the ordinary meaning of an instrument as a formal legal document: see *Auditor-General v Attorney-General 1* [2005] SBHC 64 per Palmer CJ.

139. By s 16(1) of the *Interpretation and General Provisions Act* –

> "'amend' includes repeal, revoke, rescind, cancel, replace, add to or vary, and the doing of any two or more of such things simultaneously in the same Act or instrument." (*Emphasis added*)

140. Clearly the Minister's power to amend or substitute a commencement notice would allow him to alter a commencement date at any time prior to the date already appointed. Recently a proclamation fixing the days for commencement of a list of provisions of the *Water Reform and Other Legislation Amendment Act 2014* (Qld) was amended by another proclamation changing the list of provisions to commence on the appointed day. The second proclamation was made the day before the commencement date fixed by the first proclamation. See SL 2014 No 333 and SL 2015 No 2 (Qld).

141. It is arguable that once the date appointed in the first commencement notice had passed, the power to appoint a commencement date (with its attendant power to amend or substitute) was exhausted. See Greenberg (ed), *Craies on Legislation* (Sweet & Maxwell, 10th ed, 2012) at [10.1.13]; *Palais Parking Station Pty Ltd v Shea* [1977] 16 SASR 350 at 358 per Bray CJ. Assuming this to be correct, if the Minister appointed 31 July 2009 as the commencement date by the first commencement notice, he had no power to amend that notice or to substitute another notice for it by the second commencement notice made on 17 June 2010, and accordingly, the second commencement notice was void.

142. However, in the circumstances of this case, it is not necessary to reach a concluded view on the effect of the second commencement notice.

Judicial Review

Judicial Discretion

143. When dealing with an application for Judicial Review and following a finding adverse to the maker of the challenged decision, there remains an inherent discretion concerning relief. That discretion is not wide, it seems in our view, for sound reasons. When and how it may be exercised varies according to the circumstances including the nature of the defect in the decision making process. At the one end there lies the decision which is made ultra vires. It is most unlikely that a court will utilize the discretion to deny relief where the decision is ultra vires the decision maker. At the other end there is the decision made in breach of some other rule, for example, of natural justice. Dependent upon the breach a court may refuse relief or grant a different form of relief from that sought.

144. In early editions of the text book *Administrative Law* Wade & Forsyth suggest:-

> "There are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. 'To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from rock to sand.' The true scope for discretion is in the law of remedies, where it operates within narrow and recognised limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him."

145. The general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action should be granted a remedial order. The requirements of the rule of law mean that 'the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow" – per Lord Bingham in *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603.

146. The general approach, following the above, should be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to a remedy. Perhaps the simplest explanation of how the discretion should be exercised is that the court should consider what it is fair and just to do in a particular case. That might indicate a declaration rather than a quashing order or no remedy at all. But as was said in *Berkeley* (supra) "the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow".

147. Delay may be a factor to be taken into account in determining any remedy. Under the Solomon Islands Courts (Civil Procedure) Rules 2007 (CPR) claims for a quashing order must be made within six months of the decision complained of and under R15.3.18 the court will not hear the claim unless it is satisfied that, inter alia, there has been no undue delay in making the claim. Even so depending on the circumstances of the case a relief may be withheld if, for example, to order relief would adversely affect innocent third parties.

148. The utility of any remedy is important. If to make an order would serve no practical effect then a court may consider not providing that remedy. Events may have overtaken the proceedings,

making the remedy of no value. Examples of the same may be an already expired licence, or an activity complained of having ceased.

149. The claimant's motive in bringing the proceedings is not relevant to the exercise of the discretion to withhold a remedy. The claimant's conduct, however, may be regarded as relevant to the exercise of the discretion. Lord Denning said in *Hoffmann-La-Roche (F) & Co v Secretary of State for Trade and Industry* [1975] A.C. 295 at 320:-

> "He may be debarred from relief if he has acquiesced in the invalidity or has waived it. If he does not come with due diligence and ask for it to be set aside, he may be sent away with nothing. If his conduct has been disgraceful and he has in fact suffered no injustice, he may be refused relief."

150. Whilst at the ex parte stage of proceedings there is, as commonly recognised, an obligation of *uberrimae fidei* on an applicant/claimant, such obligation does not extend to the proceedings inter partes. *Uberrimae fidei* applies at the ex parte stage, because the other party is absent and unable to present the contrary argument, facts or view.

151. Conduct of the party seeking relief is a matter that may be taken into account in determining whether to deny relief, but it is not necessarily conduct lacking in *uberrimae fidei*.

152. The Court's evaluation of the applicant's conduct may be the critical factor in the exercise of the discretion to refuse relief or to grant different relief from that sought. An applicant who has shown unlawful conduct on the part of an administrative authority should not be denied relief simply because his or her own conduct was not exemplary. Conduct the Court regards as involving a grave departure from acceptable conduct in the circumstances of a particular case will ordinarily be sufficient to warrant the exercise of the discretion in a way that is adverse to the applicant. Lord Denning used the simple and resonant adjective "disgraceful" to describe conduct which may be disentitling in this sense. We think it would be unhelpful to import expressions such as "lacking in uberrimae fidei", "in bad faith" or "not coming with clean hands" into judicial review in Solomon Islands. We respectfully adopt Lord Denning's approach – namely, that an applicant whose conduct was disgraceful and in circumstances where he or she has in fact suffered no injustice may be refused relief in the exercise of the Court's discretion.

153. At first instance reliance was placed on both conduct and a particular outcome being compelled. That particular outcome being compelled is dealt with later in this judgment under the heading the Three Prospecting Licence Rule. During this appeal a concession was made in that regard by counsel for SMMS. Having formed a particular view on that aspect of the case, we do not need to deal at length with the standard of conduct required to invoke the discretionary withholding of remedy or to deal with the allegations made against SMMS's officers in that regard. We do, however, need to deal with the question of procedure suggested to amount to an abuse of process.

The rule in O'Reilly v Mackman

154. Prior to the changes introduced with the Solomon Islands Courts (Civil Procedure) Rules 2007 (CPR) and in common with England and Wales a rule of procedural exclusivity may have existed here following the dicta of Lord Diplock in *O'Reilly v Mackman* [1983] 2AC 237. The effect of that rule, oft criticised even in England and Wales from whence it originated, has all but disappeared with the introduction of the CPR in this jurisdiction and similar changes in

England and Wales. It used to be the case that great care needed to be taken in determining the correct route to commence proceedings so as not to offend the rule. Whether the proceedings should be brought by way of Judicial Review or whether it was permissible to commence litigation using some other procedure (a writ action or originating summons) used to be the subject of sterile and expensive procedural disputes.

155. With the abolition of different modes of initiating procedure and in particular Rule 15 (3) (4) CPR requiring an application for a mandatory order, a prohibiting order or a quashing order or for a declaration in relation to an Act or subsidiary legislation to be made by a claim to the High Court for judicial review, the effect of the former rule has been reduced to a footnote. The important consideration under the CPR is not how the proceedings were commenced but whether the choice of procedure may have a material effect on the outcome.

156. Where it is asserted by the claimant that the defendant is carrying out a public function and that his or her decisions are amenable to judicial review and the defendant does not accept that position, it seems clear that under the present CPR an action may be commenced for Judicial Review under Chapter 15.3 and jurisdiction be determined as a preliminary question or in the alternative both a claim for Judicial Review and an ordinary civil claim may be commenced and the two may be consolidated. Either way it is important to comply with the overriding objective of the CPR that cases are dealt with justly and with the minimum of delay and expense and to ensure that the real issues are addressed.

157. The claim in the court below was, principally, for judicial review under Chapter 15.3 of the *Civil Procedure Rules* seeking "orders in respect of decisions, determinations or actions of the Minerals Board, the Minister of Mines Energy and Rural Electrification, the Commissioner of Lands and the Registrar of Titles". The claimants sought a total of seven declarations, four quashing orders, three mandatory orders, usually in the alternative, two prohibiting orders and three permanent injunctions with penal notices together with orders for specific performance, rectification under the *Land and Titles Act*, account and costs on an indemnity basis. During the course of the trial, a claim of Constitutional breach was also added. The details of the claim itself then ran to a further 98 paragraphs set out in the manner of a category A proceeding. It was accompanied by more than 30 pages of annexures.

158. On 19 September 2011, an interim injunction had been sought by SMMS. It was granted by Chetwynd J and his decision was appealed to this Court by Axiom; *Axiom v SMMS* [2012] SBCA 22. The Court considered the matters required under Rule 15.3.5 and dismissed the appeal. The judgment also referred to the developing changes in the approach to judicial review in many common law jurisdictions. Whilst outlining the requirement (still retained in England) of leave and the necessary test there of sufficiency of interest, the Court referred to *R v IRC ex p National Federation of Self-employed and Small Businesses* [1982] AC 617, in respect to standing:

> "The House of Lords, by a majority, introduced a uniform and relaxed *locus standi* test for all judicial review claims, so as to include anyone affected by a public decision or action in question. The issue as to standing is to be judged in the legal and factual context of the individual case, not only on the directness or indirectness of the effect on the claimant personally of the matter of which complaint is made … all in all a pretty low and elastic threshold … ."

159. Referring to Counsel's reliance on 'legal and equitable rights' as the relevant test, the Court continued:

> "In the Court's view it is plain from the foregoing provisions and jurisprudence in the common law world that an interest capable of protection in judicial review is not necessarily confined to "legal or equitable rights", but may also apply to other personal interests deserving protection by the courts in their exercise of public law jurisdiction. These may, depending on the circumstances, include statutory rights or legitimate expectations or matters of customary law, especially where, as in the Solomon Islands, they are given constitutional recognition and, of course, other interests such as those of a private injury flowing from a public wrong."

160. As that appeal was against the grant of an interim injunction, it was only concerned with the need to satisfy rule 15.3.5 so these comments were largely obiter. However, the Court set out the matters which it felt could be seen as allowing SMMS to surmount the threshold already described and concluded that there is no sensible basis for confining relief in this context to a "legal and equitable interest" as if this were purely a matter of private law.

161. The Commissioner, correctly, took the view that, despite the conclusions of the Appeal Court, it was still for him, as the trial court, finally to determine whether or not these claims should succeed and whether the claimants had standing to bring them. As so often, he commenced his consideration of the case by adopting the submissions put forward by Mr. Lilley:

> "Axiom says the claimants have prosecuted their claims by pleading all causes of action against all parties and having failed to themselves logically connect the causes of action that gave rise to the relief sought, leave the parties and the court to conduct a 'treasure hunt' as to what the claimants case is. … This case before me has a myriad of factors, matters which while inter-related to various extent really involve statutory and regulatory concerns which have sought to have been separated by pleadings of a fashion, such that the defendant parties have been obliged to address them.
>
> There is a logical temporal relationship to the pleadings. The problem is the conflation of causes of action, those under Chap 15.3 [judicial review] pleaded in terms of Chap 5 of the Civil Procedure Rules. The statement of case under Chap 5 may have been struck very early on, it has not, but the convoluted pleadings may be considered on a question of costs."

162. At the conclusion of the trial, the Commissioner refused all orders under judicial review. We have found some difficulty in distilling his reasons from his comments and conclusions on the evidence but it appears that he considered the claimants' decision to pursue judicial review was an abuse of the court process on the ground that the manner in which the claimants had conflated the causes of action by mixing private and public issues amounted to such an abuse. He based that decision on the rule, stated in *O'Reilly v Mackman*, that public law decisions should be challenged by judicial review and private law matters should be tried by ordinary action.

163. The rule has been described as one of procedural exclusivity and, whilst the procedure in cases involving pure public law or private law issues was clear under the rule, in many cases there were elements of both. Its application led to a line of cases where the distinction between public and private law matters became a critical issue in determining the correct procedure.

164. The description by Lord Diplock in *O'Reilly* of the principle as a 'general rule' suggested, as Lord Diplock himself acknowledged, that there may be exceptions. Numerous (and sometimes inconsistent) decisions were made. However, an overall trend emerged by which the strict procedural exclusivity of *O'Reilly* was considered less important than permitting a more flexible approach to the choice of procedure. As the flexible approach to the choice of an appropriate procedure became increasingly accepted, mixed public and private law claims challenging decisions by public bodies became frequent and the public/private distinction became less significant; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624.

165. In *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, the House of Lords, per Lord Slynn, acknowledged the benefit of more procedural flexibility over the choice but warned of the need for vigilance that the reason for, or effect of, the choice was not an abuse of process such as where a clear public law decision is brought by writ to avoid the stricter time limits and requirement of promptitude imposed on claims for judicial review (see, for example, *Stancliffe Stone Co Ltd v Peak District National Park Authority* [2005] EWCA Civ 747.)

166. It should be borne in mind that the procedural exclusivity of *O'Reilly v Mackman* will still apply in purely public law decisions; *North Dorset DC v Trim* [2010] EWCA Civ 1446 which involved what Carnwath LJ described as "an archetypal example of the public action which Lord Diplock would have had in mind." Although the *North Dorset case* was a clear example of the continuing need sometimes for the application of the rule in *O'Reilly*, he also explained:

> "Public action does not lose its 'public' character merely because it involves, as most public action does, interference with private rights and freedoms. It is only where there is an overlap with private law principles (such as contract or tort) that procedural exclusivity may become difficult to maintain."

167. In *Clark v University of Lincolnshire and Humberside* [2000] 1WLR 1988. Lord Woolf MR explained that:

> "The intention of the CPR is to harmonise procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.
>
> Where [there is] a claim in contract, the court will not strike out a claim which could more appropriately be made under [judicial review] solely on the basis of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including delay in initiating the proceedings, there has been an abuse of the process of the court under the Civil Procedure Rules."

168. In the same case, Sedley LJ stated his view that "the single important difference between judicial review and civil suit [is] the differing time limits."

169. Our Civil Procedure Rules, 2007, are largely based on the English Rules (for which Lord Woolf was principally responsible), and the form of our Rules as a whole, including the procedure in Chapter 15.3, demonstrates a similar intention to that expressed by Lord Woolf.

170. In the present case, the claim as a whole clearly involved a number of challenges to public law decisions. All the quashing, mandatory and prohibiting orders were directed at decisions by public officials made in the purported execution of their official duties. The declarations were directed at ascertaining the legality of relevant surrounding facts which, in the majority of

cases, required the court's interpretation of the *Mines and Minerals Act* and the *Land and Titles Act* and their subsidiary legislation. The terms of rule 15.3.4 require that all claims for such orders "shall be made by a claim to the High Court for judicial review".

171. The remaining orders sought also included an element of public law but, even if that would not have been sufficient to justify making a claim for judicial review if brought in isolation, they were integrally linked to the sequence of relevant events upon which the overall background of this whole complex claim was founded. They were pleaded as alternative to, or a consequence of, the principal grounds seeking judicial review.

172. The inconvenience of separate proceedings for the alternative remedies may be conveniently illustrated through paragraph 9 of the claim. That seeks rectification of the register pursuant to section 229 of the *Land and Titles Act*. If that had been brought in separate proceedings under Chapter 5 of the Rules, the whole of the evidence required in the present proceedings to prove the declarations and orders sought in paragraphs 5A, 7, 7A, 8, 8A and 10 of the claim would have had to be pleaded and determined to prove that the facts amounted to mistake under that section. The same applies to the other claims for alternative remedies; essentially the same elements would have been required to prove either the principal or the alternative remedy.

173. The Commissioner's finding that some of the claims for judicial review should not have been brought until any alternative statutory remedies had been exhausted defeats the likelihood, also demonstrated by the claim for rectification, that declarations if made would lead to the same result. To have sought rectification in separate proceedings first would have ignored the interrelationship of all these issues and been an example of Lord Woolf's satellite litigation being generated by a barren procedural dispute.

174. We cannot accept that they were incorrectly included in the same claim and we disagree with the Commissioner's conclusion that their inclusion, the conflation of issues of which he complained more than once, was in any way intended to, or resulted in, an abuse of process.

175. What is clear is that the manner in which the case as a whole was pleaded and presented in the High Court by the parties resulted in an inordinately protracted hearing. The Commissioner correctly pointed out the failure to call a conference under rule 15.3.16. We do not share his opinion that had there been a rule 15.3.16 conference called, the claim would have been struck out at that stage. If there had been such a conference, we are satisfied that the court would have allowed the case to proceed but would undoubtedly have given directions which could have clarified the issues and shortened the proceedings.

176. We appreciate the Commissioner's concern at the manner in which the case was presented in the High Court. It was both complex and bedevilled by an apparent inability or unwillingness to refine the case into its critical and determinative parts. This Court, in Appeal 22/12, having been confronted with a similar situation in the appeal hearing, had warned of the problem being repeated in the High Court:

> "… we deprecate the manner in which the whole issue was put before the Court, with voluminous documentation, prolix and highly repetitive submissions each descending into a maze of legal and factual minutiae more appropriate, if at all, to the conduct of the case at trial. The costs to the parties and the public are a sad reflection of the legal process. If this litigation is to continue, the Court repeats its suggestion made on the oral hearing of

the appeal that the parties should attempt to agree a short list of preliminary and determinative issues for consideration and disposal of the matter at trial."

177. It is all too clear that no such attempt was made and the pleadings were in fact extended to introduce even more of the legal and factual minutiae about which this Court had warned previously. The inordinate length of hearing in the High Court and the volume of papers presented in this appeal were a direct consequence. As a result the Commissioner too was dragged into lengthy consideration of matters which would not have needed to be determined if the critical issues had been identified and clarified and the proceedings refined to require determination only of those issues.

