

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

**CIVIL APPEAL CASE No.43 OF 2014**

**BETWEEN:** GILBERT DINH  
*Appellant*

**AND:** MENZIES SAMUEL  
*First Respondent*

**AND:** DIRECTOR OF LANDS, SURVEY AND REGISTRY  
*Second Respondent*

**AND:** SILVER HOLDINGS LTD  
*Third Respondent*

**AND:** TAHE PAMAVARI as Executor of the Estate of  
JOHN PAMAVARI  
*Fourth Respondent*

**AND:** ALLEN PAMAVARI AND GEORGE PAMAVARI  
*Fifth Respondent*

**AND:** URELAPA LIMITED  
*Sixth Respondent*

**Coram:** *Hon. Chief Justice Vincent Lunabek  
Hon. Justice John von Doussa  
Hon. Justice Daniel Fatiaki  
Hon. Justice Ronald Young  
Hon. Justice Mary Sey  
Hon. Justice Dudley Aru*

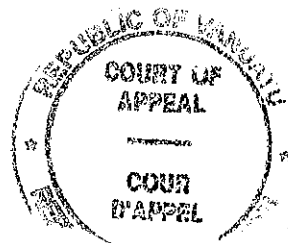
**Counsel:** *Mr Robin Kapapa for Appellant  
Mr Frederick Gilu State Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents  
Mr Nigel Morrison for 3<sup>rd</sup> Respondent  
Mr George Boar for 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents*

**Date of Hearing:** 30 April 2015

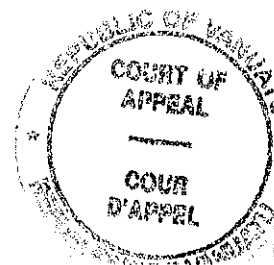
**Date of Judgment:** 8 May 2015

**JUDGMENT**

1. This is an appeal against a judgment of the Supreme Court upholding a determination of the Valuer-General forfeiting the appellant's leasehold title No. 04/2052/002 over the whole of Urelapa Island, South Santo for failure to build a tourism resort within the time specified in the lease and breach of other covenants as a consequence.



2. The undisputed facts in the case may be briefly summarised. In 1994 the appellant acquired the 75 year commercial lease from John Pamavari for an annual rental of VT100,000 and paid the entire rental of VT7.5 million in advance. By Clause 2 of the lease the appellant agreed to construct a tourist resort in stages to be completed within 10 years from the date of execution of the lease. The first stage was to be completed within 5 years and would include no less than 6 new bungalows, restaurant, kitchen, water supply and additional infrastructure.
3. Although some development work was undertaken by the appellant on the island over the ensuing years including the construction of an airstrip and jetty and the installation of a 10,000 litre water tank, it is common ground that after the expiration of 5 years (ie. 1999) and up till the forfeiture of the lease in 2013, no tourist resort had been constructed and opened for business as required under the lease.
4. It is also common ground that by letter dated 3 April 2000 the lessor gave the appellant a Notice of Forfeiture of the lease setting out various breaches of the terms and conditions of the lease including Clause 2 and calling on the appellant to remedy the breaches within 30 days. By a second Notice of Forfeiture dated 30 December 2000 the lessor reiterated the appellant's breach of Clause 2 of the lease and referred the matter to the Valuer-General for enforcement. On 22 May 2002 the lessor appointed his sons Allen and George Pama to act as his authorised attorneys in any dealings with the appellant concerning the lease during his absence in Vila. No enforcement action was taken with respect to this notice of forfeiture.
5. A further dispute arose between the lessor (by now represented by his sons Allan and George Pama) and Mr. Dinh. It was resolved by a settlement agreement which involved Mr. Dinh paying VT2 million. We will return to the terms of this agreement later in this judgment.
6. By 2005 a further notice before forfeiture was given to Mr. Dinh based on an alleged failure to begin construction of the resort. Mr. Dinh rejected the complaint. Attempts to negotiate a sale of the land were made but they were unsuccessful.
7. A further notice before forfeiture was then given to Mr. Dinh. Mr. Dinh was given two months to remedy the alleged breaches of the lease or to apply to the Valuer-General for relief against forfeiture. He did neither and on 31 May 2006 the Valuer-General declared the two leases were forfeited. Subsequently a new lease over the land was entered into and that lessee subsequently sold the lease to Silver Holdings.



