

**BETWEEN:** THE GOVERNMENT OF THE REPUBLIC OF  
VANUATU  
First Claimant

**AND:** THE MINISTER OF LANDS  
Second Claimant

**AND:** SAM MAHIT  
Defendant

*Corum: Vincent LunabeK CJ  
Mrs Viran M. Trief, Solicitor General, for the First and Second Claimants  
Mr Collin Leo for the Defendant*

## **JUDGMENT ON ASSESSMENT OF DAMAGES**

### **INTRODUCTION**

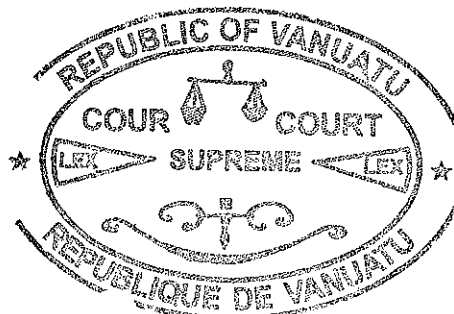
This is the 4<sup>th</sup> judgment between the parties in this proceeding. The present judgment is on the assessment of damages including exemplary damages sought by the Claimants against the Defendant and ordered by the Court on 3<sup>rd</sup> February, 2009.

This claim arose out of a compulsory acquisition of a Leasehold Land Title 11/0H32/067 ("the Land") after a compensation payment of VT58 Million was paid to the Lease owner (the Defendant) for the unexpired term of his Lease and the Defendant refused to execute an instrument of surrender in favour of the First Claimant. On 3<sup>rd</sup> February 2009, the Court, among other orders, ordered for specific performance requiring the Defendant to execute an instrument of Surrender in favour of the First Claimant. The Defendant failed to comply with the Court orders to execute the surrender. On 23 March 2009, the Court made further orders, requiring the Defendant to comply. The Defendant failed to comply with the Court orders. He was dealt with for contempt in a separate decision. The facts are simple and are not in dispute.

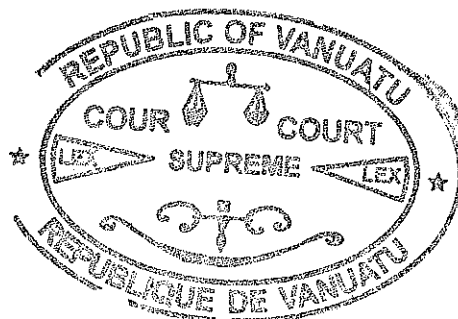
### **BACKGROUND FACTS**

The background facts are as set out in the sworn statement of Russel Nari, then, Director General of Lands Ministry filed on 2 February 2009. They are as follows:

1. The claimants are the owners of the land identified by registered survey plan of the area 11/0H32/067 (the "Land").
2. On 12 April 2001, the Claimants granted the Defendant a lease of the Land for a term of 15 years commencing 1 October 1997 (the "Lease"). The Lease was registered on 5 July 2001. A copy of the Lease is provided "RN1".



3. On 2 February 2006, the Defendant provided the Claimants with a valuation in respect of compensation for the compulsory acquisition of the Land in the amount of VT346,505,765. A copy of the said Valuation is exhibited "RN2".
4. On 16 March 2006, the Department provided a valuation of the identified interest in the land in the amount of VT74,300,000. A copy of the said Valuation is provided "RN3".
5. On 23 March 2006, the Minister of Lands and Natural Resources made a written declaration that the Land is required for a public purpose. A copy of the said declaration is exhibited "RN4".
6. On 24<sup>th</sup> March 2006, Public Notices in English, French and Bislama were given to the Defendant. Copies of the said notices together with a receipt notice are also shown "RN5".
7. On 19 June 2006, the Defendant wrote to the Department of Lands rejecting the offer of payment of compensation in the amount of VT74,300,000 and making a counter-offer in the amount of VT173,528,600.
8. There was no agreement between the parties as to the amount of compensation payable for the compulsory acquisition of the Land and the Valuer General was called upon to make an independent final compensation determination.
9. On 28 July 2006, the Acting Director of the Department wrote to Levi Tarosa, representative for the Defendant, confirming that the Department had made its final compensation determination of an amount of VT58,949,000. A copy of the said letter is shown "RN6".
10. On 29 August 2006, Levi Tarosa wrote to the Department of Lands accepting payment in the amount of VT58,000,000 as compensation for the compulsory acquisition of the Land on the conditions set out in that letter. A copy of the said letter is shown "RN7".
11. On 19 September 2006, the Valuer General released his final compensation determination in the amount of VT58,000,000. A copy of the valuation of the Valuer General dated 19 September 2006 is provided "RN8".
12. On 3 November 2006, the parties entered into a Deed of Release and Surrender. A copy the said Deed of Release and Surrender is also provided "R.N.9".
13. On or about 3 November 2006, the Claimants paid to the Defendant the first instalment of compensation in the amount of VT12,000,000 in accordance with the Deed of Release and Surrender. Copies of documents demonstrating the said payments are exhibited "RN10".
14. On or about 5 February 2007, the Defendant sent a letter to the Second Claimant seeking payment of the second instalment of compensation under the Deed of Release and Surrender. A copy of the said letter is provided "R.N.11".