178. The Commissioner's decision that the institution of proceedings under Chapter 15.3 was an abuse of process as a result of the claimant's failure to follow the rule in *O'Reilly v Mackman* was wrong.

The cancellation of the Letter of Intent

179. Given our reasons set out above, that the claim for Judicial Review did not amount to an abuse of process, and that we do not consider that the discretion to refuse relief for the reasons relied upon by the Commissioner arose, what should the position be as regards the cancellation of the letter of intent?

180. The Commissioner gave twelve reasons for refusing relief. We have dealt with standing, conflation and conduct above. Of the remaining nine a number are procedural and, given our reasons, do not impact on this appeal. We reject the finding that the process did not involve a sufficient public law element. We equally do not accept that the Minister's decision, based as it may have been on a Cabinet decision, was not susceptible to review. Whilst there is nothing improper in being offered and/or accepting advice, nevertheless a Minister when considering a cancellation such as this is obliged to follow the rules of natural justice. Equally this was not a contractual situation. It was a statutory process, nothing more.

181. It is still then, perhaps, worth noting that in the circumstances in which the Minister found himself, faced as he was with the prospect of cancelling the Letter of Intent, the Minister owed an obligation of procedural fairness to the successful applicant, SMMS. Given that, the obligation was on him to advise the applicant of the intention to consider the question of cancellation and allow the applicant a reasonable opportunity to make representations prior to making any decision on the issue.

182. In our view, in the absence of breach of the Three Prospecting Licence rule, and on the facts shown from the material before the Commissioner at trial, SMMS would have been entitled to relief in Judicial Review against the Minister's decision to cancel the Letter of Intent on the grounds of procedural fairness to which we will now turn.

Procedural Fairness

183. As described in the factual overview, on 23 July 2010 the Mines and Minerals Board issued a document seeking tenders for prospecting licences for nickel deposits at San Jorge, Takata and Jejevo in Isabel Province. It was headed The Isabel Nickel Deposit International Tender. SMMS lodged a tender on 15 September 2010. Between those two dates, a different government had been elected and a new Minister of Mines, Mark Kemakeza, appointed.

184. After the tenders had closed, the Screening Committee, on 29 September 2010, unanimously recommended that the Board accept the SMMS tender. The following day, the Board, endorsing the Committee's recommendation, determined that SMMS was the successful tenderer and that a letter of intent should be granted under section 21(1) of the *Mines and Minerals Act*, for a period of twelve months. The new Minister was advised accordingly but declined to sign a letter advising SMMS of its successful bid until 4 December 2010, on which date he handed two letters to Ochi; the notification of the award of the tender and the Letter of Intent. They were dated 4 October 2010 and 23 November 2010 respectively. On 6 December 2010, SMMS acknowledged receipt of the letters and confirmed its acceptance of the award.

185. However, in a letter dated 17 January 2011, the Minister wrote to SMMS advising that he intended to cancel the award and the Letter of Intent:

> "I write to formally inform you that because of strong objection from some tribal Chiefs on San Jorge and Takata land areas and a good number of leaders across Isabel against the award of the Nickel Tender to Sumitomo, I had to refer the matter to Cabinet for its consideration and deliberation.
>
> Subsequently the Cabinet during its decisions on 17th January 2011 approved that the award given to Sumitomo be cancelled forthwith and that a new investor who is strongly supported by the majority of leaders and resource owners should be identified and encouraged to develop the Isabel Nickel mine during the tenure of this Government in office … my intention to grant a prospecting license for San Jorge and Jejevo land areas the subject of the Isabel Nickel International Tender is hereby withdrawn as of today's date."

186. Ochi and Mason of SMMS gave evidence that a copy of that letter only reached them on 14 March 2011. It was followed by a letter dated 2 June 2011 from the secretary of the Board stating:

> "This letter serves to inform you that on its Extraordinary sitting on 12th April 2011, the Mines and Minerals Board has resolved that the Letter of Intent over San Jorge and Takata and Notice of Award in respect to the Isabel Nickel International Tender be cancelled. The Board's decision for cancellation is based on Cabinet's decision regarding the implementation of government conclusions for this Ministry.
>
> This belated notice has been a result of administrative matters on our behalf, and we sincerely apologise for any inconvenience caused."

187. The reference to a resolution at the meeting on 12 April 2011 that the Letter of Intent should be cancelled was not true. Instead, the Board had recommended that the Minister should issue a Letter of Intent to Axiom regarding San Jorge and Takata and he did so the same day. Three days later on 15 April 2011, the second respondents signed a surface access agreement with Axiom and, that same day, the Minister also issued the company a prospecting licence.

188. The first appellant accepts that by section 36(a) of the *Interpretation and General Provisions Act* (Cap 85) the Minister had power to cancel the Letter of Intent but submits that SMMS was also entitled to, but was not afforded, procedural fairness in the manner in which that was done. The appellant was given no opportunity to respond to the stated reasons for the cancellation. Such a failure was a denial of natural justice.

189. Section 71(2) of the *Mines and Minerals Act* requires the Minister to allow the holder of instruments specified in the section an opportunity to show cause why such a cancellation should not be ordered:

> "71. (1) The Minister on the advice of the Board may suspend or cancel a permit, licence or mining lease in the event that the holder -
>
> (a) contravenes any provisions of this Act or any regulations made thereunder;
> (b) commits a material breach of, or fails to comply with or observe, any provision of his permit, licence or mining lease unless such breach is due to an event beyond his reasonable control which could not have been reasonably foreseen or avoided; or …
>
> (c)
>
> (2) The Minister, before exercising his powers under subsection (1), shall call upon such holder to show cause within reasonable time as he may specify, why the holder's rights should not be suspended or cancelled, as the case may be, and if such holder fails to show cause within the time so specified or if the cause shown is, in the opinion of the Minister, inadequate, the Minister may take such action as specified in subsection (1), or in the case of any breach mentioned in paragraph (b) of subsection (1) may allow such holder to remedy such breach within such time as the Minister may specify."

190. That safeguard, the first appellant submits, should have applied to the cancellation of the Letter of Intent and Parliament should be assumed to have intended that it should and the section read accordingly.

191. The respondents submit that Parliament has clearly established a scheme to protect the right to be able to show cause as provided in section 71(2) but intentionally restricted it to any permit, licence or mining lease. The omission of a Letter of Intent, counsel submits, demonstrates a clear intention by Parliament to withhold the protection from such a document. Section 2(3) and 2(4) (c) of the Act gives the Government the exclusive right to deal with and develop mineral resources in such manner as it deems to be in the national interest and to grant the exclusive rights to any person to enter any land to prospect for and acquire such minerals upon such terms and conditions it thinks fit. The omission of a Letter of Intent from the protection in section 71(2) was, the respondent suggests, an intentional exercise of that power.

192. The Commissioner adopted the respondent's submissions on this aspect of the case and found:

> "… section 71 of the Mines and Minerals Act guides the Court. Axiom says while that action relates to "a permit, licence or mining lease" which the Minister may suspend on the advice of the Board, the legislature may have included a "show cause why" procedural fairness claim in that section in relation to Letters of Intent, but the section is silent. I accept the argument that the necessary intendment in the Act is to abrogate that right. Axiom suggests that had Parliament intended not to exclude a procedural fairness requirement from the power to cancel Letters of Intent, it could easily have made the provision to that effect but did not do so.

> For if damage is alleged, the injured party may seek to claim based on the implied breach of agreement implicit in the Letter of Intent. The injured party is not left without recourse. The Minister's power under section 36(a) [of the *Interpretation and General Provisions Act*] is unfettered.
>
> I do not accept on the facts found, that the first Claimant has shown any right to procedural fairness."

193. The Commissioner's and Axiom's interpretation of section 71 relies on the inclusio unius maxim. The respondents acknowledge that recent authorities in many jurisdictions have given a more restricted application to the maxim when interpreting provisions intended to preserve or remove people's rights. In his written submissions before this Court, Mr Lilley properly acknowledges the caution by Lopes LJ in the nineteenth century;

> "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." (*Colquhoun v Brooks* [1888] 21QBD 52, 65)

194. However, counsel urges, this is no accidental or inadvertent omission by Parliament. The terms of section 71 including, notably, subsection (4), apply solely to a limited number of specified documents and demonstrate the clear intention of Parliament to exclude any other.

195. We cannot accept that the maxim is the proper foundation for the interpretation of this statutory provision. Authorities have repeatedly, in respect to rights and obligations, warned against too rigid an application to construction. The principle is that, if Parliament, as is its undoubted right, intends to limit or remove a citizen's rights, that intention must be stated clearly and any necessary interpretation of such provisions should proceed on the assumption that Parliament always intends to, and will, act fairly.

196. Axiom's submission, adopted by the Commissioner, that 'had Parliament intended not to exclude it', it could easily have included such provision reverses the sole or proper approach to the interpretation of the provision. As Mr Gibson for the first appellant put it, the question is not whether the legislature has sufficiently revealed an intention not to exclude the requirement of procedural fairness. It is whether the legislature has sufficiently revealed an intention to exclude that requirement.

197. Both parties accept that the principles of natural justice should apply to such a decision and that any person directly affected must be able reasonably to expect procedural fairness in any such implementation. Equally both accept that the rights to procedural fairness may be excluded by statute.

198. The relevant issues in the present case are whether the omission of a right to show cause before a Letter of Intent is cancelled was a deliberate exclusion by Parliament and, if not, the proper interpretation and effect of the statute in this regard.

199. In England, in *Wiseman v Borneman*, [1971] AC 297,310, Lord Guest stated that in the interpretation of such a provision:

> "Parliament is not to be presumed to act unfairly; the courts will imply into the statutory provision a rule that the principles of natural justice should be applied."

200. This has been accepted and repeated in numerous cases from many common law jurisdictions. In Australia in *Kioa v West*, [1985]169 CLR 550, 609, Brennan J explained:

> "When the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that 'the justice of the common law will supply the omission of the legislature'. The true intention of the legislation is thus ascertained."

201. Similarly in England, the principle has been described as a principle of construction requiring the courts to interpret even very wide words in a statute as implicitly limited by the presumption that Parliament intends the common law requirements of fairness to apply unless it has been clearly indicated to the contrary, per Lord Browne-Wilkinson in *Pierson v Secretary of State for the Home Office* [1998] AC 539, 573.

202. More directly relevant to the present case, Bingham LJ warned:

> "The duty to act fairly or consult or take certain procedural steps may, of course, be expressly or impliedly excluded by the words of the statute itself. It should be noted, however, that e.g. the maxim of construction inclusio unius exclusio alterius (the express mention of one thing excludes all others) can seldom, if ever, be enough to exclude the common law rules of natural justice." *R (West) v Parole Board* [2005] 1 WLR 350, [29].

203. Mr Lilley has correctly pointed out that 'seldom, if ever' does not mean 'never' but we are satisfied there is nothing in the statute to suggest that the legislature intended to exclude a Letter of Intent from the protection of the widely accepted common law duty to apply the rules of natural justice which the Act specifically recognised and afforded to other instruments. There is undoubtedly nothing to the contrary which could satisfy the test of a 'clear manifestation' (*Kioa v West (supra)*) or of 'irresistible clearness' (*Saeed v Minister of Immigration and Citizenship* [2010] 241 CLR 252) nor is there anything elsewhere in the Act that would suggest Parliament had any specific reason to intend such an exclusion. The right of the Minister to cancel the Letter of Intent arises from the much more general provision of the *Interpretation and General Provisions Act*. We note the warning in *Commissioner of Police v Tanos* [1958] 98 CLR 383 that indirect references, uncertain inferences or equivocal considerations will not be sufficient to demonstrate an intention to exclude procedural fairness.

204. This principle of statutory interpretation has been accepted and repeated emphatically by the courts in many common law jurisdictions including many of our close neighbours in the South Pacific.

205. Having found that the protection given by section 71(2) is properly applied to the Minister's decision to cancel the Letter of Intent, it is necessary to move on to consider whether the right to be given an opportunity to show cause entitles SMMS reasonably to expect it as an essential ingredient of procedural fairness. The test is whether or not the appellant was deprived of the right. Whether or not he was prejudiced as a result of such deprivation is not the relevant test.

206. As can be seen in the passage above, the Commissioner, having incorrectly concluded that section 71 was intended to exclude the appellant's right to the protection of section 71(2), inevitably also found that SMMS had no right to expect procedural fairness.

207. In 1962, Lord Denning explained:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them." (*Kanda v Government of Malaya* [1962] AC 322,337)

208. It is a statement that has been accepted and applied in numerous cases. The court's approach when considering such a case was also explained by Lord Denning in the same case:

> "[It] appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179,182 down to the decision of their Lordships' Board in *Ceylon University v Fernando* [1960] 1 WLR 223 … the court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk is enough."

209. The present position in Australia was recently summarised by McPherson JA in *Australian Meat Holdings Pty Ltd v Douglas*, [2005] 2 Qd R 457,461:

> "The common law rule, said Barwick CJ in *Twist v Randwick Municipal Council* [1976] 136 CLR 106, is that "a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power …" The legislature, his Honour went on, may displace the rule and provide for the exercise of such power without any opportunity being afforded to the affected person to oppose its exercise; but, "if that is the legislative intention it must be made unambiguously clear"."

210. That is also the law in Solomon Islands and the Commissioner's conclusion that Parliament intended the exclusion of a Letter of Intent from the protection of section 71(2) and that the holder of the Letter of Intent could not expect procedural fairness in the cancellation was wrong.

211. SMMS seeks as relief declarations that the award of the tender to SMMS and consequential Letter of Intent are each valid, subsisting and effective. Whether such relief is to be ordered requires consideration of a further issue to which we now turn.

The Three Prospecting Licence Rule

The issue on appeal

212. The Commissioner held that on the proper construction of s 20 of the *Mines and Minerals Act* the Director was obliged to refuse SMMS's tender bid as "non-complying", because it already held three prospecting licences.

213. Counsel for SMMS submitted that the Commissioner erred in his interpretation of s 20. They submitted that, on the proper construction of the section, s 20 (5) (c) did not apply to an application for a Prospecting Licence made in response to a call for tenders pursuant to s 20(4). Therefore, in their submission, the Director was not obliged to refuse to accept the SMMS tender bid.

Prospecting Licence

214. The holder of a Prospecting Licence has an exclusive right to carry out prospecting in the prospecting area it covers; *Mines and Minerals Act* s 26.

215. The Minister has power to issue a Prospecting Licence "to any applicant who makes application pursuant to section 20"; s 19.

216. Section 20 deals with applications for Prospecting Licences, and s 21 deals with the Minister's informing an applicant of his intention to issue a Prospecting Licence subject to the applicant acquiring surface access rights ("Letter of Intent") and the applicant's acquisition of surface access rights. On agreement being reached between the applicant and the landowners and that agreement being reduced to writing, the Minister shall issue a Prospecting Licence to the applicant; s 21(9).

217. There is a prescribed form for a Prospecting Licence; s 22. The area covered by it may not exceed 600 square kilometres, and its term may not exceed three years. It may be renewed for a reduced land area; s 24.

218. Any transfer of a Prospecting Licence or other dealing with it requires the approval of the Board; s 28. The licence holder may surrender the area concerned in whole or in part; s 72. In certain events, the Minister may suspend or cancel a Prospecting Licence on the advice of the Board, after calling on the holder to show cause why its rights should not be suspended or cancelled; s 71.

Amendments

219. Before the international tender was advertised, the *Mines and Minerals Act* and the Mines and Minerals Regulations 1996 ("the Regulations") made pursuant to it were amended.

220. The Act was amended by the *Mines and Minerals (Amendment) Act* in four respects –
    (i) inserting definitions of "associate company" and "tender" in s 3;
    (ii) adding to the powers of the Director by the insertion of two paragraphs in s 7;
    (iii) amending s 20(1), (4) and (5); and
    (iv) adding "prescribing the procedures for tender" to the list of matters in s 80 about which the Minister may make regulations.

221. The amendments to the Regulations included the introduction of "Part IIA – Tender Procedures for Prospecting Licence."

Approach to statutory interpretation

222. Section 9 of the *Interpretation and General Provisions Act* provides –

> "9. (1) An Act speaks from time to time.
>
> (2) Each Act is intended to be read as a whole.
>
> (3) Each Act shall be deemed to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

223. The *Mines and Minerals Act* must be read as if "it is always speaking", as the Commissioner observed. However, we do not accept the respondents' submission (which was accepted by the Commissioner) that it is impermissible to have any regard to the Act as it stood before it was amended.

224. The provisions of an Act are to be given the interpretation that will best achieve their object or purpose. In ascertaining the meaning of a provision, it is proper, indeed necessary, to have

regard to the context in which it appears. There is immediate context in the form of other provisions of the same statute and wider context including the state of the law immediately before the provision was enacted, its legislative history, the provisions of other statutes pertaining to similar matters, and the mischief it was intended to remedy.[1]

The Act as amended

225. The powers of the Director are set out in s 7. So far as presently relevant, that section provides–

> **"7.** Subject to the provisions of this Act, the Director shall have power, for the purpose of the performance of his functions under this Act –
>
> (a) to advise the Board on the technical aspects of reconnaissance, prospecting and mining operations so as to ensure that Solomon Islands receives the greatest benefits obtainable from the exploration of its mineral resources;
> (b) to receive applications for permits, licences and leases and to submit such applications to the Board for the Board's consideration;
> (c) to carry out independent and due diligent search and proper assessment of the companies intending to or applying for reconnaissance permit, prospecting licence and mining lease as prescribed;
> (d) if necessary, to interview or hold meetings with an applicant for discussing or resolving any relevant matter that the Minister may direct in writing from time to time or the Director deems essential for the board's purposes".