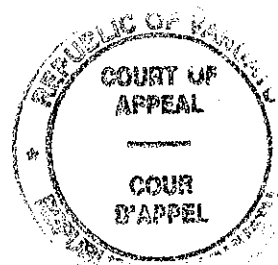
8. On 13 October 2014 a lengthy and closely-reasoned judgment was delivered by Harrop J. dismissing the appellant's claim in its entirety. The counterclaim by Silver Holdings Limited was upheld to the effect that it was a bona fide purchaser for value without notice of any defect in title, fraud or mistake.
9. In his judgment Harrop J. concluded that the Valuer-General's determination to forfeit the appellant's lease title No. 04/2052/002 was lawful and legitimate and the lessor's notice before forfeiture was properly issued notwithstanding the presence in the lease of Clause 7 (an arbitration clause) and the signing of a settlement agreement of 24 May 2002 (which the appellant alleged prevented forfeiture of the lease).
10. By notice of appeal dated 13 November 2014 the appellant appealed against the entire judgment on nine (9) grounds as follows:

*"(1) His Lordship erred in fact and law in deciding that the Valuer General has no obligation to look behind a notice of forfeiture which on its face has been validly issued and which has been served but not responded to and further placing obligation on the Appellant (the lessee) to take appropriate efforts to resolve disputes in terms of clause 7 of the lease and held that "if the lessee himself makes no issue of any of these things then why should the Valuer General make it his business to enquire?" when there are overwhelming evidence that:*

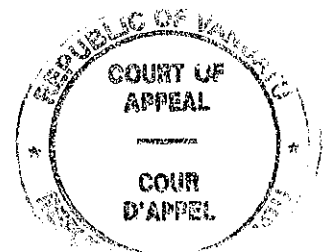
- (a) Overwhelming/uncontested evidence produced by the appellant in his sworn statement filed in support of his claim that shows breaches alleged has been answered and remedied;*
- (b) Breach relied asserted in the notice before forfeiture has been settled pursuant to Settlement Agreement dated 24 May 2002;*
- (c) The appellant did through his lawyer wrote to the Valuer General on 24 May 2006 (after successfully searching for the lessor to talk about notice before forfeiture) requesting a round table meeting and to be heard as required by clause 7 of the lease;*
- (d) The Valuer General failed to properly enquire whether notice before forfeiture and forfeiture was made in compliance with statutory requirement of section 43(1) of the Land Leases Act states:*

*"a lessor's right to forfeit the lease in the face of a breach by the lessee is subject both to the provisions of section 45 and to any provision to the contrary in the lease".*

- (2) His Lordship erred in law in drawing an analogy with an application for default judgment based on a properly-served claim in the Supreme Court in deciding in that the Valuer General has no discretion to determine a lease when proof of service of notice before forfeiture was produced when even the Supreme Court has discretion to grant default judgment or not no pending on the nature of the claim;*



- (3) *Obligation to look behind a notice of forfeiture which on its face has been validly issued and which has been served but not responded to and further placing obligation on the appellant (the lessee) to take appropriate efforts to resolve disputes in terms of clause 7 of the lease when there are overwhelming evidence that:*
- (a) *Dismissing the appellant's claim when there is uncontested evidence shown in the appellant's sworn statement filed in support of his claim that the first respondent had refused and or ignored the appellant's lawyer's letter dated 24 May 2006 requesting representation of the appellant's side of story by determining the appellant's lease 04/2952/002;*
  - (b) *Consider the gist of the appellant's claim challenging the determination made by the first respondent, determination made on 31 May 2006 cancelling the appellant's leasehold title 04/2952/002 on grounds of principle of natural justice and fairness, hence opportunity to be heard his side of story and in response to allegation of breaches of terms of the said lease;*
- (4) *His Lordship erred in dismissing the appellant's claim when there is overwhelming/uncontested evidence produced by the appellant in his sworn statement filed in support of his claim that shows breaches alleged has been answered and remedied;*
- (5) *His Lordship erred in dismissing the appellant's claim when there is uncontested evidence shown in the appellant's sworn statement filed in support of his claim that the first respondent had refused and ignored the appellant's lawyer letter dated 24 May 2006 requesting representation of the appellant's side of the story determining the appellant's lease 04/2952/002;*
- (6) *His Lordship erred in dismissing the appellant's claim when there is overwhelming/uncontested evidence produced by the appellant in his sworn statement filed in support of his claim that shows that fourth and fifth respondents have been trying to cancel the appellant's lease and even offer to buy the appellant's lease in order for them to sell the appellant's lease to the third respondent at higher value;*
- (7) *His Lordship erred in dismissing the appellant's claim when there is overwhelming/uncontested evidences produced by the appellant in his sworn statement filed in support of his claim that shows that at the time the lease was cancelled, the fourth respondent was/is no longer custom owner of Urelapa Island (leasehold title 04/2952/002);*
- (8) *His Lordship erred in law and fact in refusing the appellant's claim when there is no defence filed by all the respondents and/or evidence produced or attends the Court for trial despite being attending conference and notice of hearing of the appellant's claim;*
- (9) *That His Lordship fails to consider and apply the relevant laws as to the forfeiture of the lease and place more weight to the defendant's case rather than placing weight to the claimant's evidence. The breaches have been remedies and there are agreements and payments made."*