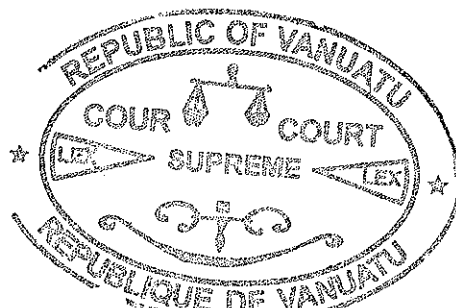


15. On or about 7 February 2007, the Claimants paid to the Defendant the second instalment of compensation in the amount of VT15,000,000. Copies of documents demonstrating the said payment are provided "R.N.12"
16. On or about 8 March 2007, the claimants paid to the Defendant the third instalment of compensation in the amount of VT15,000,000 in accordance with the Deed of Release and Surrender. Copies of documents demonstrating the said payment are provided "R.N.13".
17. On or about 17 April 2007, the Claimants paid to the Defendant the final instalment of compensation in the amount of VT16,000,000 in accordance with the Deed of Release and Surrender. Copies of documents demonstrating the said payments are shown "R.N.14".
18. On 16 May 2007, the Defendant's lawyer sent a letter to the Claimant's lawyers seeking payment of a further VT70 million before the Defendant would vacate the Land. A copy of the said letter is provided "R.N.15".
19. On 1 October 2007, the Defendant was sent a notice to vacate. A copy of the said notice is exhibited "R.N.16".
20. On 4 October 2007, the Defendant's lawyer sent a letter to the Claimant's lawyers stating that the Defendant maintained his position as set out in the letter dated 16 May 2007. A copy of the said letter is provided "R.N.17".
21. On 9 October 2007, the Defendant was sent a further notice to vacate. A copy of the said notice is provided "R.N.18".
22. On 13 November 2007, the Defendant was delivered a notice under sections 2 and 3(b) of the Deed of Release and Surrender. The Defendant refused to accept the notice or to sign a surrender of the Lease. A copy of the said notice is exhibited "RL19".
23. On 13 March 2008, the claimants lawyers responded to the Defendant's letter dated 13 March 2008. A copy of the said letter is shown "RN21".

The above sequence of events leads up to this claim filed 14<sup>th</sup> December 2007. On 3 February 2009, the Court granted the Claimants Summary Judgment (after striking out the Defendant's Counter-claim) and made the following orders:

- (a) An order for specific performance requiring the Defendant to execute an instrument of surrender in favour of the First Claimant.
- (b) The claimants are entitled to damages and exemplary damages to be used.
- (c) The claimants are entitled to costs as taxed or agreed.
- (d) The claimants are entitled to interest on damages consequent upon the assessment of damages.

On 23 March 2009, the Court made further orders requiring the Defendant to execute the surrender within 21 days. The claimant failed to comply with this order.



In addition, the Defendant has built additional structures on the land since 15 September 2006. It is estimated that the removal of these additional structures will cost VT104, 000 as shown in the sworn statement of Peter Pata filed 24 June 2009.

**In summary:**

The Claimants entered into a contract with the Defendant pursuant to which they paid the Defendant VT58 Million for the surrender of the unexpired term of his lease. The Lease was for a period of 15 years commencing on 1 October 1997 and ending on 1 October 2012.

