HIGH COURT OF SOLOMON ISLANDS
CIVIL JURISDICTION

Civil Case No. 15 of 2014

BETWEEN :	**HERITAGE PARK HOTEL LIMITED**	-	Claimant
AND :	**COMMISSIONER OF LANDS**	-	First Defendant
AND:	**REGISTRAR OF TITLES**	-	Second Defendant
AND:	**VINCENT KURILAU, MOSES BOTU and RENATO KAVICHAVU**	-	Third Defendant
AND:	**CORINA DOUGLAS**	-	Fourth Defendant

Date of Hearing: 17 May, 7 June 2016
Date of Judgment: 28 June 2016

Mr. A Radclyffe for Claimant
Solicitor-General for 1st and 2nd defendants
Mr. S Balea for 3rd defendant
Mr. G Suri for 4th defendant

Proceedings for rectification of the Perpetual Estate Land Register following vesting and registration pursuant to Part V of the Land and Titles Act Cap 133.

JUDGMENT AND ORDERS

Brown PJ.

1. These proceedings have been brought by the Heritage Park Hotel, seeking rectification of the Land Register as it affects the Hotel's seafront. On the basis of an agreement with the Lands Commissioner, the Hotel also seeks a grant of the fixed term estate to that part of the seabed along the hotel's frontage.

2. The hotel is one of only a small number of hotels affording quality accommodation and services in the city of Honiara for locals and tourists alike. The Hotel has a frontage to Iron bottom Sound and has become a landmark. It brings these proceedings for it has apparently lost control over its waterfront by reason of a lease of the Perpetual Estate of seabed below high water mark affecting the hotel waterfront to the Sound, to the 4th defendant, Mrs. Corina Douglas. The hotel had sought to have any such rights to that part given to it by way of registered parcel of land and had approached the Lands Department with that intention in mind.

3. In its claim the Hotel says the Commissioner of Lands mistakenly allowed the Perpetual Estate to be registered in favour of the 3rd defendants [who subsequently leased to the 4th defendant] in spite of the fact of a promise to the Hotel.

4. An acquisition officer had been appointed by the Guadalcanal Province to acquire the seaward estate below high water mark, at the instigation of the 3rd defendants who, with the late Savino Laugana, claimed as "customary landowners" and vendors of the seaward estate in the acquisition proceedings. The acquisition officer, purporting to act in accordance with the Lands and Titles Act, accepted those identified as "landowners" with rights to the seaward estate and relying on her Report, the Commissioner vested the perpetual estate in the named 3rd defendants and Savino Laugana. The estate became on registration Parcel number 191-017-108 and contained by square area, some 5.2048 hectares. A curious circuitous affair.

5. The registered owners then leased the whole Parcel to Mrs. Corina Douglas. The lease recited the fact of the receipt of $250,000 from the lessee, Corina Douglas [being the premium] with an annual rental of $1 per year. The lease was registered at the Honiara Land Registry on the 5 September 2012.

6. Mrs. Corina Douglas, the 4th defendant, claims rights in custom to the seaward estate in any event, by virtue of her matrilineal connection with customary owners. Since there are various defendants, I shall use their names from time to time to seek to avoid confusion.

The Claimant's Case.

7. The Hotel challenges the acquisition and registration process affecting the land Parcel no. 191-197-108 of the 3rd defendants particularly the subsequent lease of the land to Mrs. Douglas as it affects the hotel. The claimant says that the 1st defendant, the Commissioner of Lands mistakenly allowed the perpetual estate to the area of sea bed in front of the Hotel, promised to the Claimant, to be registered by these others as part of the Parcel. The claimant pleaded that the 1st defendant, the Commissioner of Lands, had agreed to grant the fixed term estate to the claimant. [Statement of Case, para. 7].

8. It also pleaded [Case, para. 6] that the Commissioner failed to complete the acquisition process in favour of the claimant *"despite the Claimant doing all that was required of it by the 1st Defendant."*

9. The 1st and 2nd defendants pleading in answer to paragraph 6 of the claim joins issue by denial and goes on to illustrate their understanding of the practise about the purchase of customary land; *"That they do not admit paragraph 6 of the Statement of Case and add that as the subject land was customary; the claimant ought to have negotiated and secured the agreement of the 3rd defendant, its owners for its acquisition, following which a registration process pursuant to Part V of the Land and Titles Act Cap 133 would have had to be completed, before it could be formally acquired by the claimant, something which the latter however did not do."*

10. The Solicitor-General appears to accept the practice reflected in the dealings between the 3rd and 4th defendants where they had struck a bargain in relation to the land and that bargain was formalised by the acquisition proceedings.