Paragraphs (c) and (d) were inserted by the *Mines and Minerals (Amendment) Act*.

226. The Board's functions are set out in s 11, which provides –

> "**11.** The functions of the Board shall be –
>
> (a) to advise the Minister on the issue of permits, licences or leases in respect of gold dealing, reconnaissance, prospecting and mining operations to be carried out in terms of this Act;
> (b) to take such measures as it deems necessary or appropriate to inform landowners or land holding groups affected, on operations to be carried out, in terms of permits, licences or leases, as the case may be;
> (c) to assist respective holders of, or applicants for, permits, licences and leases to negotiate with landowners and land owning groups in order to enable such holders to gain access to affected land and carry out reconnaissance, prospecting or mining operations;
> (d) to assist landowners or land holding groups to determine surface access fees and other payments in terms of this Act;
> (e) to assist in the determination of compensation for damage that may become payable pursuant to this Act; and

[1] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, 463 per Viscount Simonds; *NWL Ltd v Woods* [1979] 1 WLR 1294 at 1311 – 1312 per Lord Scarman; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995-1996) 187 CLR 384 at 408; Jones, *Bennion on Statutory Interpretation – A Code* (LexisNexis, 6th ed, c 2013) at 539 - 541; Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at 3.32.

(f) to take such measures as it deems necessary or appropriate to establish trust funds for the benefit of landowners or land holding groups referred to in sections 25 and 34 of this Act."

227. We set out s 20 in its amended form, underlining words inserted by the *Mines and Minerals (Amendment) Act* and striking through words that were omitted by that Act.

"**20.** (1) Except in cases of tender, each application for a prospecting licence shall be made to the Director in the prescribed form and shall state –

(a) the applicant's full name, address and nationality and, in the case of an application by a partnership or other association of persons, the full names, addresses and nationalities of all partners or of all such persons;
(b) in the case of an application by a corporate body, the registered name and address of such body, the full names and nationalities of the directors and the full name and nationality of any shareholder who is the beneficial owner of more than five per cent of the issued capital and any other person who controls the corporate body;
(c) information as to the financial status, technical competence and experience of the applicant;
(d) a description of the area over which the prospecting licence is sought in accordance with the Universal Transverse Mercator Grid, together with a plan thereof to such scale and accuracy as may be prescribed;
(e) a report setting forth his evaluation of the mineral prospects in the area, and, if the area was subject to a reconnaissance permit held by the applicant including the information required by section 18(2) not theretofore supplied;
(f) the minerals for which the applicant wishes to prospect;
(g) the period for which the prospecting licence is required;
(h) a proposed work programme, its minimum estimated direct costs and the names and qualifications of the individuals to be in charge thereof;
(i) a proposed programme for the acquisition of surface access rights and the names of the individuals to be in charge thereof;
(j) the applicant's intentions regarding environmental protection; and
(k) such additional information as the Director may require or as may be prescribed.

(2) Each application shall be accompanied by payment of such application fee as may be prescribed.

(3) The Director may require an applicant to amend an application with respect to the proposed work programme and other matters.

(4) The Board may call for tenders for a prospecting licence over a specified area, in which case all such tenders shall comply with ~~the requirements of this section~~ the prescribed procedures.

(5) The Director shall refuse to accept an application for a prospecting licence if, at the time of submission of the application –

(a) there is pending before the Board an application for a prospecting licence or mining lease in respect of all of the proposed prospecting area; or
(b) all of the proposed prospecting area is subject to an existing prospecting licence or mining lease; or
(c) the applicant or an associate company is currently holding three or more prospecting licences over different prospecting areas and has not applied for a mining lease or commenced mining in at least one prospecting area.

(6) Where an application for a prospecting licence is in respect of an area which includes part of the area which is the subject of –

(a) any previous application, pending before the Board, for a prospecting licence or mining lease; or
(b) any existing prospecting lease,

the Director shall accept the application and shall excise from it that part of the area which is the subject of such previous application, licence or lease.

(7) The Director shall inform the applicant of any excision made pursuant to subsection (6) (b)."

228. By s 21 (1) and (2) –

"**21.** (1) Where the Board is of the opinion that an application for a prospecting licence, submitted in accordance with section 20, is acceptable, the Minister shall inform the applicant in writing (which writing is hereinafter referred to as the 'letter of intent') of his intention to issue the prospecting licence subject to the applicant acquiring surface access rights.

(2) The Minister's letter of intent, issued pursuant to subsection (1) may, *inter alia*, allow such period and include such terms and conditions that the Board may seem fit to impose with regard to the process of seeking surface access rights."

Tender

229. Section 3 of the *Mines and Minerals Act* contains definitions of over 20 terms used in the Act. It begins –

"**3.** In this Act –"

This definition of "tender" was inserted into s 3 by the *Mines and Minerals (Amendment) Act*–

"'tender' means inviting, soliciting or placing on open market, whether domestically or internationally, a land area proposed for reconnaissance, prospecting or mining." (*Emphasis added*.)

230. The use of "means" rather than "includes" suggests that the definition is intended to be exhaustive. Unlike many definition sections, s 3 does not contain a phrase such as "except where the context otherwise requires". However, even in the absence of such a qualifying phrase, a definition in an Act must always yield to any contrary context in which the word

defined is used. If a word is plainly used in a different sense, the definition does not apply.[2] After reviewing relevant authorities, Pearce and Geddes have suggested that –

> "…. the proper approach is to assume that the expression is used as defined and then ask whether, in the particular context in which it appears, a contrary intention is shown. This inquiry is not affected one way or the other by the term being used other than as defined in another place in the Act. If the definition is to be departed from, it is only to be for the purposes of the particular provision under consideration." Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [6.67].

231. In commercial usage, the process by which a government or a company invites interested persons to submit offers to supply goods or services or enter some other contractual arrangement is called a "tender" or a "call for tender". An offer submitted in response to such an invitation is a "bid", although the word "tender" is often used interchangeably with "bid".

232. The definition of "tender" is awkwardly expressed. A land area that is proposed for reconnaissance, prospecting or mining cannot be invited or solicited, and it probably cannot be "placed on open market". Consistently with the commercial usage of the word "tender" to describe an invitation to submit bids, we consider that Parliament intended to define "tender" as the process by which interested parties are invited or solicited to make offers to carry out reconnaissance, prospecting or mining on land proposed for the relevant purpose, or an invitation to make such bids is put on the open market. For brevity's sake, we will refer to the process as an invitation to bid, whether in a particular case it be one of invitation, soliciting or placing on the open market.

233. Section 20(1) provides for the form and content of an application for a Prospecting Licence. Since its amendment, it begins with the words "Except in cases of tender". In this context, there is no reason to depart from the definition of "tender" in s 3. Thus, an application for a Prospecting Licence must comply with s 20(1) except where there has been an invitation to bid.

234. Even where there has been such an invitation, an application for a Prospecting Licence must be made, because by s 19 the Minister's power is to issue a Prospecting Licence "to any applicant who makes application pursuant to section 20". The effect of the exception in s 20(1) is merely to make it unnecessary for applications for Prospecting Licences in cases of tender to comply with the procedural requirements of that subsection. There is no reason why s 20(2) and (3), which respectively provide that an application for a Prospecting Licence shall be accompanied by payment of the prescribed application fee and that the Director may require an applicant to amend an application, should not apply in cases of tender.

235. The Commissioner said of s 20(4) –

> "By s 20(4), the Board is the designated authority to do the inviting in relation to a land area proposed for prospecting.
>
> The reference there to 'tenders' is the plural of 'tender' in the interpretation section which predicates the use of the words in the Act.

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2 *R v Lynsey* [1995] 3 All ER 654 at 658 per Henry LJ; *Brown v Brook* (1971) 125 CLR 275 at 277 per Barwick CJ; Jones, *Bennion on Statutory Interpretation - A Code* (LexisNexis, 6th ed, c 2013) at 521*;* Gifford and Gifford, *How to Understand an Act of Parliament* (Butterworths, 8th ed, 1994) at 72.

> 'S 20(4).The Board may call for "tenders" for a prospecting licence over a specified area, in which case all such tenders **[the invitations by the Board]** shall comply *with the prescribed procedures*.' [Amended by s 4(2)/2008.] [my emphasis]

It must be remembered that the land area previously was 3 discrete areas which envisaged separate 'tenders' but in fact the areas were later treated as one for the tender.

The phrase '… in which case all such tenders shall comply with the prescribed procedures' is a mandatory obligation on the Board, when the Board, at its option has decided to invite prospecting of land areas. [In this case the land areas were amalgamated to one parcel; there was no need for 'tenders' in respect of individual parcels.] The phrase 'all such tenders' towards the end of the clause does not refer to the bid of a tenderer but must be read to mean the 'tender' [or invitation] of the Board.

The 'prescribed procedures' are procedures found in the Regulations, 3C of Part IIA – Tender Procedures for Prospecting Licence."

236. For a number of reasons, we consider that the Commissioner erred in his construction of s 20(4) and that "tenders" in that subsection means "tender bids".

237. "Tenders" appears twice in that subsection –

> "The Board may call for tenders …"
>
> "… all <u>such</u> tenders shall comply with the prescribed procedures." (*Emphasis added*.)

The word "such" is an indicator that "tenders" is used in the same sense in each part of the subsection.

238. On both occasions it is used as a plural noun. This is consistent with "call for" meaning "invite" and an expectation of more than one response to the invitation. Those responses will be in the form of bids or "tenders".

239. It would be surprising if the Legislature did not provide for the procedures to be followed by tenderers, after excepting applications for Prospecting Licences in such cases from the procedural requirements of s 20(1).

240. By s 80 as amended –

> "**80.** The Minister may make regulations generally, for the proper carrying out of the provisions and purposes of this Act, and in particular but without prejudice to the generality of the foregoing may make regulations –
>
> > (v) prescribing the procedures for tender; and
> >
> > (w) prescribing any other matter or anything which may be, or is required by this Act to be, prescribed."

This regulation-making power is broad enough to encompass not only power to make regulations applicable to the process of calling for tender bids, but also regulations prescribing what is required of an applicant for a Prospecting Licence who is a tenderer.

241. In our view the words "all such tenders shall comply with the prescribed procedures" in s 20(4) refer to compliance with prescribed procedures applicable to tenderers.

242. In this case the land area specified for prospecting comprised three distinct parts physically separate from one another, and separate tenders were initially envisaged. Because that will not always be so, it does not explain the use of the plural "tenders" in s 20(4). Nor is it otherwise a relevant consideration in construing that subsection.

The Regulations

243. The procedures in Part IIA of the Regulations may be summarised as follows –

(a) The Minister may specify an area for prospecting: r 3B (1).
(b) If any application for a Prospecting Licence under s 20(1) of the *Mines and Minerals Act* is pending on the date the area is specified, the Director shall not accept it before closure of "the tender". He shall inform the applicant to submit "a tender" when the "tender notice" is advertised: r 3B (3).
(c) The Board approves the "approved tender specification": r 3C (1).
(d) The Board issues a "tender notice" inviting interested persons to submit "their respective tenders" in accordance with the tender specification: r 3C (1).
(e) Each tenderer submits to the Director a "tender document", including the prescribed tender fee, and an application for a Prospecting Licence, including the prescribed application fee: r 3C (6).
(f) The Director informs "each tenderer" of receipt of the tender document and procedural matters: r 3C (7).
(g) The Minister appoints a "Screening Committee" of ten persons, including up to three representatives of the land owning group within the specified area: r 3D (1).
(h) The Director refers "all the tender documents and the applications for prospecting" to the Screening Committee: r 3C (8).
(i) The tender document and applications for prospecting are screened by the Screening Committee, which reports to the Board: r 3D (3) and (4).
(j) The Board decides on the successful tenderer and the application: r 3D (4).
(k) The Board informs the Minister of the successful tenderer and whether or not the application for prospecting is acceptable for the purposes of s 21: r 3D (5).

244. Section 63(2) of the *Interpretation and General Provisions Act* provides –

> "**63.** (2) Except where the context otherwise requires, words and expressions used in subsidiary legislation have the same meaning as they have in the Act under which the subsidiary legislation is made."

245. In the Regulations, the word "tender" is used in the two senses in which it is used in the Act. See, for example, r 3B (3) and r 3C (1). The latter refers to s 20(4); it provides –

> "3C (1) If the Board calls for tender under section 20(4), the Board shall issue and publish ….. a tender notice inviting interested persons to submit their respective tenders in accordance with the tender specifications approved by the Board." (*Emphasis added*.)

We respectfully concur with the Commissioner's observations that the first part "If the Board calls for tender under section 20(4)" concerns the Board's invitation to treat for a Prospecting Licence over a particular area, while "respective tenders" in the later phrase "inviting interested persons to submit their respective tenders in accordance with the tender

specifications approved by the Board" means the tenderers' bids. He said that this latter interpretation accords with the need for the "interested persons", the tenderers, to ensure that their bids accord with the "tender specifications" approved by the Board.

Section 20(5) (c)

246. Section 20(5)(c) provides –

> "(c) The Director shall refuse to accept an application for a prospecting licence if, at the time of submission of the application –
>
> > the applicant or an associate company is currently holding three or more prospecting licences over different prospecting areas and has not applied for a mining lease or commenced mining in at least one prospecting area."

247. The Commissioner considered that s 20(5) applies to an application for a Prospecting Licence whether made in accordance with s 20(1) or by a tenderer. He held that the Director ought to have refused SMMS's tender bid because it was not compliant with s 20(5) (c).

248. Counsel for SMMS made four submissions as to why s 20(5)(c) does not apply to a person making a tender bid in response to a call for tenders pursuant to s 20(4). They relied on those submissions as both individually and collectively supporting that conclusion.

249. Their first submission ran as follows. Section 20 commences with a reference to an application for a Prospecting Licence made to the Director in the prescribed form, and all the succeeding subsections other than s 20(4) refer to an application or an applicant. Therefore, whenever "application" or "applicant" are used throughout s 20, their reference point is an application for a Prospecting Licence made to the Director under s 20(1). Relevantly, in s 20(5) those words do not refer to a document submitted in accordance with a tender process or a tenderer.

250. There are several reasons why we do not accept this submission. First, the reference point for "application" and "applicant" is s 19, which is the source of the Minister's power to issue a Prospecting Licence: he may do so "to any applicant who makes application pursuant to section 20". Second, s 20(1), which is concerned with the form and content of an application for a Prospecting Licence, begins "Except in cases of tender…". Even in a case of tender, there must still be an application for a Prospecting Licence in order to satisfy the prerequisite in s 19. As we have already said, the effect of the exception in s 20(1) is merely to make it unnecessary for applications for Prospecting Licences in cases of tender to comply with the procedural requirements of that subsection.

251. Since the amendments made by the *Mines and Minerals (Amendment) Act*, there are two procedural pathways to obtaining a Prospecting Licence – direct applications which must be made in the prescribed form and contain the information in s 20(1) and applications in cases of tender. The correctness of this construction of s 20 is confirmed by reference to what the Attorney-General said when the Bill was debated in Parliament.

252. The *Interpretation and General Provisions Act* does not contain any express provision allowing recourse to extrinsic materials such as reports of law reform bodies and proceedings in Parliament. The common law used to allow those materials to be used only to identify the mischief at which legislation was directed and its objective setting. That principle was relaxed in *Pepper v Hart* [1993] AC 593, where the House of Lords held that recourse to Parliamentary proceedings as an aid to interpretation is permissible where (a) legislation is ambiguous or

obscure or leads to absurdity, (b) the Parliamentary material relied on consists of one or more statements by a Minister or other promoter of the Bill together with such other Parliamentary material as is necessary to understand those statements and their effect, and (c) the statements relied on are clear (at 640 per Lord Browne-Wilkinson).

253. In the United Kingdom, Courts have taken a cautious approach to the principle in *Pepper v Hart.* For example, in the recent decision of the Supreme Court in *Williams v Central Bank of Nigeria* [2014] AC 1189 Lord Neuberger said –

> "104. However, one must not lose sight of four important factors in that connection. First, the court's constitutional role in any exercise of statutory interpretation is to give effect to Parliament's intention by deciding what the words of the relevant provision mean in their context. Secondly, it follows that in so far as any extraneous material can be brought into account, it is only part of that context. Thirdly, before such material can be considered for the purpose of statutory interpretation, certain requirements have to be satisfied – see e.g. per Lord Mance JSC in *The Presidential Insurance Co Ltd v Resha St Hill*[3] and per Lord Browne-Wilkinson in *Pepper v Hart.*[4] Fourthly, even where those requirements are satisfied, any court must be wary of being too ready to give effect to what appears to be the Parliamentary intention from what was said by the authors of a report or by the sponsors of the relevant Bill: one cannot always be sure that what they say has been read or heard, or accepted, by the parliamentarians who voted in favour of the provision in question."

254. We consider that the common law of Solomon Islands should be treated as having developed in accordance with the principle in *Pepper v Hart*, which is appropriate in the circumstances of this country[5] but in any particular case, that principle should be applied with circumspection, for the reasons expressed by Lord Neuberger.