Pursuant to the contract, the Defendant was to surrender the lease on 15 September 2006. Accordingly, the unexpired term for which VT58 Million was paid was 2207 days.

The Defendant was paid the amount of VT58 Million by way of 4 instalments between 3 November 2006 and 17 April 2007.

The Defendant did not surrender the Lease on 15 September 2006 nor did he vacate the Lease premises. The Defendant eventually signed the surrender instrument on 15 October 2009.

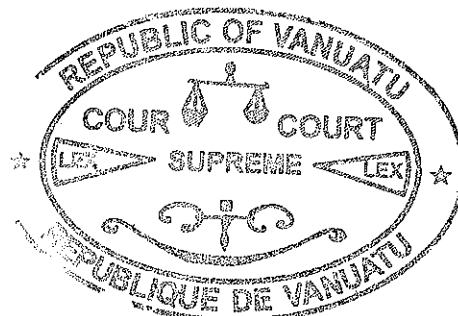
The Claimants are, by the orders made 3 February 2009, entitled to damages and exemplary damages as a result of the Defendant's high-handed and blatant conduct.

**SUBMISSIONS AND APPLICATION OF LAW**

Both Counsel are required to file submissions on the assessment of damages. Before the Court considers the method of assessing the damages in the circumstance of the present case, the Court must first deal with a contention raised by the Defendant Mr Mahit in his sworn statement filed 20 November 2009. Mr Mahit contended that he had conducted a property search of the Land Department and he found out that the Lease Title No.11/0H/32/067 as referred to in the Deed of Release dated 30 November 2006 was for a term of 75 years and not 15 years. The contention of Mr Mahit is based on a document entitled "ADVICE OF REGISTRATION OF A DEALING AFFECTING REGISTERED LAND" exhibited "SM1". The title affected is 11/0H32/067- an Urban Agriculture Lease dated 12<sup>th</sup> April 2001, made between the Minister of Lands and Natural Resources and Sam Mahit.

On perusal of the copy of the Lease exhibited at "RN1" and the document exhibited at "SM1", the Court finds that on 12 April 2001, the Claimants granted the Defendant Lease title 11/0H32/067 (the "Lease") for a term of 15 years commencing on 1 October 1997. The Lease was registered on 5 July 2001.

The Court finds and accepts the Claimants' submissions that the "ADVICE OF A DEALING AFFECTING REGISTERED LAND" at attachment "SM1" to the statement of the Defendant dated 20 November 2009 incorrectly states that the Lease is for a period of 75 years. It is a clerical mistake. This mistake is reflected in the Register. This clerical mistake does not have the effect of varying the terms of the Lease. The Lease is the best evidence of its terms, not the Register. The Register is to this extent, merely hearsay, except as to the fact of registration.



It is noted that this point has not been raised by the Defendant at any time prior to 20 November 2009 and is not supported by any evidence. Here, the Defendant does not deny the terms as stated in the Lease.

The position as accepted by the Court is therefore that, the Claimants entered into a contract with the Defendant pursuant to which they paid the Defendant VT58 Million for the surrender of the unexpired portion of the Lease. Pursuant to the contract the Defendant was to surrender the Lease on 15 September 2006. The Defendant was paid the amount of VT58 Million by way of 4 instalments between 3 November 2006 and 17 April 2007. Having accepted the whole of the purchase price without comment, the Defendant did not then surrender the Lease on 15 September 2006 nor did he vacate the premises. The Defendant eventually has signed the surrender instrument on 15 October 2009.

The Claimants have obtained summary judgment and the Defendant cannot now seek to look behind the judgment by arguing points of fact relating to the liability.

The Claimants are, by the orders made 3 February 2009, entitled to damages and exemplary damages.

The object of damages for breach of contract is to put the party whose rights have been violated, so far as money can do, in the same position as if his rights had been observed.

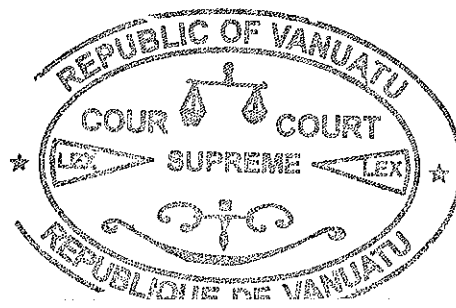
In the present case, money was paid in consideration of an unexpired term of a Lease. The vendor then refused to yield up occupation, thereby depriving the purchaser of part of this unexpired term. Because it is not possible to travel in time, to give the purchaser retrospective possession, an appropriate method of calculation must be devised. This calculation must take into account the purchaser's expectation of receiving the entire unexpired term and the purchase price.