11. But this is not a sale by the customary owners to the eventual purchasers under a contract for sale. For there can be no absolute sale or divestment of customary land unless carried out pursuant to Part V of the Land and Titles Act. [the Act]. The eventual purchasers in this case were the very persons purporting to sell to the Commissioner, purchasers in whom the Commissioner vested the land to enable registration, in the absence of any consideration for the purported sale. The fact of registration was the necessary incident in the separate arrangement by the customary landowners with Corina and Fred Douglas, who for commercial reasons, needed to be afforded a registered lease. As I say later, Part V provides for the purchase of customary land by a government of whatever tier. There may be a presumption [since the Act is silent on any action subsequent to a purchase and for historical reasons which I touch on here], that customary land shall remain as such, unless bought by the government and that Part V may not be presumed to afford anyone an avenue to directly purchase such land.

12. There is no impediment to customary landowners dealing with land howsoever they may wish [subject to Town and Planning Regulations if applicable], but customary ownership will always remain with them. The impediment may well be their inability to raise funds for development using customary land as security but that is another issue.

13. It is apposite to quote Professor Rudy James, erstwhile Professor of Law at UPNG, while discussing Yoruba {who predominate in 6 of Nigeria's 30 states} customary land law general principles [handed down in the context of an oral tradition and idiomatically] and here, in popular adaptations[1];

> *"Land belongs to a vast family of whom many are dead, a few are living and countless are still unborn [this expresses the corporate nature of ownership]*
>
> *The notion of individual ownership is quite foreign to native ideas.*
>
> *Land belongs to the community, the village, or the family, never to the individual.*
>
> *Possession of land, no matter how long, does not confer title on the possessor.*
>
> *The usufructuary cannot claim ownership."*
>
> Professor James went on to say *"the traditional system of land tenure predominates today. Its chief characteristic is its ability to absorb changes as the society modernises. The judges time and again, have emphasised the need to avoid the rigid application of customary law and showed an inclination to treat those laws as being in a continual process of evolution. They were therefore well disposed to take cognisance of changes to ancient rules, provided*

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[1] *Custom at the Crossroads*- Edited by Jonathan Aleck and Jackson Rannells, Waigani Faculty of Law University of Papua New Guinea 1995 at 194

there was evidence to indicate changes in practice, or disfunctionalism arising from the application of existing rules of law."

14. This case again demonstrates disfunctionalism arising from the application of existing rules of law, although the courts cannot adapt the outcome to meet the expectations of the parties, in the face of the strictures embedded in the legislation. Certainly the Act allows a sale to the government and reflects the acceptance of this in practical terms when the customary landowners were fully cognisant. Lord Simonds, delivering the judgment of the Judicial Committee of the Privy Council in the case of *Wabo v. Attorney-General of Nigeria*, said[2];

"Learned counsel for the applicants laid stress on the importance of native law and custom in regard to the disposal of land, alleging alternatively that customary law made it impossible to sell such land or that a sale was so unprecedented a measure that it could not be supposed that the chiefs understood what they were doing. Neither alternative can prevail. Their Lordships see no reason to doubt the view of the learned trial judge that native law and custom was not so inflexible as to render a sale of land to the government illegal nor can they suppose that this aspect of the matter was not fully considered in determining the question of fact whether or not the chiefs understood what they were doing."

15. This quote supports a view of Part V that its purpose was to codify the manner in which a sale to the government would be effected and implies that otherwise, dealings in customary land would remain with the landowners according to the practice they saw fit to use. For the Court of Appeal has emphatically stated that Part V of the Act is the only way in which a sale by customary landowners may be effected and the Act names the governments, whether State or Provincial, as the ultimate beneficiary.

16. The paramount rule impliedly recognised by the Court of Appeal and on an interpretation of Part V is that sales, generally, in a Western sense are not to be countenanced by the purported use and application of that Part V. That does not prevent customary landowners treating with others whether individuals, companies or other Solomon Islanders, [as has happened here], for the use of the land in accordance with their own arrangements. Whether that involved a grant or sale of use, or lease in the modern sense [quite separate from an absolute divestment by transfer in accordance with custom to a tribe, clan or individuals able to take in custom appertaining at the time of the proposed transfer] would be but an evolution of the old practices and if adopted, would become part of that evolution [law is not static] so necessary to remain relevant. Part V of the Act stemmed from the time of de-colonisation and sought to balance the customary view of land [see James, above] with the States need to purchase particular lands for its own purposes, whether public hospitals, airports for transport, ports for freight, land for mining or hydro-electricity or for government buildings for instance. Another implied right of the tribe, clan or individuals to deal with their land as they see fit is to be found in the Forest Resource and Timber Utilisation Act where unanimity of purpose must be exhibited before logging can take place.