255. Under the *Constitution*, the Attorney-General must be a lawyer entitled to practise in Solomon Islands. He is not a Member of Parliament; rather he holds a public office and is the principal legal adviser to the Government. By s 42(4) –

> "(4) If the Minister responsible for justice is not a person entitled to practise in Solomon Islands as an advocate or as a barrister and solicitor, the person holding the office of Attorney-General shall be entitled to take part in the proceedings of Parliament as adviser to the Government:
>
> Provided that he shall not be entitled to vote in Parliament or in any election for the office of Prime Minister."

256. During the Bill's passage through Parliament, the Attorney-General answered a number of questions from Members. He said of the amendments to s 20 –

> "Coming to section 20 itself, it has been decided by High Court that section 20 does not allow for international tendering, although in section 20(4) it says the Board may call for tender …..

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3 [2012] UKPC 33 at [23].

4 [1993] AC 593 at 640.

5 *Constitution* s 76, Schedule 3 cl 2, 4.

> If you look at section 20, section 20 only spells out procedures for direct applications. If you look at section 20 carefully, it provides for direct application processes and then it also provides for restricted tender process. I use the word 'restricted' because although it says the Board may call for tenders, at the end of subsection 4 it says: *'in compliance with the requirements of this section'* which means you go back to the direct application process again.
>
> What we have done is in clause 4 we have added the words 'except in cases of tender'. That is the difference brought there. If you look at clause 4 paragraph (a) (i) you will see the new clause. Really, the new words we have inserted are the words 'except in cases of tender' so that you have the two processes demarcated clearly under section 20. And then in subsection 4 we remove the words 'with the requirements of this section' and replaced with the words 'the prescribed procedures'.
>
> When the tendering process is activated, we will not be required to go through the section 20 process again. Instead applicants will be required to go through the procedures set out in the regulations …. "

257. Counsel for SMMS's second submission was that s 20(5)(c) imposes a "requirement" within the meaning of that word as it formerly appeared in s 20(4) – namely, a requirement that an applicant for a Prospecting Licence currently hold fewer than three Prospecting Licences. They submitted that the amendment of s 20(4) relieved a tenderer of any obligation it might otherwise have had to comply with "the requirements of this section".

258. Paragraph (c) of s 20(5) must be read in the context of the whole subsection, and in the context of s 20 as a whole. The *Mines and Minerals Act* promotes the development of mining in Solomon Islands by providing procedural and regulatory controls. Section 20 (1), (2), (3) and (4) impose obligations on an applicant for a Prospecting Licence, while s 20 (5), (6) and (7) impose obligations on the Director. This was also so before the amendments.

259. Under s 7(b) the Director has power to receive applications for Prospecting Licences and to submit them to the Board for its consideration. Under s 11(a) the Board is to advise the Minister on the issue of Prospecting Licences. Under s 21(1) the Minister issues a Letter of Intent "where the Board is of the opinion that an application for a prospecting licence, submitted in accordance with section 20, is acceptable". The word "accept" in s 20(5) and (6) refers to conduct on the part of the Director, while "acceptable" in s 21(1) refers to the worthiness of an application in the opinion of the Board.

260. Section 20(5) requires the Director to act as a gatekeeper in relation to applications for Prospecting Licences. Consistently with his power in s 7(b), "to accept" in s 20(5) means to receive and pass on to the Board for its consideration. He must refuse to do so if (i) an application for a Prospecting Licence or a mining lease in respect of all of the proposed prospecting area is pending before the Board; (ii) all of the proposed prospecting area is subject to an existing Prospecting Licence or a mining lease; or (iii) the applicant or an associate company is holding three or more Prospecting Licences over different prospecting areas and has not applied for a mining lease or commenced mining in at least one prospecting area.

261. Counsel for SMMS submitted, in effect, that the whole of s 20(5), not just paragraph (c), is inapplicable in cases of tender. They went so far as to suggest that the Board might call for tenders over an area in which there is an existing Prospecting Licence or mining lease.

262. There is good reason why, pursuant to paragraph (b) of s 20(5), the Director must "refuse to accept" an application for a Prospecting Licence over an area that is subject to an existing Prospecting Licence or a mining lease, regardless of whether it is a direct application or an application by a tenderer. Those tenements afford their holders exclusive rights; ss26, 43, and the Act contains express provisions as to when they may be suspended or cancelled; s 71. It would be an absurd outcome if those rights could be defeated by that area being specified for the purposes of s 20(4) and an application for a Prospecting Licence over it being submitted as part of a tender process.

263. Paragraph (a) of s 20(5) reflects a legislative policy to protect the priority of an earlier application which has passed through the gatekeeper to the Board.

264. Regulation 3B (3) deals with the situation where an application is "pending" when its area is specified as a proposed area for prospecting. The Director must not "accept" the application before the closure of the tender; instead, he must inform the applicant to submit a tender when the tender notice is advertised. Unlike s 20(5) (a) and (6) (a), this regulation refers to an application that is "pending" rather than one that is "pending before the Board". Giving "accept" the same meaning in the regulation as it has in s 20(5) and (6), the regulation relates only to an application received by the Director but not passed on to the Board when the land is specified for prospecting.

265. The *Mines and Minerals Amendment Bill* had three objects –

> (i) to ensure that companies applying for reconnaissance permits, prospecting licences and mining leases are diligently checked by the Ministry and its officers;
>
> (ii) to restrict the issue of prospecting licences through control by the Director; and
>
> (iii) to open up international tender by placing land areas proposed for reconnaissance, prospecting or mining on the open market, whether domestically or internationally.

Those objects were respectively achieved by inserting paragraphs (c) and (d) into s 7, the insertion of paragraph (c) into s 20(5), and the amendment of s 20(1) and (4) and s 80.

266. It is apparent from the Parliamentary material that the mischief addressed by s 20(5) (c) is "landbanking". As counsel for the respondents submitted, there is nothing to suggest this would be any less of a problem in cases of tender than it is in cases of direct application. We accept their submission that Parliament intended companies and groups of companies holding three or more Prospecting Licences to progress at least one of them to mining before any further Prospecting Licence would be granted, and that there is nothing to indicate it intended that objective to be defeated by its other objective of providing for a tender process.

267. Another indication that Parliament intended s 20(5)(c) to apply in cases of tender is the absence of express words such as "except in cases of tender" which were inserted at the beginning of s 20(1). Nor is there any statement in the extrinsic materials suggesting that s 20(5) (c) was not intended to apply in cases of tender.

268. For these reasons, we have concluded that it would be wrong to characterise paragraph (c) as a "requirement" with which a tenderer need not comply.

269. Counsel for SMMS's other two submissions on s 20(5)(c) both involved reference to the Regulations –

(i) that the specific and extensive functions conferred on the Screening Committee by r 3D(3) were consistent with there being two different procedures for applying for a Prospecting Licence – direct applications and applications submitted in conjunction with tenders; and

(ii) that the Director's obligation in r 3C (8) to refer "all the tender documents and the applications for prospecting to the Screening Committee" was not consistent with an obligation to refuse to accept an application from a tenderer holding three or more Prospecting Licences.

270. Counsel for the respondents submitted that the Regulations cannot be used to construe the meaning of the Act, and that to the extent they are inconsistent with the Act, the Regulations are invalid. They observed that the Regulations had not been drafted when the Act was passed by Parliament; indeed, they were not made until about two years later.

271. In reply, counsel for SMMS said that reliance on the Regulations was not fundamental to acceptance of their submissions, but they relied on reference to them as better revealing the scheme they submitted was apparent on the face of s 20.

272. In general, subsidiary legislation may not be taken into account in construing the Act under which it was made. In other jurisdictions, subsidiary legislation has sometimes been referred to in construing an Act, for example, where the regulations were roughly contemporaneous with the Act,[6] and where the Act and the regulations were intended to form an overall legislative scheme or a code.[7] However, in this country there has not been an authoritative exposition of the circumstances in which this may be done or the purposes for which it may be done.[8]

273. In the present case it is unnecessary to resolve this issue of principle. Without making any reference to the Regulations, it is apparent from s 20 as amended that there are now two procedural pathways for applying for a Prospecting Licence. Further, the Regulations can be construed harmoniously with the Director's obligation to refuse to accept an application for a Prospecting Licence from an applicant who already holds three or more Prospecting Licences. He can be expected to inform the tenderer of that refusal as part of the information supplied pursuant to r 3C (7). At any rate, on the proper construction of r 3C (8), the words "all the tender documents and the application for prospecting" cannot include those applications the Director is bound to reject under any part of s 20(5) of the Act.

Conclusion

274. We consider that s 20(5) (c) of the *Mines and Minerals Act* applies to all applications for Prospecting Licences, whether they be direct applications or applications in cases of tender.

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6 *Hanlon v The Law Society* [1981] AC 124 at 178D-H per Lord Simon of Glaisdale, 185H – 186C per Lord Scarman, 193F – 194G per Lord Lowry; *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 397 per Lord Browne-Wilkinson

7 *R v Secretary of State for the Home Department, ex parte Mehari* [1994] QB 474 at 486 per Laws J.

8 In Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [3.41], the learned authors opine that if there are regulations that, together with the principal Act, form part of a legislative scheme, it may be useful to refer to them to ascertain the nature of the scheme. They cite the observation of Mason J in *Brayson Motors Pty Ltd (in liq) v Federal Commissioner of Taxation* (1985) 156 CLR 651 at 652: "One looks at regulations, not to construe an overall scheme or to throw light on ambiguity in a statutory provision, but to ascertain what the scheme is."

Counsel for SMMS conceded that if this Court were of that view, there would be no purpose in granting relief in the judicial review application.

275. The appeal should be dismissed to the extent it is an appeal against the Commissioner's dismissal of the claim for judicial review of the Minister's decision to withdraw the SMMS Letter of Intent.

SMMS's non-compliance with tender procedures

276. We have concluded that s 20(5) (c) of the *Mines and Minerals Act* applies to an application for a Prospecting Licence in a case of tender. As SMMS already held at least three Prospecting Licences, the Director would have been bound to reject any application by it for a further Prospecting Licence. In these circumstances it is not necessary to give detailed consideration to the Commissioner's legal analysis of the steps set out in "The Isabel Nickel Deposit International Tender – The Tender Document". There are, however, several important points which need to be addressed.

277. Both the authority calling for tenders and those responding to the call were bound to comply with the Act and the Regulations. The Commissioner erred if he meant this was not so when he said-

> "….the obligation rests with the authority seeking to tender the land to comply with regulatory matters, otherwise the 'tender' has no basis in law. The bidder's interest is to seek to satisfy the requirements in the document. The bidder [tenderer] is not concerned with the Regulations but with the document which terms it need address."

278. To comply with the Act and the Regulations, SMMS needed to submit an application for a Prospecting Licence as well as a tender bid; *Mines and Minerals Act ss 19-21; Mines and Minerals Regulations r 3C (6)*.

279. As the Commissioner noted, the tender specification (which he referred to as the "tender document") was drawn with the assistance of the Geoscience Division of the Secretariat of the Pacific Community (SOPAC). It was issued two days after the Regulations were made, and so it is unlikely that it was drawn with those Regulations in mind. The procedural steps it called for are difficult to marry with those prescribed by the Regulations. For example, the tender specification provided for –
    (i) submission of tenders;
    (ii) evaluation of tenders by the Screening Committee;
    (iii) deliberation by the Board;
    (iv) official announcement by the Minister of the award of the tender;
    (v) notification to the successful tenderer within 15 days of that announcement;
    (vi) acceptance of the tender: within 15 days of receipt of that notification, the successful tenderer was to inform the Minister that it agreed to undertake exploration activities as specified in its tender proposal;
    (vii) an application for a Prospecting Licence, in the prescribed form, within 30 days of acceptance of the tender.

By contrast, the Regulations require submission of the tender document (i.e. the tender bid) and the application for a Prospecting Licence at the same time,[9] and consideration of both by the Screening Committee and then the Board.

280. The Commissioner found that –

> "…no application for a Prospecting Licence was ever made in accordance with the Regulations in terms of the Tender Document, 1.8(4)."

He held that the waiver signed by Mr Auga (who was the Director of Mines and chairman of the Board) on 14 December 2010 was ultra vires and of no effect.

281. SMMS submitted its tender bid (and the tender fee of SBD $10,000) on 15 September 2010, without submitting a separate application for a Prospecting Licence. It paid the prescribed tender fee but did not also pay the prescribed application fee (SBD $2,250). Nor did it submit an application for a Prospecting Licence within 30 days of its letter of 6 December 2010, in which it accepted the tender award, noted the contents of the Letter of Intent, and undertook to comply with the relevant provisions of the *Mines and Minerals Act* as soon as possible.[10]

282. In principle, both the tender bid and an application for a Prospecting Licence could have been included in the one document, as there was no need to use the prescribed form for the application for a Prospecting Licence. In this regard, we agree with the approach taken by Chetwynd J in *SMM Solomons Ltd v A-G* [2012] SBHC 52 at 6*,* but, unlike the learned Judge in that case, we think two separate fees were payable. Nevertheless, where a tenderer intends to include the two in one document, it should make its intention clear by expressly applying for a Prospecting Licence, and not leave it to inference. In the present case, we are inclined to think that what appeared in the tender bid was not sufficiently clear, but it is not necessary to reach a concluded view about it.

283. We respectfully agree with the Commissioner that the waiver by Mr Auga was of no effect.

284. The Commissioner found that the Board merely selected SMMS as the successful tenderer. In the absence of an application for a Prospecting Licence, it could not have advised the Minister whether an application for a Prospecting Licence was acceptable, and it did not purport to do so. The Minister acted on a false premise that he was obliged to grant SMMS a Letter of Intent immediately upon the Board's selecting it as the successful tenderer. In the absence of an application approved by the Board, the Letter of Intent was void and of no effect. We agree with his analysis in this regard.

285. In our respectful view, the Regulations are not well drafted and contain some obvious errors, for example, the definition of "tender notice" in r 3A, and r 3B (3). Before any further call for tenders is made, it would be prudent for those administering the legislation to have the Regulations revised and section 1 of the tender specification redrawn.

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[9] By r 3D (3) (f) the Screening Committee is to assess the application for prospecting in relation to the tender document, and by r 3D (4) it is to make a report to the Board on its screening of tender documents and applications for prospecting. By r 3D (5) the Board is to inform the Minister of the successful tenderer and whether the application for prospecting is acceptable for the purposes of s 21 of the Act.

[10] SMMS later submitted three applications for Prospecting Licences, each in Form 1 – for Takata on about 11 February 2011 (with the application fee of SBD $2250), for San Jorge on 28 February 2011 and for Jejevo on 28 April 2011. AR 3156; Transcript of appeal Day 4 Session 1 pp 4 – 5.

Scheme of the *Land and Titles Act*

286. The *Land and Titles Act* is based on the Torrens system of registration of titles in land which has been adopted in many jurisdictions. It is a system in which registration is everything. Once a title is correctly registered, it is protected by the fact of registration. It is, in the oft-quoted phrase from *Breskvar v Wall* [1971] 126 CLR 376, 385, a system of title by registration as opposed to a system of registration of title. Authority can be found from many jurisdictions confirming that proposition and it is no different in Solomon Islands as many decisions of this Court have confirmed. The aim of the Torrens system is to provide certainty of title. The fact of registration confers an indefeasible title. Mr. Lilley for the respondents, submits that the title given by registration can only be challenged on very limited grounds which, in the present case, counsel suggests, and the Commissioner found, do not apply. Counsel stresses that the aim of the system is to provide certainty of title and that is the sole foundation of the *Land and Titles Act*.

287. Mr. Sullivan challenges the respondents' categorisation of the *Land and Titles Act* as being exclusively founded on the principle of registration. It is, he submits, a system which relies on both adjudication and registration. There can be no dispute that the aim is to provide certainty of title of registered land but, when the title to be registered is of former customary land, that can and will only be achieved following an adjudication process which recognises and protects the integrity of customary land before any such registration. The structure of the present Act, which came into force in 1969, and the provisions in the two statutes which preceded it are clearly, counsel submits, based on a combined process of adjudication and registration whenever customary land is involved.

288. Both counsel agree that the *Land and Titles Act* grew from the overall approach suggested by Colin Allen in the report of a Special Land Commission published in 1957. The Commission's terms of reference were:

> "To study, record and as far as possible correlate, native custom relating to land.
> In the light of the knowledge thus gained and of the apparent needs of the future to recommend in what way the use and ownership of native land …can best be controlled; and to draft the necessary legislation to govern this."

289. Allen accepted that it was intended that the Special Land Commission's enquiries should be directed at facilitating future development of agriculture, forestry and mining. He considered it prudent to apply the widest interpretation to the terms of reference and "to examine the whole system of customary land tenure and its course of evolution, against the general background of pre-war, post-war and future development".

290. Rather than drafting legislation as was required under the terms of reference, the Land Commission confined its attention to recommending the lines of future policy and presented four alternative proposals for consideration. The two most relevant to the determination of this appeal were (b) and (d):

> (b) "to devise a modern land policy which accepts the fact that the present customary system is outmoded and should be extinguished immediately;
>
> (d) to devise a policy which takes into account the present continuing need for the customary system, but which at the same time guides it along progressive lines towards the emergence of a modern tenure system, based on adjudication and registration of individual title."