The Claimants proposed therefore, that the damages are most appropriately assessed on a restitutionary basis, calculated as a percentage of the amount paid to the Defendant for a benefit for each day that the Defendant retained the benefit in breach of the contract.

In his submissions on behalf of the Defendant, Mr Leo referred the Court to the concept of restitution as the converse of the concept of compensation whereas compensation seeks to reverse the plaintiff's loss. He also referred to the principle of unjust enrichment with various case authorities, among others, the case of *BP Exploration Co. (Lybia) Ltd -v- Hunt (No.2) W R 783 at 839, where GofJ ( as he then was) formulated the principle of unjust enrichment in this way:*

*"... the principle of unjust enrichment, presupposes three things: (1) receipt by the Defendant of a benefit, (2) at the plaintiff's expense, (3) in such circumstances that it would be unjust to allow the defendant to retain the benefit".*

He also referred to case authorities in which judges urge "caution" or "restrain" in judicial acceptance of any all-embracing theory of restitutionary rights and remedies founded upon a notion of "unjust enrichment" whereby a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory



and to dictate the outcome in new cases. [See *Roxborough –v–Rothmans of Pall Mall Australia Ltd* (2002) 208 CLR 516].

Mr Leo also referred to case authorities where the Court instead of dwelling on the unjust enrichment principle looked into equitable principles and acknowledged the common law nature of the old action for money had and received. [See *Pavey and Mathews Pty Ltd –v–* (1987 162 CLR 221; *Pan Ocean Shipping Co Ltd –v– Creditcorp Ltd (the Trident Beauty)* [1994] 1 ALL ER 470.

Mr Leo relying on the case of *Pan Ocean Shipping Co Ltd-v- Credit Corps* [1994] 1 ALL ER 470, contended that the Claimants are claiming restitution for breach of the contract, however, In *Pan Ocean Shipping* case, it is stated that there is no scope for a claim in restitution while an enforceable contract governs the rights and remedies of the parties. Liability in restitution seeks to strip the defendant of an enrichment made at the plaintiff's expenses; liability in contract seeks to compensate the plaintiff for a loss caused by the defendant's breach or reputation. To allow both complete restitution and complete compensation in the same claim would result in the wind fall to the plaintiff, which the law deems to be undesirable result. [See also *Batic Shipping Co. –v– Dillon* (1993) 175 CLR 344].

The Court is assisted by the case authorities referred to by Counsel for the Defendant, however, the Defendant fails to propose any alternative basis or method for assessing damages in the present case.

Accordingly, the Court agrees and accepts that the only common-sense calculation of damages is that proposed by the claimants.

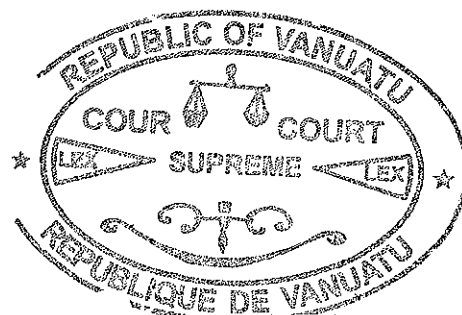
It is noted that whether this is in truth a species of restitution damage based on the enrichment of the Defendant by his own wrong or simply a method of calculating compensatory damages based on that part of the purchase price for which no value was received does not matter - because the calculation is the same and its logic is compelling.

As set out in the claim, the Defendant breached the contract (paragraph 5 of the claim). As a result of the breaches of the contract, the Claimants have suffered loss and damage and the Defendant has been correspondingly unjustly enriched (paragraph 6 of claim). The Claimants submitted also that they do not seek complete restitution and complete compensation as appears suggested by the Defendant. Rather, the Claimants submitted the damages to which they are entitled should be assessed on a proportional basis. The Court agrees.