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[2] [1956] 1 JAL 45 at 49; quoted in footnote 1 at 197

17. Whilst I have mentioned mining as a reason for the State to become involved in purchasing customary land, I should not presume to suggest that problems between landowners which thwarted development of a mine on Santa Isabel would be circumvented by that course. But it may obviate the continual spats and assertions of illegal practices by competing mining companies supported by landowning schisms where the companies are tainted by allegations of corruption. If the Commissioner of Lands, the agent of the Government is to be treated as an *intermediary* then there is implied recognition that the Government is the appropriate body to deal with competing third party interests and foreign firms rather than allowing and expecting the outsiders to know and appreciate the nuances of local land customs and politics with the inevitable court proceedings as a consequence. That is not to say problems would be avoided by the Government treating with such tribes or clans claiming rights, but the Government may be seen as the appropriate authority to control any arrangements with the landowners. In the absence of agreement, the Government must say no to the importuning applicants. The inevitable court proceedings would not fall to be decided between competing foreign firms perhaps but rather involve the Government and its citizens with the court the arbiter having proper regard to custom, not principally commercial law. It is interesting to contrast our situation with the opinions of Sir Julius Chan, a former Prime Minister of Papua New Guinea.[3]

> *"Another consideration should be how does a government stop landowners from making decisions that may not be in their best interests? That is what governments should do. We need strong guidelines to make sure that whatever happens it should not go beyond an acceptable point for continued exploration or development of a mine. We should be able to set the parameters in which these negotiations can take place. "*

18. Sir Julius is not saying that the money should go to the government except for a percentage for royalties [to be enshrined in the legislation to protect the parameters] for while accepting the people's right to benefit from their land, when asked- *"What if people just spend their money on cars and drinks?"* he said-*"For me it is up to them because if the money comes to the Government in Port Moresby it is misappropriated and corruptly abused anyway."*

19. There can be neither absolute sale of customary land [unless by customary transfer as envisaged, above] nor subsequent lease of the registered parcel of land, outside the provisions of Part V of the Act. Any agreement to purchase in this case needed to be in terms of s. 62 of the Act, which envisaged the Commissioner paying the persons named in the s. 62 agreement as vendors the purchase money, taking possession and then vesting the estate in the land in the Provincial Assembly *"for and on behalf of the people of that Province."* [S. 69-[1][c][iv] of the Act].

20. I have had the benefit of the judgment of the Court of Appeal in *SMM Solomons Ltd v. Axiom anors*[4] which at paragraph 317 says;

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[3] Playing the Game- An autobiography by Sir Julius Chan at 220
[4] Civil Appeal no. 34 of 2014; [2016] SBCA 1

> *"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 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 landowners and those who seek access to the land and also help ensure that the negotiations will be conducted properly."*

21. It is for these very reasons, that the legislation needs review.
22. The Court of Appeal accepts the Commissioner's role as condescending to help the customary owners in their proposed relationships with the anticipated end-user. With the greatest respect, I rather think the relationship of the vendor of customary land is with the Commissioner as agent for the Government. As agent of the Government, conflict in his obligations by this approach as intermediary is moot. Gone are the days however when customary societies trade with outsiders was based upon reciprocal acts, not upon the market. If independent advice is necessary, it is unlikely to be seen as such were the Commissioner to stand in that role.

23. The Provincial or Central Government may decide to sell or lease the land for good reason but that is an entirely separate issue to the formal acquisition process under which the 3rd defendants in this case benefitted from the Commissioner's vesting order whereupon they became first registered owners. [Exhibit 2- *Parcel no. 191-017-108 Perpetual Estate Register – First Registration under Part V dated 23/08/2012*]. For as implied by the pleading, and acknowledged by the acquisition officer in her report, the concurrence of the Commissioner to the acquisition and his vesting order followed upon a separate agreement between the 3rd and 4th defendants. What has transpired in this case, was that the eventual lessee, the 4th defendant with her husband, had agreed with the 3rd defendants to take a transfer of land to become registered; customary land which then became the subject of these acquisition proceedings. No consideration passed from the Commissioner in purported implementation of the s. 62 agreement, rather the Commissioner gave his imprimatur to the earlier agreement between these other defendants. The S. 62 agreement recited no purchase price for the customary estate.