291. The Commission's preferred proposal was that (d) should be adopted. The report explained,

> "… it is both feasible and desirable to meet future requirements by providing legislative and administrative arrangements to enable customary interests in land to be adjudicated, and registered, and for individual titles to be issued in respect of them. The issue of titles would extinguish the customary element attaching to such land, whose tenure and transfer would then be governed by appropriate legislation. … The policy should only be applied in specific areas and where circumstances make it desirable. In other areas, the customary title will continue to attach to interests held in native land until such time as adjudication and registration become necessary." *Allen*, SLC 277-8.

292. The recommendations of the Special Land Commission's report were based on a thorough examination of the state of land law in Solomon Islands in the 1950s. There is no dispute that the Land Commission's recommendations were accepted and provided the basis for subsequent legislation including the present *Land and Titles Act* the structure of which is clearly directed at attaining certainty and security of title by registration and, as such, reflects the central tenet of the Torrens System.

293. In Solomon Islands the existence of substantial areas of land held in multiple ownership under custom has necessitated special treatment for that land. It is the ultimate intention of the legislative provisions, as Allen clearly explains and all counsel agree, eventually to have all land held indefeasibly under the Torrens system. Until that has been achieved, any customary land must be held outside the registration process in the Act. Its status as customary land does not prevent it from being changed to registered land. What the Act does is to ensure that it should not be registered before it is clear all customary owners understand and agree with the proposed change.

294. As a result of Allen's recommendations regarding customary land, it was necessary to include additional provisions both to protect it and to allow it to be changed to registered land. The concept of ownership by a group, clan or tribe and the method of inheritance, the difficulty of ascertaining the wish of at least the majority of the collective owners and the wide ranging levels of education amongst them leading to a real risk of exploitation or misrepresentation of any proposed alienation were all matters which required consideration. In consequence, the Act provides an effectively separate procedure to extinguish the customary element in order to make it possible for the title to be registered. It is only when that procedure has been completed that there can be registration. Thereafter, the title to the land will be governed by the overall provisions of the Act including the recognition and assurance of indefeasibility.

295. The status of customary land is confirmed by Part XXVI which sets restrictions on any changes of status. It is not intended to prevent change to registered land but to ensure steps are taken to protect the customary owners by providing a special procedure to ensure the change is properly made. Division 1 of Part V provides that procedure. Once it is properly completed, the land is liable to, and ready for, registration. Until it is, the land continues to be customary land and any attempt to register it will be contrary to the purpose of Part V Division 1.

296. Both sides to the present appeal agree that the ultimate aim of proposal (d) is to establish title by registration and that any such title, once registered, shall be indefeasible subject only to the limited right of rectification permitted by section 229(1) which allows the High Court to order rectification of the register where it is satisfied that registration has been obtained, made or omitted by fraud or mistake. Submissions were addressed by counsel to the question

of whether mistake or fraud had been properly proved and whether rectification was the only proper remedy. In order to answer that, the court must consider the fundamental issue of whether, when customary land is involved, Division 1 of Part V provides a separate code to protect its status by requiring a number of steps to be taken prior to registration and whether it is only when they have been completed that it is possible to register the title.

297. There is no dispute that the statutory structure and the effect of the *Land and Titles Act* is ultimately to aim for the certainty of registered title. The difference between the parties is the respondents' submission that the registers are everything and, once made, effectively exclude any consideration as to the source of the title as opposed to that of the appellants that to achieve such a result requires, whenever owners of customary land wish to sell or lease their land, a strict procedure to ensure that the customary owners are identified and properly informed, before registration, of the intention to change the land from its customary status, the consequences of such change and that they agree with the intention and the terms before the land can be alienated. Until that is done and acceptable representatives have been identified, registration cannot take place. The adjudication process in Part V Division 1 ensures an examination of the custom of the landowners which, in the present case, involves customary ownership of land in the relevant area on Isabel which is, with one small exception, all inherited and held under a matrilineal system. The appellants contend that, in order to determine this case, the Court must understand and evaluate that custom.

298. The Commissioner rejected Mr. Sullivan's submission to that effect as philosophical and stated:

> "His [*Mr. Sullivan's*] suggestion that the Court, to give effect to that policy, must understand (and apply) custom as it affects matrilineal society ignores the line of authorities (touched on elsewhere) which constrains the High Court from stating custom as a consequence of fact finding. That role is left to others."

299. That does not accurately reflect the position under the Act. Section 254 of the Act, whilst acknowledging the exclusive jurisdiction of the local courts in civil matters affecting or arising in connection with custom, specifically excludes from that court's jurisdiction any matter or proceeding for the determination of which some other provision is expressly made by the *Land and Titles Act* (subs (1) (a)) and any matter or proceeding involving a determination whether any land is or is not customary land; subs (1) (b).

300. The Allen report's recognition of the need for a process of adjudication to ascertain matters of custom before registration of customary land is adopted in the present *Land and Titles Act*. Such a process is set out in Part V Division 1 to protect the interests of the landowners and any others who may have customary interest in that land.

301. Whilst there is disagreement between counsel as to the extent of failures to observe the requirements of Part V Division 1, the issue which is fundamental to the determination of this aspect of the present appeal is the effect of any such failures on a title which has, nevertheless, purportedly been registered. The respondents, relying on indefeasibility of title as the essential foundation of the Torrens system, submit that title to the land in this case has been registered and that cannot be changed except by rectification on the limited grounds of mistake or fraud and so the only causes of action open to the appellants in the court below were to seek rectification of the land register under section 229 or indemnification under section 230. Counsel suggests the appellants are wrong to characterise the litigation "as a

dispute concerning customary land. The subject land ceased to be customary land for the purposes of the *Land and Titles Act* when the perpetual estate was registered."

302. The appellants' case is that the requirements of Part V Division 1 are a necessary protection of the rights of all persons holding customary interests over the land in question. If the protection is to be effective, the requirements must be mandatory and, until and unless they are complied with, the land cannot be changed from customary land. In the present case, they submit, those requirements were not fulfilled, the land never lost its customary status, it was not eligible for registration and any purported registration of title was void as there was no title to register. In the alternative, the Commissioner should have found that the evidence of the failures of the respondents and the public officials to comply with the requirements of Division 1 was sufficient clearly to prove that the registration upon which the respondents rely was the result of mistake and therefore subject to rectification.

The provisions in the *Land and Titles Act* in respect of customary land.

303. Section 2 of the Act defines customary land as "any land (not being registered land, other than land registered as customary land, or land in respect of which any person becomes or is entitled to be registered as the owner of an estate pursuant to the provisions of Part III) lawfully owned, used or occupied by a person or community in accordance with current customary usage, and shall include any land deemed to be customary land by paragraph 23 of the Second Schedule to the repealed Act"[11].

304. Part XXVI, headed 'Customary Land', provides in section 239(1);

> "(1) The manner of holding, occupying, using, enjoying and disposing of customary land shall be in accordance with the current customary usage applicable thereto, and all questions relating thereto shall be determined accordingly."

305. Subsection (2) allows a court required to determine any such question to refer to any books and other extraneous material as prima facie evidence of the custom in question unless and until the contrary is proved. By section 240, every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned. It is provided that both sections 239 and 240 are subject to other provisions of the Act.

306. The heading to Part V covers two separate matters; "Purchase or Lease of Customary Land by Private Treaty, and Compulsory Acquisition of Land". Each is placed in a separate Division and the procedures enacted in each Division are complete and not subject, outside Part V itself, to any provisions of the Act or of any other statute. The purchase or lease of customary land by private treaty is dealt with in Division One which commences with the provision, in section 60, that:

> "Notwithstanding any current customary usage prohibiting or restricting such transaction, customary land may be sold or leased to the Commissioner or any Provincial Assembly in accordance with the provisions of this Division."

307. There is no provision in the Act outside Part V permitting the sale or lease of customary land

[11] The reference to 'land registered as customary land' appears to be a reference to the provisions of a proposed *Customary Land Records Act* for which, although it has received the Royal assent, a commencement date has never been gazetted.

and it is notable, therefore, that any such disposition is only permitted to the Commissioner of Lands or to a Provincial Assembly.

308. Section 61(1) provides that, whenever the Commissioner of Lands wishes to purchase or take a lease of any customary land under section 60 he must in writing appoint an Acquisition Officer to act as his agent for the purposes of that acquisition and subsection (3) gives that officer the powers of a magistrate for the purpose of obtaining evidence of any matters relevant to the acquisition. Subsection (2) makes similar provision where a Provincial Assembly wishes to purchase or lease customary land and gives the Provincial Secretary power to appoint an Acquisition Officer if he so wishes.

309. The duties of the Acquisition Officer are set out in the following sections and generally reflect the concerns and recommendations of the Allen report. The requirements are:

> "62. - The Acquisition Officer shall -
>
> (a) cause the boundaries of the land to be demarcated on the ground or upon a map or plan in such manner as to bring them to the notice of the persons affected;
> (b) make a written agreement for the purchase or lease of the land required with the persons who purport to be the owners or with the duly authorised representative of such owners."

The Acquisition Officer is not appointing the landowners or their representatives. Section 62(b) requires him to identify any purported owners or authorised representatives in order to name them on the draft agreement as possible lessors. Sections 63 and 64 stipulate the manner in which their names are to be publicised and an opportunity given to challenge them.

> "63. - The Acquisition Officer shall publish in such manner as he considers to be adequate or most effective for the purpose of bringing it to the attention of all person affected thereby, notice -
>
> (a) of the agreement made under section 62 (b);
> (b) of the arrangements made for a public hearing by him in the area to decide any claims-
> (i) that the vendors or lessors named in such agreement are not the owners; or
> (ii) that such vendors or lessors do not have the right to sell or lease the land and to receive the purchase money or rent; and
> (c) requiring such vendors or lessors and the claimants, if any, to attend.
>
> 64. - The Acquisition Officer shall hold a public hearing in the area in accordance with a notice published under the last preceding section, and if-
>
> (a) there are no claimants, he shall record that fact; or
> (b) there are any claimants, he shall hear their claims and determine the identity of the persons who have the right to sell or lease the land and receive the purchase money or rent."

These matters will all require the Acquisition Officer to make his determination according to the custom of the specific area involved.

> "65. - The Acquisition Officer shall-
>
> (a) record in writing the absence of claimants or his determination of the claims, as

the case may be;

(b) date such record or determination of the claims;

(c) send a copy of such record or determination to the Commissioner, and

(d) as soon as practicable bring the record or determination to the notice of the vendors or lessors and the claimants, if any, in such manner as he considers appropriate."

310. Section 66 allows appeal from any act or determination of the Acquisition Officer.

311. Where the Acquisition Officer, or the court following an appeal under section 66, has determined that there are no claimants or has dismissed the claims, the Commissioner of Lands may, when the time limited for appeal under section 66 has expired and no appeal has been made, or on receipt of the order of the court, implement the agreement for the purchase or lease of the land (section 67). Where the Acquisition Officer or the court has determined that any claim has been established, the Commissioner of Lands may (a) implement the agreement to the extent it is still possible to implement it, or (b) rescind the agreement (section 68(1)). Should he decide to rescind, he may;

> "enter into a fresh agreement relating to the same land or any part thereof with those persons who have been found by the Acquisition Officer or the court … to have the right to sell or lease the land and receive the purchase money or rent, and the terms of such fresh agreement may be implemented without further notice, inquiry or hearing" section 68(2).

312. Section 69(1) provides the procedure by which the agreement to purchase or lease is implemented for the purposes of sections 67 or 68:

(a) in the case of a purchase of land, by the Commissioner:

i. paying to the persons named in the agreement as vendors the purchase money;

ii. taking such other steps as shall be necessary to comply with the terms of the agreement,

iii. taking possession of the land, and

iv. making an order vesting the perpetual estate in the land in the Commissioner for and on behalf of the Government, free from all other interests;

(b) in the case of a lease of the land, by the Commissioner:

i. making an order vesting the perpetual estate in the land in the persons named in the agreement as lessors;

ii. requiring the persons so named to execute a lease in favour of the Commissioner in accordance with the terms the agreement;

iii. paying to such persons any premium or rent payable in accordance with the terms of the agreement; and

iv. taking possession of the land.

Section 69(1) (c) and (d) have provisions generally similar in the case of a Provincial Assembly.

313. Section 69(2) deals with a case where the Commissioner of Lands can only implement the agreement to a limited extent under section 68(1) (a). Section 69(3) provides:

> "If the agreement has not been rescinded, and has not been implemented, the Commissioner or the vendors or lessors may, within one year from the date on which the time limited for appeal under section 66 expired, or from the date of the order or decision of the court, whichever is the later, institute proceedings for specific performance of the

agreement".

314. Section 70 is the concluding provision under Part V, Division 1:

> "70. - On receipt of a vesting order made by the Commissioner under section 69 and after preparation of the registry map, the Registrar shall compile registers in respect of the perpetual estate in the land comprised therein in accordance with the provisions of Part VI."

The adjudication process under Part V Division 1

315. As this Court has observed in *Hiva v Mindu* [2009] SBCA 22:

> "There is no general provision in the Act allowing for the conversion of customary land into registered title. Part V of the Act is entitled 'Purchase or Lease of Customary Land'. That Part prescribes a procedure by which purchase or lease of customary land can take place."

316. As can be seen from the provisions set out above, the procedure only allows sale or lease of customary land to the Commissioner of Lands on behalf of the Government or to a Provincial Assembly and only comes into operation if the Commissioner of Lands or the Provincial Assembly wishes to purchase or take a lease of such land. Thus whilst the landowners, other Solomon Islanders or a commercial venture may wish to sell or lease or purchase customary land, they can do nothing until the Commissioner of Lands or a Provincial Assembly have been involved and are willing to proceed. If the Commissioner of Lands wishes to do so, he must appoint an Acquisition Officer to act as his agent and when a Provincial Assembly wishes to do so the Provincial Secretary may make a similar appointment.

317. The reference, in section 61(1), to the 'wish' of the Commissioner of Lands or Provincial Assembly is part of the protective function of the provisions of this Division. It is clear that the owners of the customary land may wish to convert it to registered land and must as a group have the right to do so. The reference to the wish of the Commissioner of Lands or Provincial Assembly places them as intermediaries in any negotiations to transfer the land for registration. Such negotiations may be between the indigenous landowners and, often, large and well-resourced commercial interests. Interposing the Commissioner of Lands or Provincial Assembly from the outset will help counteract any inequality of commercial experience between the land owners and those who seek access to the land and also help ensure that the negotiations will be conducted properly.

318. Once appointed, the Acquisition Officer must demarcate the boundaries on the land itself or on a map or plan in such manner as to bring them to the attention of the persons affected and then make a written agreement with the persons who purport to be the owners or with their duly authorised representatives for the purchase or lease of the land. The draft agreement under section 62(b) can only be to sell or lease the land to the Commissioner of Lands or the Provincial Assembly and, it must borne in mind, is not a lease (section 2). Although the agreement will be drafted between the purported owners or their duly authorised representatives on the one hand and the Acquisition Officer as agent for the Commissioner of Lands or Provincial Assembly on the other, the Acquisition Officer is not determining whether they are the rightful owners at this stage. He must first publish notice, under section 63, of the terms of the proposed agreement and of the arrangements for a public meeting or meetings when he can hear any claims against the vendors or lessors he has named in the agreement

and require any claimants, vendors or lessors to attend.

319. The meetings are held under section 64 and the Acquisition Officer is required to hear and decide any adverse claims. When he has held such meetings and there have been no claimants, he must record that fact. If there are claims, he must hear them and determine which persons have the right to sell or lease the land and receive the purchase money or rent. The Acquisition Officer must record these matters and send a copy of his record or determination to the Commissioner of Lands and, as soon as practicable, bring his record or determination to the notice of the lessors and claimants.

320. When the time limited for appeal under section 66 has expired or any appeals made have been determined and dismissed and there are no successful claims, the Commissioner of Lands may, under section 67, implement the agreement made under section 62. On the other hand, if any claim has been established the Commissioner of Lands may choose, under section 68, either to implement such part of the agreement made under section 62 as is still unaffected or rescind the agreement. Where he decides to rescind, the Commissioner of Lands still has an option to enter into a fresh agreement with the remaining persons who have already been found by the Acquisition Officer or the court to have the right to sell or lease the land and receive money or rent. If he takes that option, the fresh agreement may be implemented without further notice, inquiry or hearing.

321. If the Commissioner of Lands decides to implement the agreement to purchase or lease, it can only be implemented on performance of the steps set out in section 69(1) (a) for an agreement to purchase or in 69(1) (b) for an agreement to lease. In a case where the wish to purchase or lease was that of the Provincial Assembly and an Acquisition Officer was appointed by the Provincial Secretary, it is still the Commissioner of Lands who must take the necessary steps under section 69(1) (c) or (d) to implement the agreement between the vendors or lessors and the Provincial Assembly.

322. Where the Commissioner of Lands wishes to purchase, he must make an order vesting the perpetual estate in the Commissioner of Lands for and on behalf of the Government or in the Provincial Assembly for and on behalf of the people of that Province. In the case of leases, under (b) or (d) the Commissioner of Lands must vest the perpetual estate in the persons named as lessors in the agreement to lease and require those persons to execute a lease in favour of himself (para (b)) or the Provincial Assembly (para (d)) in accordance with the terms of the section 62 agreement. He must pay any premium or rent payable in the terms of the agreement and take possession the land. In a case under paragraph (d), the Assembly must pay any premium or initial rent payment to the Commissioner of Lands who will pass it to the lessors and the Assembly will then be permitted to take possession of the land.