At the hearing of the appeal grounds (6) to (9) were not pursued and may be set aside.

11. The remaining grounds of appeal were not argued separately before us and may be conveniently condensed, in the circumstances of this case, into the following issues:

(a) In the absence of an application for relief under section 46 of the Land Leases Act does the Valuer-General have the power and/or duty to inquire into the validity and/or merits of a referral to him under Section 43 (2)(b) of the Land Leases Act for the enforcement of the lessor's right of forfeiture?

In submissions counsel also raised the following issues:

(b) Did the settlement agreement of 24 May 2002 prevent the lessor from seeking forfeiture of the lease? If we conclude that forfeiture was wrongly granted what is the effect on the leasehold interest of Silver Holdings? Were they a bona fide purchaser for value? If they were, can their leasehold interest be set aside? If not, issues of damages in relation to the appellant may arise.

To answer issue (a) it is necessary to construe the relevant statutory provisions in the Land Leases Act [CAP. 163] and the Valuation of Land Act [CAP. 288] which we set out below.

**VALUATION OF LAND ACT** provisions are:

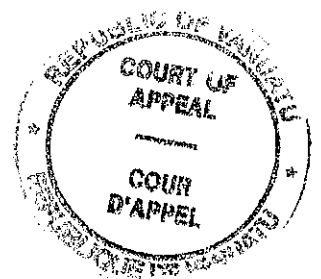
***"2. Valuer-General***

- (1) *The President is on the advice of the Judicial Services Commission to appoint a Valuer-General.*
- (2) *The Judicial Services Commission must not recommend a person for appointment as Valuer-General unless the person is, or is eligible to become, a registered land valuer.*
- (3) *The Schedule has effect in respect of the Valuer-General.*

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

*The general role of the Valuer-General is:*

- (a) *to exercise functions with respect to the valuation of land in Vanuatu; and*
- (b) *to ensure the integrity of valuations under this Act; and*



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

#### **4. Functions of Valuer-General**

The functions of the Valuer-General include the following:

- (a) to resolve disputes regarding valuations of land as required by or under this or any other Act;
- (b) to deal with objections and appeals against valuations under this Act;
- (c) subject to this Act, such other functions conferred or imposed on the Valuer-General by or under this or any other Act or law.

#### **5. Valuer-General's land referee jurisdiction**

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

- a) the amount of rent payable for a lease of land whether originally or on periodic reassessment;
- b) disputes relating to the value of improvements on or to land;
- c) any matter referred to the Valuer-General by any party to a lease of land relating to the interpretation of a provision in the lease;
- d) any matter which is by any other Act or law directed to be determined by the Valuer-General.

#### **6. Referee to act as expert and not as arbitrator**

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

#### **LAND LEASES ACT provisions are:**

##### **"43. Lessor's right of forfeiture**

- (1) Subject to the provisions of section 45 and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease.
- (2) **The right of forfeiture may be –**
- (a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or



(b) **enforced by a reference to the Valuer-General.**

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

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

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

44. (not relevant and omitted).