24. The purpose to which these acquisitions may be put, are quite clear. In the case of a purchase of land by the Commissioner, after complying with the requirements of S. 69 [1][a][i-iii] of the Act, he shall vest the estate in himself for and on behalf of the Government, free from all other interests. No such purpose was realised since the estate was vested in those found to be the customary landowner representatives.

25. In the case of a purchase by a Provincial Assembly [Government] the Commissioner shall vest the land in the Assembly for and on behalf of the people of the Province. Again, no such purpose was realised.

26. Experience has shown the legislation to be difficult to effectively implement when acquisition proceedings under Part V of the Act are contemplated. Certainly such was the case here, for in good faith the 4th defendant had expended moneys to further her legitimate commercial interests and those of her company, interests which may advance the general business community about Honiara and directly help the nascent tourist industry, with the expectation of taking an interest in registered land [since I presume commercial lending practice prefers registered land as security for money advances; customary land cannot be sold by a bank on default by a customary landowner], only to be caught up in proceedings not of her own making. Whilst she will be affected by these court orders, the law in these types of cases has often not matched the understanding or expectations of the parties. This is an area which may need serious reconsideration to better reflect current needs and aspirations. For it would seem the Commissioner and acquisition officer may have accepted congruency of the customary landowners wish with that of one of their kind, Mrs Douglas, to effect the transfer of the customary estate into that of a registered parcel since the acquisition officer had accepted evidence of payment to the landowners for just such a purpose. Justification for the vesting in terms of S. 69 of the Act by the Commissioner to the 3rd defendants is absent, for the purpose, congruency of wish [relied upon by the acquisition officer and the Commissioner] does not accord with Part V of the Act. What will drive the Commissioner to purchase, whether for one or other Government, is not mentioned in the Act although the Act is exhaustive in laying down the steps to be followed in terms of a Code. Of course the reference by the Court of Appeal to commercial interests driving a wish to purchase is one reason. For a Government may well wish to "clip the ticket" [seek its own premium] for any subsequent transfer to commercial interests. This will also give rise to the conflict I will touch on later.

27. What can be said, however from the undisputed facts of this case is the reality; landowners will choose the eventual registered user or lessee on their own terms for that is their implied right under the legislation. No subsequent sale or lease by the Commissioner would be contemplated by an end-user unless the customary landowners concurred, and their concurrence could not be obtained without their knowledge. It would be reasonable to assume that an end-user which was not a government agency but a third party, would be vitally interested in the terms contemplated by the parties to a Section 62 agreement for such agreement, [whilst the end-user is not a party to such agreement], in relation to any sale or lease from the Government, would determine the terms under which the 3rd party would take from the government. This is another aspect where conflict of interest will arise, were the Commissioner to act as an intermediary.

28. The criticism in this case now levelled by the claimant, *post* pleading and *post SMM Solomons Ltd*, is at the bureaucratic mistake which short-circuited the steps, for the persons granting the customary land by sale to the Commissioner became the eventual registered owners and the mistake vitiated the process.

29. It may be equitable for the 4th defendant to claim an interest as lessee [in customary terms, as the person by custom entitled to hold, occupy, use, enjoy and dispose of the subject land according to her own standing in custom and according to the terms of the Memorandum of Understanding referred to later] from the very customary landowners with whom she had

dealt, in accordance with custom and paid, but her interest, whether in equity or in custom cannot overcome the failed process in law and correct the error on the Register. So it was with the 3rd defendants who sought by registration, to control more fully in a Western sense, the land which they claimed as owners in custom. A court cannot accommodate this by equitable means or techniques of evolution in the face of the strictures in the legislation but must apply the black letter law of the Act.

30. The 3rd defendants could only take from the Provincial Government or the Commissioner [on the Central Government's behalf]. The purported vesting directly to the 3rd defendants was not in accordance with Part V and the subsequent lease to Mrs. Douglas must fail since it relies on the title of the lessors who had been registered by mistake of process reliant on a void vesting order of the Commissioner.