323. The result is that, when the land has been sold, the perpetual estate must be vested in the Commissioner of Lands and, when it has been leased, the perpetual estate will be vested in the landowners' representatives and a lease executed by them in favour of the Commissioner of Lands on behalf of the Government or the Provincial Assembly. Clearly if any further lease is to be made with the outside body which wishes to have rights of access to the land, it will be executed by the Commissioner of Lands or Provincial Assembly and the body seeking access.

324. Once the Commissioner of Lands' vesting order is received by the Registrar of Titles and the registry map has been prepared, the Registrar will compile registers in respect of the perpetual estate in the land under Division 2 of Part VI of the Act. By sections 2 and 88 of the Act, the

land register will be comprised of the relevant registers (leaves) in respect of the perpetual estate and, where the land was leased to the Commissioner of Lands or the Provincial Assembly, of that lease.

325. Until the section 62 agreement to purchase or lease is implemented fully, there is no sale or lease to register as required under section 89(c) of the Act.

The failures to comply with the requirements of Part V Division 1

326. As has been set out in the factual overview, the land in the present case was the subject of acquisition proceedings in 1992. The Acquisition Officer appointed by the, then, Commissioner of Lands was Laury Penrose Palmer who had considerable experience of such proceedings. There is no dispute that he carried out his duties properly and in accordance with the requirements of the Division. As agent for the Commissioner of Lands, he pursued the Commissioner of Lands' wish to lease the land in question and did so in accordance with the requirements of sections 62 to 65. There were appeals under section 66 which changed one of the original names in the agreement to lease leaving the Commissioner of Lands with the choice of either implementing the lease in respect of the lands of the four remaining lessors or making a fresh agreement without the need to hold further inquiry or of rescinding the agreement. It is not disputed that he did nothing to implement or rescind the agreement and the matter was effectively left in abeyance for many years.

327. Where no steps are taken to implement the agreement made under section 62, section 69(3) of the Act gives either party the right to institute proceedings for specific performance within one year from the date on which the time limited for appeal expired or of the last court decision. Neither party took any such step. There has been some discussion whether the original acquisition proceedings were still valid or had been abandoned or expired. Section 69(3) is an unusual provision in that it allows a claim of specific performance against the Government and reduces the usual period of limitation against either party to the agreement to lease. We note that, in *Hiva v Mindu,* the decision of the High Court had been that the agreement needed to be implemented within one year based, it would appear, on the time limit placed on seeking specific performance so that, when no step has been taken by either side in that time to implement the agreement, it should be taken to be abandoned.

328. On appeal, this Court upheld the decision on other grounds and cannot be taken as authority for the proposition that one year is the time limit for implementation of the agreement. Whilst the right to seek specific performance of the agreement will lapse after 12 months, whether or not the agreement itself has lapsed or been abandoned will depend on the facts of the particular case including any activity by the parties or other interested persons to implement or use any other aspect of the acquisition process. We note there is evidence in the present case of steps having been taken by some of the land owners to activate the process as a whole.

329. The Commissioner decided the issue principally on the validity of the vesting order which he found was properly made. Having reached that conclusion, he continued:

> "The vesting process had not lapsed for it was the Department of Lands which accepted the process instituted in 1992 and completed acquisition and registration. But after this length of time, should it have?"

330. He referred to the vesting order and the steps by the land respondents which led to it and

concluded:

> "Sullivan QC's assertion … the vesting order was to give effect to the wishes of the land owners and does not support the deficiencies of the process. It does not support the conclusion that the Commissioner of Lands still wished in February 2011 to implement the agreement for lease.
>
> That assertion is wrong on the facts. The Commissioner of Lands proceeded in purported compliance with the 1992 acquisition process. The lapse and abandonment argument is not made out on the facts or the law."

331. We consider the Commissioner's decision that the vesting order was correct is wrong. As the errors in the vesting order were sanctioned by the Commissioner of Lands' signature, the Commissioner's reliance on the accuracy of the Commissioner of Lands' compliance with the 1992 acquisition process is questionable. However, we are satisfied that the land issues in this appeal will, in any event, be decided on the more important issues of indefeasibility of registered title and the requirements and effect of Part V Division 1.

332. As the facts summarised in the introduction above show, other related events in respect to the right to prospect and extract minerals in Kolosori land were going ahead involving, inter alia, the first appellant and companies associated with the first respondent. Those events, to varying degrees, also involved the land appellants and the second respondents.

333. On 23 April 2008, a significant step was taken to move the land issue forward when the Iron Bottom Sound meetings were held in Honiara, chaired by one of the land respondents, Elliot Cortez. The first meeting started at 5.00pm and lasted only 30 minutes. It was followed immediately by the second. The minutes record that, at the first meeting, 23 people were present and they unanimously elected the present second respondents to replace those named in the original agreement to lease drawn up by Palmer in 1992. They record that Robert Malo replaced his father Joseph Malo, Leonard Bava his uncle Hugho Bughoro, Elliot Cortez his uncle Levi Likoho, Francis Selo his brother Lonsdale Manase and Rev Wilson Mapuru his cousin-brother Joseph Bengere who was, by that time, dead. The minutes conclude:

> "IT WAS FURTHER RESOLVED THAT the new trustees shall be responsible and answerable to the respective beneficiaries of Kolosori land and that in the event that the registration is effected the above respective trustees names shall appear in the certificate of title of the perpetual estate."

334. The second meeting was attended by 12 people and the minutes made no mention of the meeting which had immediately preceded it. It resolved that the Takata landowners should withdraw from the Bogutu Landowners Association apparently to form their own company, Kolosori Holdings Ltd, a private company, which was actually incorporated some weeks later. The directors and shareholders were Cortez, Selo, Bava and Mapuru each holding 2000 shares.

335. The respondents submit that the appointments made at the first meeting were valid. Each person elected held himself out as having the status and standing in custom as had the original lessors named by Palmer and was therefore entitled to replace them. All were eventually appointed or had their appointments recognised by those present unanimously.

336. The appellants challenge the 'appointments' by the IBS meeting. Section 239(1) [above] deals

with the necessity to base actions and decisions on custom and section 240 further provides:

> "240. - Subject to the provisions of this Act, every transaction or disposition of or affecting interests in customary land shall be made or effected according to the current customary usage applicable to the land concerned."

The identification of representatives of the land owners should clearly, they submit, be made in accordance with custom and this meeting was not.

337. The respondents submit that it does not matter whether the appointments were made in custom. The business of the meeting was the replacement of persons appointed pursuant to the acquisition procedure in Part V Division 1. That, the submission continues, is a matter of statutory law and not custom and they took their appointment as agents of the original lessors.

338. The Commissioner found in respect of the IBS meetings:

> "The Claimants criticise the resolutions of the meetings as not made in custom. They point to the lack of "notice" to the land owning groups. Sullivan QC has referred the Court to various Australian decisions as guidance when considering the sufficiency of "notice".
>
> He says, the IBS meeting may be contrasted to the procedure adopted by Palmer from which it can be inferred that Palmer's process was conducted transparently and in public in a way that explains the basis on which representatives were agreed upon by the participants and then determined by Palmer… Sullivan QC does not criticise the manner in which Palmer conducted his meetings …
>
> There is no evidence here that the particular groups concerned with their Kolosori land were not present at the IBS meeting. I see this as a non-issue for the representatives named there, for the purposes recited, were also found to be representatives by the DME and listed, at the pre-tender awareness meetings [*under the Mines and Minerals Act*] held at Isabel early in 2010. Ochi had the detail. He impliedly acknowledged their representative capacity by, when they could not be convinced to accept SMMS, moving to have them removed, to come to court today in the face of that recognition, has no merit.
>
> I appreciate the reference to the Australian cases but this Court has no jurisdiction to enquire into matters of custom affecting the manner in which tribes, groups or clans conduct their affairs especially in relation to "notice" sufficient for the particular purpose of the business to be conducted. The seventh defendants [*present land respondents*] and Axiom did not suggest I should embark on any such enquiry. If it should be shown that the issue is one for determination, it must be referred to an appropriate forum."

339. With respect, the Commissioner's dismissive approach misstates the position. It is correct that the duties and obligations placed on the Acquisition Officer and the Commissioner of Lands under Division 1 are statutory requirements but the process by which the Acquisition Officer ascertains the essential issue of who would be acceptable to the land owners as their representatives in order to fulfil the role of lessors requires the Acquisition Officer's knowledge, understanding and application of the current customary practices of the region. Similarly, the manner he considers appropriate to give notice of the hearing under section 63 and his determination of claims under section 64 can only be made under custom.

340. The Commissioner was entitled, and needed, to find as a matter of fact whether or not the

manner in which these respondents were appointed at the IBS meeting was done according to custom as had been done in determining the original landowners' representatives and whether or not custom allowed the meeting to replace the original signatories as representatives of all the relevant landowners. The original names had been selected under the statutory acquisition procedures in Part V Division 1 but the purpose of the Acquisition Officer's enquiries was to ensure that they were accepted by the landowners under their custom. The appellants submit that the respondents' suggestion that the procedure employed at the IBS meetings for the substitution of the second respondents for those originally selected by Palmer was statutory has no foundation.

341. Part V is silent as to replacement of representatives identified by the Acquisition Officer. That silence is in marked contrast to the provisions stating his obligation to check the identity and acceptability of the person chosen. Had the statute provided a procedure whereby such representatives could be replaced, the meeting might have been conducted in accordance with it but there is no such procedure. If such a step is required, it must be made or refused in accordance with the custom of the relevant area.

342. We accept that whether or not the representatives originally identified by Palmer could be replaced and, if so, how it was to be done was as much a matter of custom as had been Palmer's identification of the original representatives when determining claims under section 64(b). The appellants' submission that there was no, or insufficient, notice of the meeting points to one of the problems the second respondents have to justify their election at the meeting. Even if those people present were members of the relevant landowning groups, there was no evidence that the majority still on Isabel either knew of the meeting or its purpose or agreed with the procedure or the steps to be taken at it.

343. The respondents further submit that the appointments made at the first IBS meeting may be taken as assignment or appointment, by the original representatives, of the new trustees as their agents. The evidence does not support that and we see no merit in that suggestion. The minutes of the meeting give no indication of such intention and refer constantly to the new trustees 'replacing' the previous representatives. There is no mention of the wishes or intentions of the original lessors. Those original representatives, in any event, were effectively the agents of the landowners whose interests they represented, not principals. As agents they could not delegate their authority without the clear authority of their principals. We can find no evidence which suggests the original representatives had given such authority or had even received notification of the meeting. Neither is there reference to such a proposition in the minutes. Of the originals identified by Palmer in 1992, only Likoho, was present and was purportedly replaced by Cortez. However, his name had been removed by the Magistrates Court in 1995.

344. We do not accept appointments made at the first IBS meeting had any validity in respect of the right to act as representatives of the lessors proposed on the agreement to lease made by Palmer in 1992. They should not have been accepted as such by the Commissioner of Lands. Had the Commissioner of Lands still wished in 2010 (in accordance with section 61(1)) to lease the land which Palmer had been appointed to acquire nearly twenty years before, it would have been sensible to appoint another Acquisition Officer in order to ascertain whether the original representatives were still acceptable to the current landowners and that any new representatives were properly identified under custom.

345. The Assistant Commissioner of Lands, Nester Maelanga, reported that the Commissioner of

Lands refused to sign the relatively accurate first vesting order naming the original representatives. There is no evidence she raised any objection to the manifestly inaccurate details of the vesting order he signed on 11 February 2011.

346. The evidence shows that, on a date sometime before 2 December 2010, Maelanga reported on the status of the acquisition report and advised that the agreement to lease had not been implemented (or, the report might have added, been rescinded.) The report continued:

> "In December 2010, Vesting Order was drawn up by our Division to vest the land in the 4 (four) original trustees. Vesting Order was drawn up but not signed because the Commissioner of Land at that time refused it.
>
> Early in February when I returned to work the names of the trustees changed, however, I had no idea as to who prepared it. The file went missing and could not be retrieved."

347. The evidence was that the Commissioner of Lands requested that the vesting order be drawn up. However, after it was sent to the Commissioner of Lands, the names were changed from the four originals to those of the five land respondents and it was signed in that form by the Commissioner of Lands on 11 February 2011.

348. The Agreement for Lease had been signed on 30 October 1992 by the original representatives as lessors and Palmer acting for the Commissioner of Lands as lessee. It was for a lease with the Commissioner of Lands for 35 years from 1 March 1993 and the terms were that the Commissioner of Lands was to transfer the lease to Bughoru Nickel Ltd. Payment was identified as "30% of shares or dividend be given to the landowners in substitution for" rent. BNL subsequently, in the words of the Commissioner, had faded from the picture

349. The vesting order the Commissioner of Lands signed relates to the agreement signed by the Acquisition Officer on 30 October 1992 but states that it had been made by Palmer with the present five land respondents each of whom was described as a peasant farmer. It also states, equally inaccurately, that the Acquisition Officer, having invited claims under section 62(b), had determined that the named land respondents are "the rightful owners to lease the land and receive the rent on behalf of Kolosori Holdings Limited" and that there had been no appeals. It concluded:

> "Now therefore, I (Silva Dunge) Commissioner of Lands in Exercise of the powers conferred by section 66 and 68(1) (a) (iv) [*now sections 67 and 69(1) (a) (iv)*] of the Act hereby order that the perpetual estate … be now vested with the Kolosori Holders (*sic*) Ltd (for and on behalf of all the Land Holding groups) free from other interest."

350. There is no mention of the mandatory lease with the Commissioner of Lands or of the requirement that he transfer the lease to the first respondent.

351. After that, the second respondents, through Cortez, then lodged a "Certificate of No Appeal" (which was not true) and a slightly different copy of the minutes of the IBS meeting. A second vesting order was signed by the same Commissioner of Lands on 11 February 2011 repeating the untrue statements in the first vesting order but concluding:

> "Now therefore I (Silva Dunge) Commissioner of Lands in Exercise of the powers conferred by section 66 and 68(1) (a) (iv) of the Act hereby order that the Perpetual estate … be now vested with Robert Malo, Francis Selo, Leonard Bava, Rev Wilson Mapuru and Elliott Cortez (for and on behalf of the Kolosori Holdings Limited) free from

all other Interest."

352. That document resulted in the perpetual estate being registered on 14 February 2011 in the Perpetual Estates Register in the names of the second respondents, still described as peasant farmers for and on behalf of a company of which four are the sole shareholders. It is recorded there as a first registration under Part V Division 1 of the Act.

353. Those facts show a number of failures to follow the requirements of Part V Division 1. The result was that the protective intention of the Division was avoided. The first protection is to prevent any lease other than to the Commissioner of Lands or a Provincial Assembly. Once the agreement to lease is prepared, the Commissioner of Lands, in order to implement it, must take the steps in Section 69(1) (b). (According to the vesting order, he was acting under subsection (1) (a) (iv) which relates to purchase of the land and requires an order vesting the perpetual estate in the Commissioner for and on behalf of the Government). In fact the vesting order he made was in the appropriate form for a lease under subsection (1) (b) (i) as was necessary to vest the perpetual estate in the land respondents. By subsection (1)(b) (ii), (iii) and (iv) he must also require the persons in whom the perpetual estate is vested to execute a lease in favour of the Commissioner of Lands who must then pay the lessors any premium or rent in terms of the agreement to lease and take possession of the land. There is no evidence any of the provisions of (ii), (iii) or (iv) were performed. Until they were, the land remained customary land and could not be, and should not have purportedly been, registered.

354. Those were serious and fundamental failures by the Commissioner of Lands. His duty was to ensure the controls enacted to protect customary land and the landowners from exploitation were properly followed. The manner in which the Commissioner of Lands signed a vesting order which he must or should have realised was incorrect and failed to carry out the requirements under section 69 was a clear derogation of his duty.

355. Even the most cursory examination of the document he signed would have shown any diligent officer that this was a case requiring further inquiry. His failure is the more surprising as he might reasonably be expected to have some recollection of seeing one less than three months previously in respect of the same land and in names which had then been changed, presumably by someone in his department, before he was willing to sign. It was clear that the names of the persons in whom he vested the perpetual estate under the second vesting order differed from those on the order he refused to sign and had not been selected by any procedure under the Act. He ignored the possibility that the wishes of the land owners may have changed over nearly twenty years since the acquisition proceedings. The Commissioner of Lands apparently ignored the need to enquire exactly which landowning groups the lessors represented and whether they covered the whole or part only of the land originally investigated by Palmer. He ignored the need to require the named representatives to execute a lease to him and took no action over payment or possession. Instead of ordering further inquiry, he signed it.

356. The land was registered only three days later by the Registrar who, the evidence shows, acted with such haste that he did so before he had complied with the necessary preliminary requirement, under section 70, of preparing the registry map.

357. The respondents suggest that all these errors should now be disregarded because the title, however it was achieved, is protected from further challenge or scrutiny by the principle of

immediate indefeasibility. The appellants submit that, whilst such failures by public officials to follow proper procedures may be unlikely in many jurisdictions, as the facts of this case suggest, they are more likely in less developed countries such as Solomon Islands and require, in the interests of justice, an ability to challenge registration in such circumstances even though it erodes the principle of indefeasibility. Mr. Sullivan suggests it might be appropriate to adopt the reasoning in the PNG case of *Emas Estate* and we return to this below.