#### **45. Notice before forfeiture**

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

- (a) *shall specify the particular breach complained of; and*
- (b) *if the breach is capable of remedy, shall require the lessee to remedy the breach within such reasonable period as is specified in the notice; and*
- (c) *in any case other than non-payment of rent may require the lessee to make compensation in money for the breach;*

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

#### **46. Relief against forfeiture**

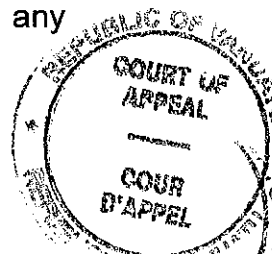
(1) *A lessee or other person upon whom a notice has been served under section 45, or against whom the lessor is proceeding, by reference to the Valuer-General or by re-entry, to enforce his right of forfeiture, may apply to the Valuer-General for relief; and the Valuer-General may grant or refuse relief,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

(2) (omitted).

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

(our underlinings)

12. Pursuant to section 5 of the Valuation of Land Act, the Valuer-General's jurisdiction as a land referee extends to determining, (a) the amount of rent payable for a lease; (b) the value of improvements on or to land; (c) any



matter referred to him by a party to a lease relating to the interpretation of a provision in the lease and, in the context of the present case, "*(d) any matter which is by any Act or law directed to be determined by the Valuer-General*". By Section 6(2) the Valuer-General in exercising his referee jurisdiction under Section 5(d) "*... may act as arbitrator*".

13. Consistent with section 5 (d) above Section 43(2) of the Land Leases Act provides:

*"The right of forfeiture may be –*

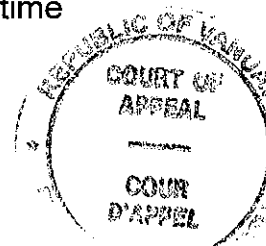
*(a) ... (not relevant in this case); or*

*(b) Enforced by a reference to the Valuer-General"*

14. It is common ground that the present case under appeal was a reference to the Valuer-General within the context of the lessor seeking to enforce his right of forfeiture of the appellant's lease. A condition precedent for the exercise of the lessor's right of forfeiture is service of a written notice on the lessee and failure on the lessee's part to comply with the requirements of the notice (all in s.45). The lessor's written notice must specify the particular breach complained of and, if the breach is capable of being remedied, the lessee must be given a reasonable time to do so. In addition the lessee may be required to pay monetary compensation for the breach.
15. The relevant notice addressed to the appellant is dated 15 March 2006. It commences with a lengthy preamble which mentions various correspondence exchanged between the lessor and lessee including a VT2 million goodwill payment made by the lessee in May 2002 "*to repair the lessor-lessee relationship and to allow works on your proposed hotel project to commence ...*". In particular preamble (8) expressly states:

*"Your obligation to honour the expressed agreement (to complete the construction of a tourist resort) is a continuing breach and is not affected or made any less applicable by the 'goodwill payment' of May 2002".*

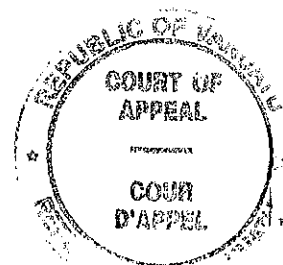
16. The notice then identifies the singular breach complained of, namely, "*... (a) serious breach of ...*" (the lease condition requiring the lessee to complete the construction of the first stage of a tourist resort within 5 years of signing the lease), and requires the lessee to make a compensation payment in the sum of VT20 million "*... on or before 15 MAY 2006 a period of 2 months from the date of this notice*". The notice then outlines in clear terms what will happen if the lessee fails to make the compensation payment in the time





identified including the exercise of the lessor's right to forfeit the lease "by reference to the Valuer-General in accordance with Section 43(2)(b) of the Land Leases Act [CAP. 163]". Finally, the notice draws the lessee's attention to the provisions of Section 46 of the Land Leases Act [CAP. 163] "whereby you may, if you wish to, apply to the Valuer-General for relief".