31. The 3rd defendants were on registration not able to transfer the Parcel to Mr. Fred Douglas and Mrs. Corina Douglas as had been envisaged by the MOU but did purport to lease the registered Parcel to the 4th defendant, Mrs. Corina Douglas [for her husband is not a Solomon Island citizen able to hold an estate in land]. Had it been feasible, the transfer of the registered estate to Mrs. Corina Douglas and her husband by the 3rd defendants, envisaged by a Memorandum of Understanding with the 3rd defendants then as customary landowners, would have been effected. By the MOU the landowner obligation included the obligation to transfer title to *Corina and Fred Douglas as soon as first registration was done*.

32. The scope of the MOU was expressed *to facilitate and enable Fred and Corina Douglas or their employees or agents or authorised person to carry out the project in the subject area*. As part of that facilitation, the 3rd defendants apparently approached the Secretary of the Province since the appointment letter addressed to the acquisition officer was for the purpose of a commercial development.

33. The amended defence of the 3rd defendant dated 5 June 2014 curiously adopts the 4th defendants defence wherein Mrs. Douglas says she is entitled by custom to the use, occupation and benefit of the land below high water mark in front of Honiara including the sea area north of the claimants land as a member of the landowning tribe described in particular statutory declarations evidencing Tribal status and ownership rights, and by virtue of the purchase agreement of the 23 October 2009 and the MOU of the 16 December 2011, even though the pleading goes on to allege fraud or mistake in the 1st, 2nd and 4th defendants in relation to the extent of the land described in the registered lease granted by the 3rd defendants to the 4th defendant. The defence purports to adopt the 4th defendants claim to the grant of customary land [described to include the sea boundaries set out in the Agreement dated 23 October 2009] in which the customary landowner representatives granted the use of the seaward estate from the western boundary of the Heritage Park Hotel easterly to the boundary of the SIPA, to Aggressor Solomon Ltd, the 4th defendant's company . The 3rd defendants do not resile from the effect of that agreement by their pleading.

34. The 3rd defendant denies that the claimant is entitled to the relief by virtue of the customary ownership by their tribes of the coastal areas of Honiara pleaded in their amended defence, a

plea which may be taken to deny any right in the Commissioner to presume to deal with the land contrary to their wish. This plea rather highlights the difficulties in the implementation of Section 69- Part V of the Act and supports my comments about the customary landowners' equitable right to agree to the eventual end-user [the 3rd party] of their customary land following acquisition by the Government where the government determines to on- sell or lease the land, acts necessarily in contemplation at the time of acquisition by purchase. [This is not a compulsory acquisition]

35. That principally covers the defences to the claim although pleadings between the 3rd and 4th defendant proceeded to identify the dispute over the extent of the seaward estate intended to be leased to the 4th defendant following the first registration of the 3rd defendants pursuant to the Commissioners vesting order.

Dealings with the customary land.

36. The purchase agreement of the 23 October 2009 between Aggressor Solomon Ltd as purchaser and Cornelia Chilivi [Haubata Tribe], Savino Laugana [Representing Haubata Tribe], Onesimo Reinunu [Representing Kakau Tribe] as vendors after reciting the purchasers purpose in developing the tourism industry and its need to raise funds for its purpose agreed that;

> 1.*"The Vendor shall grant all that piece of land stretching one hundred metres from high water mark [HWM] from the western boundary of Lamana Development [heritage Park Hotel] going easterly to the western boundary of the Solomon Islands Port Authority [SIPA] for purchase by the Purchaser. Refer to the attached sketch map showing the area shaded.*
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> *2. The Purchaser shall pay a premium of $50,000 to the Vendor as the purchase price of the land.*
>
> *3. The area purchased to be used for the purposes of operating boat operations, marina facilities and other related developments.*
>
> *4. The purchaser shall, for the purposes of its operations, excavate, reclaim or improve the said area for the establishment of its business and operation"*, whereby the seaward estate was sold to Mrs. Douglas' company, Aggressor Solomon Limited by the representatives of the tribes claiming customary ownership, the Haubata and Kakau and the efficacy of the agreement, [which has been stamped] has never been questioned. Amongst the purchasers obligations at 9 was recited; *"Have exclusive rights over all that piece of land prescribed in 1 above."* To give the clause its ordinary meaning in the context of the agreement, I am satisfied that the grant included that of the tribes purported customary rights to the possession and use of the land, but the grant is not to be presumed to include the actual ownership for Part V of the Land and Titles Act is the exclusive statutory provision for the acquisition of customary land. But what has happened is that exclusive possession had passed to Aggressor Solomons Ltd at the time of the agreement on the 23 October 2009 and has remained since, so that at the time when the Commissioner purported to vest the perpetual estate in the 3rd defendants, he could not have been in possession of the land, a requirement for the effectual implementation of any agreement under S. 62. The 3rd