358. The provisions for registration under the Act do not cover customary land. If that is to occur, the first and essential preparatory step, as recognised by Allen, must be to change its status as customary land. Part V Division 1 provides the method by which that can be ascertained and its status as customary land can be extinguished. It is then eligible for registration and the indefeasibility of title which arises from it. Customary status can only be extinguished if and when the protective processes in Part V Division 1 have been followed and it is then registered. It is only when its status has been extinguished that it can be registered. Failure to comply properly or fully with those provisions must mean that the land has not lost its status as customary land and its title cannot be registered.

359. In the present case, the failures to comply with the requirements of Division 1 were so substantial that the acquisition had not been completed and the status of the land as customary land had not been extinguished. It was not eligible for registration and the purported registration should not have taken place because the title that was entered on the register simply did not exist.

360. We are satisfied that the failures to follow the requirements of Division 1 were fatal to the purported registration. The result was that the agreement to lease correctly made by Palmer in accordance with the proper statutory procedures to ascertain its accord with the relevant custom was replaced by one between entirely different lessors and lessee and led to a vesting order granting the perpetual estate in Kolosori land to persons who had not been subject to any of the checks required by the acquisition process under Part V Division 1. It circumvented the essential requirement of a lease to the Commissioner of Lands on behalf of the Government and had the potential to provide the lessors with a personal rather than a communal commercial benefit. It flouted almost every safeguard of customary landowners provided in Part V Division 1 of the Act.

361. On receipt of the vesting order, the Registrar, in accordance with section 70, registered the perpetual estate on 15 February 2011. Although he registered the estate before he had taken the required step of preparing the registry map, he was entitled to assume that the vesting order passed to him by the Commissioner of Lands was correct and that all other steps to implement the agreement to lease had been properly performed. In the circumstances of this case, his assumption was clearly misplaced. His conduct may be exonerated by section 119 but the register must be corrected.

The consequences of failure to observe the requirements of Part V Division 1

362. As has been stated, the appellants' case is that the failure to comply with the requirements of Part V Division 1 renders invalid or incomplete the process of conversion of customary land to registered land. The failures prevented subsequent steps from being valid with the ultimate result that there was never any title which could be registered because it is still customary land.

363. Section 117(1) provides:

> "117. - (1) No registered interest in land shall be capable of being created or disposed of except in accordance with this Act and every attempt to create or dispose of such interest otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any such interest."

364. The requirements of Part V Division 1, although forming a self-contained code, are part of the Act. The purported registration following the Commissioner of Lands' failures to comply with the requirements of Division 1 was an attempt to create a registered interest otherwise than in accordance with the Act. By section 117 (1) such an attempt was ineffectual to create such an interest. To leave it uncorrected would clearly be in direct contravention of the intention of the section.

365. The respondents suggest that allowing such correction once registration has taken place would erode the fundamental principle of immediate indefeasibility upon registration and reads into the Act a right to defer indefeasibility. There will always be a possibility that pre-registration dealings can be shown to have been other than in perfect accord with Part V Division 1 of the Act and, if this allows challenge to the validity of the registration itself, it would forever dilute the certainty of title which is the cornerstone of the Torrens system. They submit that, whilst there may have been some errors or omissions in the requirements of Division One in the present case, once the title is registered it cannot be questioned in any way. Registration and subsequent indefeasibility of title are paramount and anything less, in the absence of rectification for the limited grounds of mistake or fraud under section 229, is anathema to a system of title by registration. It would be contrary to the rights of an owner under section 110 and render section 118(1) valueless.

366. The Commissioner accepted the respondents' submission that the appellants' case amounted to deferred indefeasibility and repeated, in support, a number of authorities cited by Mr. Lilley before concluding that "the claim of deferred indefeasibility has not found favour in this jurisdiction". He later explained:

> "By relying on the cases which I have set out above, Lilley QC asserts that the attempts by the claimants to undermine that principle of immediate indefeasibility, enshrined in the LT Act are he says, in truth, vain attempts to resort to the universally rejected principle of deferred indefeasibility. The court should not accede to that invitation.
>
> The Solomon Islands Court of Appeal in *Lever Solomon Ltd v Attorney General* [2013] SBCA 11 makes plain this jurisdiction accepts the principle of immediate indefeasibility of title… [*The second respondents*] are on the registered estate in accordance with the principles in *Lever Solomon Ltd* and the line of authorities which have (sic) been quoted to me and which expresses the law as it affects immediate indefeasibility in the Solomon Islands, have the benefit of that principle. There is consequently no place for any concept which may be called deferred indefeasibility, which would allow an argument as to the matters that came before registration. The argument advanced by Sullivan QC relying on deferred indefeasibility cannot stand."

367. *Lever Solomon Ltd v Attorney General* is one of a number of cases in which this Court has reaffirmed that the principle of indefeasibility is fundamental to the structure of the *Land and Titles Act*. The Court, having referred to section 110, explained at paragraph 73:

> "We have already noted above the indefeasibility conferred by registration, and the certainty created by the register. It is clearly intended so that persons dealing with registered owners do not have to go behind the register."

368. The Commissioner also adopted the submission of the appellants that it is made clear in *Manepora'a v Aonima* [2011]SBHC 79 that:

> "… once a person becomes registered as the owner of an interest under the *Land and Titles Act*, he has absolute liberty to deal with that interest according to the title which attaches to it under the *Land and Titles Act*, and an innocent party is not bound to look beyond the register."

369. The *Lever Solomon case* correctly states the intention of the law under the *Land and Titles Act* and this Court has repeated it many times. The appellants do not challenge it. The issue raised in the present case and not raised in the *Lever Solomon case*, is the purpose of Part V Division 1 and whether it forms a separate Code within, but independent of, the remainder of the Act. That code is to allow the (otherwise impermissible) alienation of customary land to the Commissioner of Lands or a Provincial Assembly and, where that is the wish of the Commissioner of Lands or a Provincial Assembly, to establish a process of adjudication to ensure the rights of the customary land owners are properly protected. Once their interests are considered to have been properly determined, the code provides for the vesting of the perpetual estate in the Commissioner of Lands on behalf of the government or individual lessors of the customary land so the title to the interest may be registered. Once that is done, the customary status of the land is extinguished and it is subject to registration and the consequent principle of indefeasibility under the Act outside Part V.

370. Although the procedure in the Act allows the perpetual estate to be vested in individuals and limits the number of individuals, the provisions of Part V Division 1 ensure those individuals are accepted by at least the majority of the owners of the land in question. The involvement of the Commissioner of Lands or Provincial Assembly safeguards their rights and also provides some oversight of the use to which the land is to be put after registration. Frequently the interested parties are overseas corporations and it is appropriate that the public authority has knowledge of such involvement.

371. It may be relevant to note in passing that both divisions of Part V, in fact, are clearly protective; by Division 1, of customary landowners against inadvertent or dishonest exploitation and, by Division 2, of the general public against arbitrary seizure of land by public authorities. Both divisions stand alone and do not rely on provisions elsewhere in the *Land and Titles Act*. Any court would be reluctant to allow arbitrary seizure of land by the authorities under Division 2 if supported by anything less than complete observance of the required safeguards. Failure, on the same scale as this case, to observe the protective provisions in Division 2 would be fatal to an attempt compulsorily to acquire land.

372. In their submissions on the meaning and role of Division 1, counsel on both sides claim support from section 9 of the *Interpretation and General Provisions Act*, which provides that each Act is intended to be read as a whole and each Act shall be deemed to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. Mr. Lilley and Mr. Sullivan each cite that provision suggesting that the submission he makes on the true meaning and intent of the *Land and Titles Act* accords with such an interpretation; the respondents that

the whole object of the Act is to provide an immediately indefeasible title by registration; the appellants that the adjudicatory provisions in Part V Division 1 are an essential precondition to registration in order to protect customary land from inadvertent alienation so that sale or lease will be possible only if all the provisions are fulfilled. It is only when it has been properly registered that indefeasibility occurs.

373. Authorities in other Torrens-based jurisdictions remind us that, whilst title by registration and the consequent indefeasibility of such title under their statutes are generally similar to the *Land and Titles Act*, many legislatures have added or adopted modifications of the general provisions to avoid errors and to protect disadvantaged landowners when it appears circumstances in their own country make it necessary or desirable. As was pointed out in *Cassegrain v Gerald Cassegrain and Co Pty Ltd*, (2015) 89 ALJR 312 [16] in respect of Australian States' and Territories' legislation:

> "Legislation implementing the Torrens System of land title is not uniform throughout Australia. Care must always be taken, therefore, to consider and apply the particular statute which is engaged."

374. Similar warnings of the need always to take note of any local variations in the element of indefeasibility in the specific Act under consideration have been emphasised in many other jurisdictions. The Privy Council, in *Quito v Santiago Castillo Ltd (Belize)* [2009] UKPC 15, for example, when considering similar legislation in Belize, warned:

> "The indefeasibility of title is, however, capable of giving rise to injustice if the registration of the title is brought about by fraud, or by a mistake. For this reason, many Torrens systems make provision for rectification of the register, but the nature of such provision varies from system to system. The effect of each depends on its own terms."

375. The Board referred to section 143 of the Belize Act, which gave a general right to rectification of any registration, and explained:

> "We accept that this significantly diminishes the element of indefeasibility of registered title that is a feature of the Torrens system, but this is the manner in which the legislation of Belize has decided to balance the desirability of a simple system of land transfer with the interests of justice. The remedy of rectification lies within the discretion of the court and is subject to the protection given to the bona fide purchaser in possession in section 143(2). The Board does not consider that it is irrational to strike the balance in this way, particularly having regard to the fact that the Act, … makes no provision for indemnification of a person unfairly prejudiced by the operation of the system."

376. In common with many jurisdictions, the provisions of our section 229 acknowledge the need to allow for rectification in cases where registration has been obtained, made or omitted by fraud or mistake and section 230 (unlike the Belize Act) also allows indemnity in some circumstances. Those provide, the respondents submit, the only remedy available to the appellants.

377. It should be noted, however, that section 9 of the *Interpretation and General Provisions Act* applies to the provisions of "each Act". The *Land and Titles Act* includes provisions specifically intended to recognise and deal with the present land situation in Solomon Islands, particularly of customary land. They undoubtedly run counter to the Torrens based foundations of the *Land and Titles Act* but they, too, must be taken into consideration as indicative of the overall

object of the Act. Those special provisions show the intention of the legislature, in the words of the Privy Council, to balance the desirability of a simple system of land transfer with the interests of justice. There can be no doubt that the aim, and probably the ultimate result, of the Act is to achieve registration of all land but, as long as some land remains unregistered and in customary ownership, the Act will require additional provisions outside the theme of registration to protect customary land in Solomon Islands. We are satisfied that is the reason Part V Division 1 was included in our legislation and will remain unless and until all land in Solomon Islands is registered under the provisions of the remainder of the Act.

378. Although, as Mr. Lilley points out, there is little or no overlap in the Act between the establishment of title by registration on the one hand and overseeing and regulating dealings in customary land on the other, it is noteworthy that the Allen report repeatedly refers to the process, when it involves customary land, as one of both adjudication and registration. Clearly he saw the adjudication process as an essential initial step in the conversion of customary land to registered land. He refers to the fact that "once adjudication and registration have been completed … the customary element will have been extinguished. When the customary element in the land has been extinguished by adjudication and registration, transfers and dealings in such land will have to be controlled by legislation." We are satisfied that he considered registration of customary land without the prior adjudication provided in Division 1 would not, alone, extinguish the customary element and it is equally apparent that the structure of the present Act has adopted the same approach. The paucity of overlap between the provisions for registration and the regulation of dealings in customary land referred to by Mr. Lilley is the result of the treatment of the latter as a separate and discrete procedure in Part V to allow the status of the land to be changed so that it can then be subject to the general provisions of the Act for registered land. Its terms do not conflict with or contradict the provisions for registration. They separately ensure the land has been properly changed from its previous status as customary land to land which is eligible for registration. If not completed, it cannot be registered and will remain as customary land.

379. As has been noted above, there is no challenge to the fact that the aim of the legislation is to institute a country-wide Torrens-style system of registration. That has been the ultimate aim since the Allen report and has been included in the "post-Allen" statutes. However, the existence of customary land in Solomon Islands and its importance to Solomon Islanders has also been acknowledged. Despite the intention ultimately to achieve a Torrens system for all land including what is, at present, still customary land, it has been recognised by the legislators that, until that is achieved, there must be a strict procedure before customary land can be changed to registered land in order to ensure the land owners are correctly identified, understand what is to change and wish to have such changes effected.

380. Whilst Part V of the Act does not indicate the consequences of failure to comply with its terms, we are satisfied that it means the land remains customary land and any attempt to register it will be ineffectual under section 117. The respondents' submission that, once registration has taken place, there is no way in which anything which occurred prior to registration can be used as a basis for challenge ignores the warning in such cases as *Cassegrain* and *Quito*. The particular provisions of the *Land and Titles Act* not only provide special provisions for customary land but also render any attempts to circumvent that ineffectual. The title the Commissioner of Lands was purporting to vest in the second respondents did not exist and, as Palmer ACJ pointed out, albeit in a different context, in *Malaita Development Authority v Ganiferi and Ors* [2002] SBHC 5: "The Commissioner cannot give what [he] does not have."

381. Counsel for the appellants suggests that the proper order in this case is to declare the registration void. He cites the unreported case in the High Court of *Mindu v Hiva* where, although the application was for rectification on the ground of mistake, counsel advises us the learned judge ordered certiorari and quashed the registration. However, this Court, in *Hiva v Mindu* [2009] SBCA 22 stated that it was corrected by an order for rectification and we note that is in accord with the reported ruling by the same judge in an earlier interlocutory application in the same case; *Mindu v Hiva* reported at [2007] SBHC 165.

382. We accept Mr. Sullivan's general proposition. There was, it is true, no land capable of being registered and no title to confer by such registration but we consider sufficient remedy is still found under section 229. There was clearly a purported registration but as there was no estate which could be registered at that stage, it was a mistake to register it. The register must be rectified on that ground by removal of the relevant leaf and for the avoidance of any doubt we shall make a declaration on the present status of this land.

383. It is not, as the Commissioner found, an attempt to dilute the Act by reading in a principle of deferred indefeasibility. We note that the terms of section 229 already effectively provide a potential to defer indefeasibility where rectification is sought. Section 229 is an acknowledgment that incorrect registrations may be entered by mistake or fraud and, when that occurs, justice requires that a person adversely affected should have some remedy. It is difficult to understand why, when errors as serious as those in this case occur because of carelessness or inefficiency of public officials, the persons who are adversely affected should not have as strong a right to correct it. The Torrens system, as we have been so frequently reminded by counsel in this case, is one of title by registration and so, where as has occurred in the present case, the register purports to record a title which never existed, it is important that it is rectified as soon as reasonably possible.

384. There is good reason for strict compliance with Part V Division 1. When in the particular case of customary land, there is a failure on the scale of the present case to observe the requirements, there is a real risk that many of the landowners may not agree, yet their wishes may not have been properly solicited or considered. Some may remain unaware of the suggested change from customary to registered land or the consequences until it has happened. Is it seriously to be suggested that they should be deprived of rights to their land by a stealthy imposition of an indefeasible title? What is certain in the *Land and Titles Act* is that, once registration has properly taken place, it will not be possible ever to revert to customary land and so proper and adequate notice of such an intention is essential.

385. Many people in Solomon Islands still live on their customary lands often in relative isolation and dependent solely on the land to provide the needs of life. Many benefits and obligations under custom still arise from their presence on, and use of, the land. They are the people who most need the protection of Part V Division 1. Without it, they are the people who may suffer most and yet will have the least voice.

386. The move to have the land registered may be initiated and implemented by the more educated or worldly members of their tribes who may no longer live on the land or even in the same province. If they are in paid employment, they may never even intend to return. (We see no reason to suggest that is the position in the present case but we consider the description by some of the second respondents of themselves as peasant farmers is, perhaps, misleading.) Once the land is registered, it may be leased to others who may have scant regard for the welfare of any remaining customary owners and may not even allow present residents

to continue their occupation of the land. It is those considerations which lie behind the provisions in Part V. They are there for very strong reasons. We do not accept they can be regarded as anything but mandatory and we have not been directed to any provision in the Act to suggest they were intended to be treated otherwise.

387. Allen noted that the adjudicatory process he was suggesting might be considered cumbersome and elaborate but continued:

> "In essence these arrangements represent little more than what the land laws, past and present, have in fact implied ought to be done in connection with the alienation of land, whether freehold or leasehold; that is, to determine by reasonable enquiry the nature and interests existing in the land before the land is alienated. The history of land policy is illustrative of the scant attention which has been paid to this. More precise and extensive arrangements are now necessary."(*Allen* SLC 285)

388. The appellants sought judicial review of both the making of the vesting order by the Commissioner of Lands and of the Registrar's purported registration of the perpetual estate in favour of the land respondents. Both applications were rejected by the Commissioner on the ground of lack of standing by the applicants. He also rejected the alternative application for rectification under section 229.

389. We have elsewhere in these reasons accepted that the appellants have standing to seek review of both aspects of the case. The failure of the Commissioner of Lands to comply with the requirements of Part V Division 1 meant his attempt to register it contravened the Act. Judicial review concerns the process rather than the merits of the case and was a suitable means to challenge the Commissioner of Lands' actions.