17. On 15 March 2006 the notice was served on the appellant's office. Two (2) months later by a hand-delivered referral notice from the lessor dated 17 May 2006, the appellant was informed the lease was forfeited and that the matter was being referred to the Valuer-General for enforcement of the lessor's right of forfeiture. The Valuer-General received the referral notice on 23 May 2006.
18. On 31 May 2006 the Valuer-General decided that the lessor's request for forfeiture should be granted. He signed and issued a written determination which confirmed that the lease was forfeited.
19. After this determination, later on 31 May 2006, lawyers for Mr. Dinh served on the Valuer-General a letter dated 24 May 2006. The letter denied breaches of the lease by the appellant. It suggested the attempt at forfeiture was for ulterior motives. It also sought a roundtable conference with all parties. The letter was not drawn to the Valuer-General's attention until 1 June 2006.
20. The appellant's case is that the Valuer-General was wrong to have forfeited the lease on 31 May 2006. The Valuer-General's obligation was to undertake a thorough investigation of the terms of the lease and the circumstances said to give rise to the forfeiture.
21. In undertaking these enquiries he would be complying with his obligations of natural justice, fairness and acting in good faith and on a legitimate basis. In particular the appellant says that before granting forfeiture the Valuer-General should have enquired about the 22 May 2002 agreement and should have made enquiries with the parties regarding compliance with Clause 7 of the lease. If he had done so the appellant argues the lease would not have been forfeited.
22. We are satisfied that the relevant statutory provisions do not require the Valuer-General to undertake such an enquiry and in any event the agreement of 22 May 2002 did not prevent the lessor seeking forfeiture of the lease.

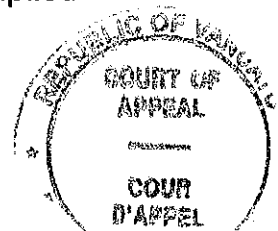


23. S. 43(1) gives the lessor the "right" to forfeit a lease if there is a breach of the lease. This "right" is subject to "any provision to the contrary in the lease". We will return to this provision.
24. Forfeiture may be "enforced by the Valuer-General" (s.43(2)). Here the Valuer-General had before him the lessor's notice that Mr. Dinh had breached the lease. Mr. Dinh had been given the chance to remedy the breach (s.45). He had not done so. When the Valuer-General considered forfeiture on 31 May 2006 Mr. Dinh had not sought relief against forfeiture. The Valuer-General also had a copy of the lease. All of the pre-requisites for forfeiture had therefore been fulfilled by the lessor.
25. And so, subject to the Valuer-General ensuring there was no provision to the contrary in the lease, the lessor had a right to forfeiture which the Valuer-General had the obligation to give effect to.
26. The appellant's case is that clause 7 of the lease did require the Valuer-General to enquire whether the lessor and lessee had complied with the clause as it was a possible provision which would prevent forfeiture. Clause 7 provides:

*"Determination of disputes*

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

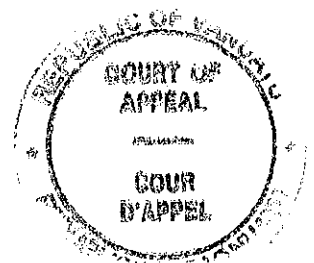
27. We are satisfied that clause 7 is not in this case a provision in the lease which prevents forfeiture (s.43). When the Valuer-General had the relevant documentation before him and when he made his decision of 31 May 2006 there was no dispute which would have prevented forfeiture. The Valuer-General's obligation before considering forfeiture in this context is to check the lease to ensure there is no provision in the lease which is a "provision to the contrary" prohibiting forfeiture. There was no such provision in this lease and so no contrary provision existed in terms of s.43(1). We reject this ground of appeal.
28. Nor do we consider the Valuer-General has wider general obligations of natural justice, fairness, and acting in good faith. We reject the appellant's submissions that the Valuer-General has wide investigative powers relating to the lease and the alleged breaches when (in terms of s.43(2)) he is asked to enforced a right to forfeiture. The Valuer-General's obligation is, as we have said, to ensure the pre-requisites of forfeiture in s.43 – 46 are complied



with. We are satisfied that any obligations of natural justice have been accommodated by the legislature requiring the lessor to give the lessee a chance to remedy any default before forfeiture can occur and most importantly giving the lessee a right to seek relief against forfeiture. We see no reason to add to these statutory obligations. We reject this ground of appeal.