defendants had divested themselves of possession by virtue of the agreement. [s. 69-[1][c][iii]]. It stands to reason that the 3rd defendants did not have possession of the seaward estate described in the unchallenged agreement with Aggressor Solomons Ltd and were not able to give possession to the Commissioner in terms of any agreement under S. 62 in consideration of payment by the Commissioner. By its defence then at paragraph 1, the 3rd defendants are *estopped* from denying the fact of the agreement of the 23 October 2009 by which their tribes had already granted possession of their customary land [the seaward estate claimed in the agreement] to a third party, Aggressor Solomons Ltd.

The 3rd defendants pleading of fraud and mistake by the 1st, 2nd and 4th defendants in relation to the description of registered land leased to the 4th defendant.

37. Now by their pleadings the 3rd defendants have alleged fraud and/ or mistake on the part of the Commissioner of Lands, the Registrar of Titles and the 4th defendant. For they say the map attached to the agreement of the 23 October 2009 shows by the hatching, only part of the seaward estate directly in front of the Breakwater café land to be granted to Aggressor Solomon Ltd and that was the land intended to be leased to Mrs Douglas following their first registration. In support they argued that immediately after they realised the mistake, they wrote to the Registrar of Titles to correct the register. Many sketch plans were used throughout the time these parties were seeking to obtain the registration of the land, sketch plans were identical and the sketch plan, exhibit 3 ["FO-7" of the sworn statement of Francis Orodani dated 16 March 2016] marked in red by Mr. Orodani in court is, I am satisfied that sketch plan to which the acquisition officer referred in her Report in the Preliminary which recites; *"The boundary of this particular land was demarcated upon a map or plan by the Survey Division. The actual surveying of the site was done by the Principal Surveyor as has been negotiated through the purchase agreement of the 23 October 2009..."* In Previous Negotiations the Report states; *"Negotiations were made by the elders and custom chiefs of Guadalcanal Province at a meeting at Barana Village. The parties has agreed to grant all that piece of land stretching one hundred [100] from HWM from the Western Boundary of Lamana Development [Heritage Park Hotel] going easterly to Western boundary of the Solomon islands Ports Authority [SIPA] to be purchased by Aggressor Solomons. There has been a purchase agreement between the Landowners and Aggressor Solomons.*

Declaration: Corina has been part of them therefore as soon as Perpetual Estate is vested in their names, they will arrange transfer PE to Corina."

38. Mr. Orodani's statement recited a number of payments pursuant to the agreement of the 23 October 2009 and annexed receipts and by his annexure, "FO-7" showed an additional agreement for the grant of additional land in consideration of the payment of $8,000, $4,000 of which was acknowledged with the balance acknowledged to have been paid on the 15 January 2010. This agreement executed by the representatives of the Tribes ["FO-7"] annexed the sketch which became exhibit 3 showing the boundary of the seaward estate in red intended to be granted Aggressor Solomons Ltd, the description of which corresponds with the acquisition officer's description of land with which she was concerned and the written description in the earlier agreement of October. I view this later agreement as a genuine attempt to correct any misunderstanding between the parties about the land to be acquired since further moneys

were paid. The 3rd defendants claim to mistake or fraud must fail since I am satisfied on the evidence that there was no doubt about the extent of the land to be acquired by the 3rd defendants and that was the land in the sketch, exhibit 3 and the land to be transferred in accordance with the declaration in the acquisition officer's report. It follows that I accept the evidence of the 4th defendant and that of Mr. Orodani on these issues for it is plain that the plea by these Trustees, the 3rd defendants, of fraud or mistake by the other defendants is wholly unsupported on the evidence.

The 3rd and 4th defendants claim for trespass and damages.

39. Mr. Radclyffe, in his opening address, referred to the defences filed by the 3rd and 4th defendants who have counterclaimed for trespass and damages. Both parties have proceeded on the basis pleaded for that the claimant had constructed a sea wall which extended into the sea below the HWM so that there was an encroachment amounting to trespass onto the seaward estate claimed by both defendants. These cross claims may be shortly disposed of on the basis of the separate interest of Aggressor Solomons Ltd to that seaward estate.

40. The various Tribal trustees had by the original agreement of the 23 October 2009 and the additional agreement of the 11 January 2010 ["FO-7"] granted their interest in that seaward estate [including the seabed in front of the Hotel] to Aggressor Solomons Ltd. This was known to the 4th defendant since she was a person by matrilineal ties part of the customary landowning tribes which transferred the rights by grant. She is also the sole shareholder of the company taking the benefit of the grant.