390. In respect to the Registrar's act in registering the purported title, although he should have prepared the registry map before such registration, there is nothing beyond his remarkable expedition to suggest his actions were otherwise than in accordance with the requirements of section 70 and are protected by section 119. However our conclusion that the registration was of an estate which did not exist means that the registration was made by mistake and the register must be rectified by the removal of the entry he made in respect of this land.

The Emas Estate Doctrine.

391. As mentioned above, Mr. Sullivan submitted that, if this Court found an apparent tension between the policy of the Act to protect indefeasibility of registered title and the policy of the code in Part V Division 1 of protecting interests in customary land, we should consider applying the principle enunciated by the PNG Supreme Court in *Emas Estate Development Pty Ltd v Mea and Ors* [1993] PGSC 7. Previously (and subsequently), the PNG courts have applied the principle of indefeasibility of title but, in *Emas Estate,* Amet CJ, stating the view of the majority of the court, suggested the issue at the end of the day, when the circumstances of the case are so irregular and unlawful at the very outset, is whether the principle ought not to prevail. He then held that indefeasibility of title :

> "… was not necessarily appropriate in circumstances such as this, where an individual land owner is deprived of his title to land by irregular procedure on the part of officials and a department of the State, to the advantage of a private corporation. I do not accept that quite clear irregularities and breaches of the statutory provision should remain indefeasible. I believe that, although those irregularities and illegalities might not amount

strictly to fraud, they should, nevertheless, still be good grounds for invalidating subsequent registration, which should not be allowed to stand."

392. Amet CJ's remarks in *Emas Estate* have been adopted and applied in PNG and elsewhere in a number of cases where there has been serious misconduct by public officials which has been described as "tantamount to fraud" or amounting to "constructive fraud". The Commissioner (who was also one of the judges in the *Emas Estate case*) distinguished the present case on a number of grounds which we do not enumerate here.

393. We do not consider it is necessary or desirable to follow the reasoning in *Emas Estate*. Section 229 of our Act allows rectification where the court is satisfied the registration was obtained, made or omitted on grounds of fraud or mistake and we consider that provides an adequate remedy in most challenges to registration. In such cases, judicial review may also be appropriate.

394. Neither, it should be mentioned, do we accept this appeal supports the appellants' submission that there is, in the provisions of the *Land and Titles Act*, any tension between the two aims of the legislation. The provisions in Part V Division 1 are a code which apply only to customary land and may be applied independently of the provisions in the rest of the Act. We see no need to look to the *Emas Estate case* in order to avoid the principle of indefeasibility where it has arisen, as in the present case, from an entry in the register purporting to record a title which did not, at the time the entry was made, exist.

395. If that occurred through misapplication of, or failure to observe, the requirements of the Act by a public official, as was the case of the Commissioner of Lands' conduct, it may be appropriate to seek an order under chapter 15.3 of the Rules. Where an entry has been made by any fraud or mistake, the appropriate procedure will be under section 229. In either case, the appropriate remedy will include rectification.

The Axiom lease

396. As has been described in the factual overview, events moved rapidly after the Commissioner of Lands made the second vesting order on 11 February 2011. Three days later the Registrar registered the perpetual estate in the second respondents prior to preparation of the registry map. Despite the failure to execute a lease with the Commissioner of Lands under section 69(1) (b) (ii), on 22 February 2011 the lease between the second respondents as lessors and Axiom KB as lessee was executed by the latter and, the following day, by the former. The lease was registered by the Registrar the same day.

397. The validity of that lease was challenged by the appellants on a number of grounds all of which were rejected by the Commissioner. Before this Court, those issues were the subject of detailed and well-presented submissions by both parties for which we are grateful. However, our conclusion that the effect of the failures to comply with the mandatory requirements of Part V Division 1 was to present a fatal bar to the registration because there was no perpetual estate to register means that the registration was clearly made in error. In consequence the second respondents had no registered estate to lease and the registration of such a lease was made by mistake.

398. In the court below, the Commissioner, having already found the Commissioner of Lands' vesting of the perpetual estate in the land respondents was correct, rejected the appellants' challenge to the validity of the registration of the Axiom lease:

> "Insofar as the claimants point to a mistake in the Registrar in registering the lease to Axiom, the provisions of section 118 protect Axiom from enquiry and consequently the Registrar, for the Registrar 'shall not be concerned to make enquiry … in relation to that interest [the ownership by the *[land respondents]*] which such person [Axiom] need not have made …'
>
> In terms of s 118, Axiom are protected for its interest given by the *[land respondents]* was for valuable consideration.
>
> The valuable consideration was the interest KHL [50%] held in KB Minerals. For Axiom KB had been incorporated as the joint venture vehicle of Axiom Mining Ltd and the *[land respondents]*. Axiom SI held 80% and KB Mineral held 20%. The fact of the interest of KHL was pleaded and admitted. The registered owners control and own KHL.
>
> There is no basis in the argument about the absence of particular documents concerning the survey not with the Registrar, for although necessary details for the survey particulars were unavailable at the time of registration they subsequently became incorporated. That issue falls if you like, to be considered as peripheral and applying the liberal approach, substance over form, I am not satisfied any mistake by the Registrar has been shown to warrant exercise of my discretion to rectify."

399. Our finding that the purported registration of the land following the second vesting order was invalid because it was, purportedly, registering land which was and remained customary land, means that the registration of the lease was similarly invalid. It is unnecessary to go further into the issue save in respect of the appellants' submissions on the effect of section 241 which, if accepted would result in consideration of a declaration that the lease is void and of no effect.

400. Section 241(1) provides that, subject to any contrary provision in the Act, no person other than a Solomon Islander may hold or enjoy any interest of whatsoever nature in over or affecting customary land. Subsection (3) further provides that every contract, agreement or arrangement made or entered into "shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly, defeating, evading or preventing the operation of subsection (1) , be utterly void and of no effect". The subsection continues to provide that the Commissioner of Lands has the discretion to institute proceedings in the High Court for a declaration that any such alleged contract, agreement or arrangement is void and of no effect.

401. The appellants' submission related to the arrangements prior to and leading to the incorporation of the first respondent and the lease between it and the second respondents. The Commissioner summarised the evidence and dismissed the claim in peremptory terms without with respect deciding the issue of whether the arrangements for or the terms of the lease had the purpose or effect of preventing the operation of subsection (1):

> "The new arrangement is for the lease of the perpetual estate for a term of years subject to the Mines and Minerals Act [with all the reservations and protections for occupiers of the registered land in terms of the Mines and Minerals Act]. The agreement relates to registered land.
>
> Section 241(3) provides the Commissioner may in his discretion, institute proceedings in the High Court where customary land is affected by an arrangement envisaged in s 241(1). No such proceedings have been instituted and the power is not exercisable by anyone else.

> The claimants [*sect 241*] case is unmeritorious, without basis in fact or law but has unduely [sic] prolonged the hearing."

402. We find it difficult to ascertain the exact scope of the decision on this aspect of the case. It appears that the Commissioner initially dismissed this part of the claim on the grounds that the land was, in his opinion, registered land but then passed on to reject it on the ground the Commissioner of Lands has not instituted proceeding for a declaration which would have only been relevant if the land was customary land.

403. His determination of whether the evidence sufficiently or at all demonstrated the purpose or effect proscribed by subsection (3) depended on his interpretation of the evidence. Whilst much of the evidence was not in dispute, his finding that the appellants' case was without basis in fact also depended on his view of the oral evidence. The Commissioner had the benefit, not shared by us, of seeing and hearing the witnesses. Despite some confusion over the parties to the option deeds and the lease agreement, we would be reluctant to interfere with his conclusion as to the credibility and reliability of such evidence. However, our decision arises from different grounds.

404. In terms of the registration of the lease by the Registrar, it was clearly made in error as it was a lease of a registered interest the purported lessors never held. There is no suggestion of impropriety or failure in the Registrar's action in so doing and he is covered by the terms of section 119.

405. As with the registration of the perpetual estate, the appropriate course is for the register to be rectified by the removal of that leaf.

Validity of Axiom's Surface Access Agreement and Prospecting Licence

406. Axiom KB's application for a Prospecting Licence over Takata land was supported by a letter from its directors in which they said (inter alia) –

> "Our application is for the Takata nickel and cobalt deposits on Santa Isabel Island. It is made with the full support of the customary landowners of the deposit being the Kolosori people. The landowners have had the Perpetual Estate registered in their name and as such have been legally confirmed as the true landowners.
>
> Axiom KB is 20% owned by KB Minerals and 80% by Axiom Mining Limited. KB Minerals is jointly owned by the Kolosori and Bungusule tribes. This gives them ownership in the mining project and a 20% share of the profits. The customary landowners of Kolosori and Bunguluse also have two representatives on the board of Directors of Axiom KB.
>
> Axiom KB Limited holds a lease over the Perpetual Estate of Kolosori Land. The mineralised area of the southern part of Santa Isabel Island lies on Kolosori Land."

407. A fortnight after Axiom KB lodged its applications for Prospecting Licences, the Minister, on the Board's advice, issued a Letter of Intent over the areas in the Takata and San Jorge applications, allowing the company 12 months to reach a Surface Access Agreement.

408. The existence of a valid Surface Access Agreement between Axiom KB and the landowners, land holding groups and persons or groups of persons who had an interest in the land, reached in accordance with s 21 of the Act, was a prerequisite to the issue of a Prospecting Licence: s 21(9).

409. By s 21(4) of the *Mines and Minerals Act*, the first step in acquiring surface access rights was to identify and record the names of the landowners, land holding groups, or any person or groups of persons having an interest in the land. The company had to do this in consultation with the Director; s 21(4) (a). Then it had to undertake negotiations for surface access rights, make arrangements for payment of surface access fees and compensation for damage, and, in consultation with the landowners, appoint trustees to receive those payments - all in consultation with the Director; s 21(4) (b), (c), (d).

410. A Surface Access Agreement was reached within three days of the Letter of Intent. It is implausible that the steps required by s 21(4) were all fulfilled in that short period.

411. The agreement was expressed to be between the company of the one part and "the Landowners and Trustees of the area of land the subject of an application for a Prospecting Licence called Takata in the Isabel Province" (subsequently referred to as "the Landowners") of the other part. It was executed on behalf of the Landowners by the land respondents (Mapuru's daughter signing on his behalf), who were described as "Trustees".

412. It recited that Axiom KB had applied for a Prospecting Licence over land in Isabel delineated in red on an attached map, and continued -

> "(2) The Landowners are the owners of the perpetual estate of the said land or of part or parts of the said land situated in Takata Isabel Province more particularly delineated in red on the said map …"

413. That was not so. The land in the Takata application was all customary land: it comprised part of the land we have found to have been mistakenly brought on to the land register, part of the land covered by a Prospecting Licence held by SMMS, and other customary land. The land respondents did not have a perpetual estate in any of it, and no other basis upon which they could have granted the surface access rights was established. Further, the Director had wrongly failed to excise from the application that part of the land which was within the SMMS prospecting area; *Mines and Minerals Act* s 20(6).

414. In those circumstances, the Minister's decisions to issue the Letter of Intent and to issue the Prospecting Licence to Axiom KB were tainted by mistakes of law. They should be quashed.

415. In the course of his reasons for refusing judicial review of the Minister's decisions to issue the Letter of Intent and subsequently a Prospecting Licence to Axiom KB, the Commissioner held that the Letter of Intent was not invalidated by non-compliance with r 5 of the *Mines and Minerals Regulations,* and that the Surface Access Agreement was not invalidated by non-compliance with r 9 of those regulations, as both of those provisions were outside the rule-making power in s 80 of the *Mines and Minerals Act.* The Commissioner made a declaration as to the invalidity of rr 5 and 9 at paragraph 5 of the order of 24 September 2014. In their amended notice of appeal (at paragraph 266) the appellants claimed that the Commissioner had erred in law in making that declaration, but in the conclusion to their written submissions they did not press this as to rr 5(2) and 9. Elsewhere in their submissions, they conceded that r 5(2) was inconsistent with s 21(4) of the *Mines and Minerals Act,* but relied on r 5(3), and sought to uphold the validity of r 5 as authorised by s 80(a).

416. Regulation 5 is concerned with meetings with landowners in the area for which a Prospecting Licence is sought. It begins –

> "5. (1) Where the Board considers that an application for a prospecting licence is in order,

the Director shall, before a letter of intent is sent, transmit a copy of the application to the Provincial Secretary of the relevant province depicting the area for which application is made.

(2) After considering the application under sub-regulation (1), the Director shall, within thirty days thereof, convene meetings in principal villages in the area for which the application is made.

(3) At such meetings, the application shall be explained by the applicant or his representative, and the Director or his representative shall explain to the landowners –
…" (*Emphasis added*.)

There is then a list of five matters to be explained. The succeeding sub-regulations deal with steps to be taken after such meetings.

417. There were no submissions relating to the validity of r 5(1). Given that the Commissioner's declaration that r 5(2) was invalid was ultimately not impeached, there is no basis on which this Court could find any of r 5(3)-(7) valid.

418. The Commissioner's declaration as to the invalidity of rr 5 and 9 should not be disturbed by this Court.

The claim for an account

419. In their claim the appellants sought an account of all moneys paid by or on behalf of Axiom KB to or on behalf of the land respondents or any of them pursuant to or in connection with the Axiom lease, the Option Deed dated 15 October 2010, the deed varying the Option Deed executed in February 2011, the Axiom Surface Access Agreement or on any account whatsoever. They also sought a consequential order that the land respondents pay the land appellants "and such other customary landowners as the Court finds entitled to the same (in such proportions as the Court thinks fit)" an amount equal to that shown by the account to have been received by or on behalf of the land respondents or any of them.

420. The Commissioner did not deal with this claim in his reasons for judgment.

421. Before this Court the appellants sought an order for an account much wider in scope than the order they had sought in their claim. They sought an account not only of moneys received by the land respondents but also of moneys received by KHL or Kolosori Holdings Community Company Limited not only from Axiom KB but from "any member of the Axiom group" pursuant to any of the Option Deed, the deed varying the Option Deed, the Axiom lease, the Axiom Surface Access Agreement or under any other arrangements between them.

422. Of the companies in the Axiom group, only Axiom KB was a party to the proceeding. It was not a party to the Option Deed or the deed varying it. Kolosori Holdings Community Company Limited was a defendant in the proceeding, but it did not appear on the hearing of the appeal; nor, it seems, was it represented at trial. Whatever the reason for this, that company has not been heard on the application for an account.

423. Further, the land appellants have not established their entitlement to moneys that the account might show were received by or on behalf of the land respondents or KHL or Kolosori Holdings Community Company Limited.

424. In the circumstances, this Court is not prepared to order an account. It is an issue which might be pursued in properly instituted proceedings in the High Court.

Costs

425. We note at the end of the judgment appealed there is a reference to first instance costs being determined following a later hearing, of which we can find no record. In any event we have considered the question of costs both of the hearing at first instance and on appeal and make the orders shown below accordingly.

Orders

426. In the event we make the following orders:-

a. The appeal is allowed.

b. Declare that on the proper construction of the *Mines and Minerals Act (Cap 42)* and the *Mines and Minerals Regulations* the Minister may not revoke a tender award or a letter of intent to issue a prospecting licence without first affording the holder an opportunity to make representations why he ought not do so.

c. Decline relief on the grounds that the tender ought not to have been awarded to SMMS and that a letter of intent to issue a prospecting licence ought not to have been granted to SMMS because SMMS already held three or more prospecting licences over other areas without having applied for a mining lease or commenced mining in at least one of them.

d. Rectification of the Land Register compiled pursuant to Part VI Division 2 of the *Land and Titles Act* (*Cap 133*) by the removal of the register (or leaves) in respect of the vesting of the perpetual estate in parcel 130-004-1 in Robert Malo, Francis Selo, Leonard Bava, Rev Wilson Mapuru and Elliot Cortez.

e. Rectification of the said Land Register by the removal of the leaves in respect of the registration of the lease of parcel 130-004-1 by Robert Malo, Francis Selo, Leonard Bava, Rev Wilson Mapuru and Elliot Cortez as lessors to Axiom KB Limited as lessee.

f. Declare that the land in parcel 130-004-1 was and remains customary land.

g. Quash the decision of the Minister for Mines, Energy and Rural Electrification made on or about 12 April 2011 to issue a letter of intent to Axiom KB Limited in respect of an application for a prospecting licence received on 29 March 2011; and

h. Declare that the letter of intent issued by the said Minister to Axiom KB Limited on 12 April 2011 is invalid.

i. Quash the decision of the said Minister made on or about 15 April 2011 to issue a prospecting licence to Axiom KB Limited; and

j. Declare that prospecting licence 74/11 issued by the said Minister to Axiom KB Limited on 15 April 2011 is invalid.

k. Declare Regulations 5 and 9 of the *Mines and Minerals Regulations* invalid.

l. Discharge all injunctive orders made on 24 September 2014.

m. The land appellants' costs of and incidental to the hearing at first instance and costs of and incidental to this appeal to be paid by Axiom KB Limited including any

necessary certification. All other costs of and incidental to the trial and the appeal to be borne by the party incurring them.

n. Liberty to apply.

……..
Justice Goldsbrough
President of the Court of Appeal

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Justice Ward JA
Member of the Court of Appeal

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Justice Wilson JA
Member of the Court of Appeal