### The 2002 Agreement

29. The appellant argues that the Agreement of 24 May 2002 between the lessor and lessee was an agreement which prevented the lessor from seeking forfeiture of the lease. On that basis it was argued the forfeiture decision of the Valuer-General should be set aside.
30. The Agreement of 24 May 2002, between the appellant and the lessor's duly authorised attorneys, recorded the appellant agreed to pay a sum of VT2 million to the lessors in instalments "... to establish a good relationship between all parties". The Agreement also authorised the appellant to negotiate the sale of the lease in consideration of the lessor receiving "... a small profit therefrom". Paragraph 2 of the Agreement provided:
- "2. Allen and George Pama accept that there can be no further dispute or any other claim or anything else regarding title No. 04/2952/002 on Urelapa Island that can arise once this agreement is signed."*
31. There was disagreement between the parties and their counsel as to the meaning and effect of the 2002 Agreement and, in particular, the above paragraph 2. We set out our views as to the meaning of the paragraph.
32. The Agreement records that there have been claims and counterclaims between the lessor and lessee relating to the land. Clearly a dispute has arisen. The context to the agreement is that notice to forfeit had been given in 2000 and the lessors were trying to buy the lease back from Mr. Dinh, apparently dissatisfied with his progress in building the resort promised in the lease. Mr. Dinh had responded offering VT2 million which seems to have been to compensate the lessors for the loss of income from the failure to build the resort and as the agreement said to "establish a good relationship" between the lessor and lessee. Given that context the meaning of Clause 2 in the Agreement we think is clear. It was providing that the VT2 million payment and the other terms of the Agreement resolved the existing dispute between the parties and that the parties could not raise this dispute again in the future.



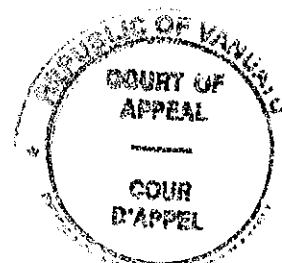
33. We note the absence of the words: "*in future*" in paragraph 2. This is drafted in the present tense as distinct from paragraphs 3, 4 and 5 which clearly relate to future events. Furthermore the use of the word, "*further*" and "*other*" before "*dispute*" and "*claim*" can only refer in our view, to an existing or past dispute or claim. Likewise the phrase "*that can arise once this agreement is signed*" is not a reference to unknown future events, but rather, reinforces the date and event when past and existing claims and disputes are settled by the agreement ie "*once*" (not after) the agreement is signed.
34. Needless to say we are not attracted to the proposition that paragraph 2, as worded, provides a complete immunity to the appellant for any, as yet unknown, future breaches of the terms and conditions of the lease. Much less do we accept that the lessor's attorneys entered into an agreement that could mean or have the effect of extinguishing by their signatures, any future breach on the appellant's part of his obligation to construct a tourist resort on the island or indeed any breach of the lease. We are therefore satisfied that the 22 May 2002 Agreement did not prevent the lessor seeking forfeiture of the lease based on breaches by the lessee after May 2002. We reject this ground of appeal.

### **Bona Fide Purchaser**

35. We agree with the judge that even if there had been merit in the judicial review of the forfeiture the transfer of the leases (by then the original lease had been divided into two) to Silver Holdings was a transfer to a bona fide purchaser for value. Silver Holdings therefore, in terms of s.100(2) of the Land Leases Act, had acquired an indefeasible leasehold title. The judge concluded that although Mr. Dinh asserted lack of good faith on behalf of those representing Silver Holdings there was no evidence to support this claim. We agree.

### **Conclusion**

36. In summary
- (a) We are satisfied the lessor was entitled to give notice of forfeiture of the lease;
  - (b) We are satisfied the Valuer-General was entitled to enforce the forfeiture of the lease by the lessor;
  - (c) We are satisfied that neither Clause 7 of the lease nor the agreement of 22 May 2002 were impediments to the forfeiture of the lease;



- (d) We are satisfied in any event that Silver Holdings was a bona fide purchaser of the leases.

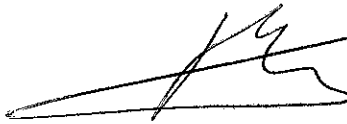
For these reasons the appeal will be dismissed.

**Costs**

37. We consider that the first and second respondents are entitled to one set of costs; the third respondent is entitled to one set of costs; and the fourth, fifth and sixth respondents are entitled to one set of costs all against the appellant.

**DATED at Port-Vila this 8<sup>th</sup> day of May, 2015**

**BY THE COURT**



**HON. V. LUNABEK**  
**Chief Justice.**