### **CALCULATION OF DAMMAGES**

The damages are calculated as a percentage of the amount paid to the Defendant for a benefit for each day that the Defendant retained the benefit in breach of the contract. This is illustrated as follows-

(Amount paid [VT 58 Million]) X [multiplied by] (The number of days the Defendant retained the benefit he was paid for in breach of the contract and the orders of this Court as at 16 June 2009) : [divided by] (The number of days between 15 September



2006, the date on which it was agreed that the Defendant would surrender the Lease, and 1 October 2012, being the end of the Lease).

In this case, the calculation of damages must take into account the fact that the Defendant eventually executed the surrender instrument on 15 October 2009. As such, the calculation of damages as at 15 October 2009, being the date that the Defendant executed the instrument of surrender of the Lease, is:

<b>VT58 million</b>		
<u>2207</u> (being the number of days between 15 September 2006, the date on which it was agreed that the Defendant would surrender the lease, and 1 October 2012, being the end of the term of the lease)	X 1126 (being the number of days that the Defendant retained the benefit he was paid for in breach of contract and the orders of this Court as at 15 October 2009.	= VT 29,591,300 Plus interest.

### EXEMPLARY DAMAGES

The Claimants are further entitled to exemplary damages. The basis for this entitlement can be found in Peter Pata's sworn statement of 24 June 2009. Pata deposed that he was involved in a physical assessment of the land Lease Title 11/0H32/067 ( the "land" ) conducted by the Ministry of Lands to identify any changes since 15 September 2006. He deposed that two permanent structures and a semi-permanent structure have been built on the land since 15 September 2006. The floor of these structures is about 81 square meters. He estimated that it will take approximately 8 hours or one day to demolish and clear these structures at a cost of VT 13,000 per hour. He based his calculation on his understanding which has developed from working in this industry more than 9 years. The removal of these structures will cost VT 104,000. The Defendant did not deny what was in Pata's statement nor did he suggest a cost estimation of the demolition and clearance of the structures.

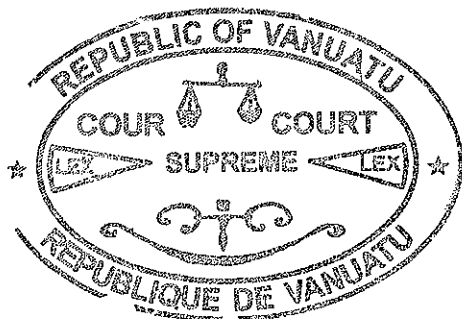
The Court assessed an amount of VT 100,000 for exemplary damages in favour of the Claimants as a result of the Defendant's high-handed and blatant conduct. They are intended to punish the Defendant for conduct and to deter him and others committing like conduct again.

### INTERESTS AND COSTS

The Claimants are further entitled to interest at the rate of 5% in respect of the damages, excluding exemplary damages, from the date the claim was filed, being 14 December 2007 until the date that the payment is made.

The Claimants are finally entitled to costs against the Defendant on the standard basis. Such costs are to be agreed failing which they will be taxed.

Based on the above considerations, the Court makes the following orders:



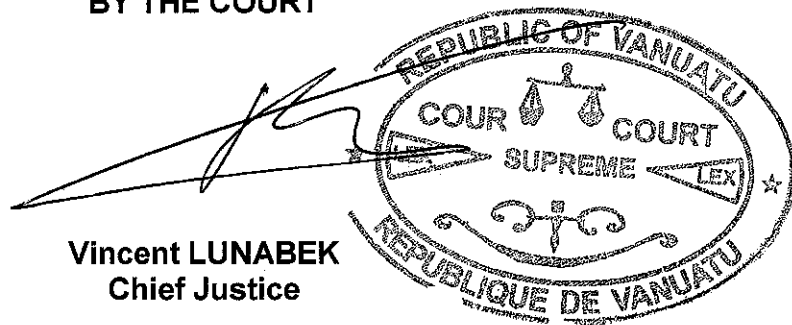
## **ORDERS**

The Claimants are entitled to the following against the Defendant ( Sam Mahit ):

1. Damages assessed in VT29, 591,300.
2. Exemplary damages assessed at VT100, 000.
3. Interests on the Damages amount of VT29,591,300 (excluding exemplary damages) from 14 December 2007 to the date the payment is made.
4. Cost to be agreed or taxed.

**DATED at Port-Vila this 23<sup>rd</sup> day of May 2014.**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**