41. The 3rd defendants have no cause of action for the alleged trespass since they have disposed of their interest [save residual claim of ownership] in the seaward estate.

42. The 4th defendant has no cause of action since any cause of action arising from the erection of the sea wall lies with the company.

> *"A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, although exceptionally he may be permitted to bring a derivative action in the right of the company and recover damages on its behalf."* [Johnson v Gore Wood & Co][5]

43. This statement of the law adequately explains why any claim about a sea wall may only be with the company. Whilst I do not presume to make findings in relation to the matter, on the evidence before me in this case it must be said on the basis of the photo without anything further, that if viewed as a chose in action, that part of the company's assets would appear to be of little value.

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[5] [2000] UKHL 65; [2000] 1 All ER 481 at 39.

The basis of the challenge by the Hotel

. The Province, it was pleaded, was not the appropriate authority to appoint the acquisition officer since the area comes within the jurisdiction of the Honiara City Council. [Statement of Case-para. 1]

. By letter dated 31 August 2010 the claimant applied to the Commissioner of Lands for title to the area of seabed fronting the claimants land. [Statement of Case-para. 5]

.By letter dated 12 December 2011 the Commissioner agreed to allocate that seabed but failed to complete the process despite the claimant doing all that was required of it by the Commissioner.[Case- para. 6]

. The Commissioner mistakenly allowed the seabed land in front of the Hotel to be registered in the names of the 3rd defendants in breach of the agreement. [Case- para. 7] and by more recent argument;

44. Even were the Province to be found to have power, incorrect procedure which vitiates the vesting order, had been followed by the acquisition officer.[*SMM Solomons Ltd v Axiom*; unreported decision of the Court of Appeal dated March 2016]

45. The claimant seeks;

    Rectification of the title to the perpetual estate in [seabed] Parcel No. 191-017-108 as it affects the seaward side of the claimant's land by reason of mistake; [Section 229-Land and Titles Act]

    Rectification of the lease register, so that the lease to the 4th defendant no longer affects the area of the seabed fronting the Hotel;

    An order granting a fixed term estate of the seabed in front of the Hotel to the claimant;

    A declaration that the acquisition of the area of the seabed and the registration in the names of the 3rd defendant is invalid;

46. The area acquired by registration of the perpetual estate by the customary owners included that area to the front of land with a common side boundary with the Hotel, land controlled by Mrs. Corina Douglas through her company, Aggressor Solomons Ltd which had Perpetual Estate Parcels 191-017-80/82 upon which a café, residences, dive shop and jetty had been erected, all commonly known as the Breakwater Café. It was not the intention of the 3rd defendants, they say by their spokesperson, Vincent Kurilau [whose sworn statement was read in their case] to lease the seaward estate in front of the Hotel, only that in front of the Breakwater café. The pleadings show that dispute between the 3rd and 4th defendant, for the 3rd defendants plead they only intended to lease that part in front of the Café, otherwise they would have sought a larger premium from Mrs. Corina Douglas for the grant of lease. I have dealt with this argument and find it has no merit.

47. If the seaward area in front of the Breakwater Café was all that was registered as the Perpetual Estate in Parcel 191-017-108 the Hotel would have had no objection. The claimants case in the pleadings was supported by a statement by the managing director of the Hotel, Mr. Sanjay Bhargava filed on the 5 October, 2015 which Mr. Radclyffe read, then closed his case. I propose to rely on the letters so pleaded and to be found in that statement, in my reasons as evidence of the agreement or promise on which the claimants rely.

The 1st and 2nd Defendant's Case

48. Mr. Banuve, the Solicitor General acting for the 1st and 2nd defendants, in his opening address, said the mistake in the acquisition process turned on the point whether the area in question, the seaward estate is within the city boundary and customary land and if so whether the acquisition process was proper. In his later submissions he argued that if, as not disputed, the subject land was customary land then the Guadalcanal Province has jurisdiction over it, not the Honiara City Council under the Town and Country Planning Act Cap 154.

49. By their pleading [para. 2], the 1st and 2nd Defendants admit the registration of the 3rd Defendants as perpetual estate holder owners of the Parcel no. 191-017-108 but do not admit any mistake by the Commissioner. They admit the Parcel is within the seaward boundary of Honiara City but say the regulatory fiat of the Council does not apply to the subject land as it is deemed customary. In other words, the Solicitor General concedes the right in the customary landowners of the area [subsequently registered as owners of the perpetual estate], to be free of any regulatory control by the City Council. This may be a matter for conjecture.

50. They do not admit the pleaded agreement by the Commissioner of Lands with the Claimant in terms of letter under hand of the Commissioner to the claimant dated 12 December 2011 whereby [para. 6] the Commissioner *"agreed to allocate the area of the seabed to the Claimant"*.

51. The claimant is put to strict proof of any such agreement.

52. It is convenient to set out the relevant parts of the letter from Mr. Silva Dunge, Commissioner of Lands to the General Manager, Heritage Park Hotel Ltd;

> *"I refer to your application for extension to frontage of Heritage Hotel. I am pleased to inform you that your application for extension has been approved. Please call at the Office of the Commissioner of Lands to facilitate survey of the area. Letter of offer shall be issued upon completion of survey and valuation."*

53. This part of the claim may shortly be dealt with. In the sworn statement of Mr. Sanjay Bhargava of the 5 October 2015, he states that;

> *"As instructed in the letter I followed this up with Mr. Dunge several times but no formal offer for the seabed was received. Mr. Dunge did however tell me that there was no problem with the Claimant's application. When he ceased to be Commissioner of Lands I tried to see*

Nesta, his successor, but she was never in the office. I was surprised to learn of the events described in paragraphs 3 and 4 above"

54. Mr. Bhargava, talking of "pragraphs 3 and 4 above" was referring to the registration in favour of the 3rd defendants. This letter then, is part of the documentary evidence of the agreement. Mr. Bhargava's understanding of the process appears to be rudimentary. He says he followed up with Mr. Dunge but no formal offer was received. He was referring to the seabed, owned by the customary landowners, it seems, so any formal offer needed to be made to the customary owners in an acquisition process, not received by Mr. Bhargava. If Mr. Bhargava expected the Commissioner to act as agent of the customary landowners or his agent, in relation to an offer to sell, then he was mistaken.

55. The Court of Appeal, in *Eta v Attorney General and Dr. Derick Sekua* [SICOA no. 30 of 2013] when considering a similar expectation by Mr. Eta to his application to the Commissioner to extend his land boundary, at paragraph 18 said;

"We have set out the chronology from the judge's findings which demonstrate the basis of his expectations. We accept as it would appear did the judge, that Mr. Eta truly expected to be given title to the land and whilst the various communications between early 1992 and his payment of the survey fees in early 1993 would have led most people to assume their application was "home and dry" the fact was that he had been granted no right. Why the position appears to have changed after the survey is unexplained and it is easy to appreciate his frustration when it was then registered to the Sikuas." And again at paragraph 20; *" It is clear that the allocation of land does not give any right to the title. It is one of a number of preliminary stages in the process of acquisition of title. The suggestion by Mr. Eta that it gives a right is incorrect."*

56. The facts of the case before me have not been distinguished from those of *Eta's* case. There is consequently no legitimate expectation in the claimant to a right to claim title to the Parcel. Part V of the Land and Titles Act provides for the manner in which a right to title may arise following acquisition, vesting and registration. The Commissioner has no power to presume to deal with such right by way of letter in this case. There was clearly an expectation dashed by the subsequent registration of the land in the 3rd defendants names but not, in a legalistic sense, a legitimate expectation for the reasons given by the Court of Appeal.

57. When addressing the criticism levelled by Mr. Radclyffe [relying on the decision of the Court of Appeal in the *SMM Solomons* case] that a vital step was omitted in the vesting procedure, for that it was registered in the names of the 3rd defendants, the customary landowners, as perpetual estate owners and then leased to Mrs. Corina Douglas, rather than following the steps laid down in the Land and Titles Act, Mr. Banuve relied on the process followed, the fact of the Agreement for Sale of Customary land between the landowners and the acquisition officer, the absence of challenge by notice under the Act to the Agreement [which purports to be the agreement required by s. 62 of the Act] and the failure by the claimant in these proceedings to appeal the acts of the Commissioner; all as evidence of an effective acquisition process. I do not accept his arguments.

58. Mr. Banuve said two authorities had power to invoke the acquisition process; the National Government and the Provincial Government. The Guadalcanal Provincial Government did initiate the process, and the acquisition was carried out in accordance with the procedure were I to have regard to the matters he relied upon.

59. Mr. Radclyffe pressed the point concerning the Honiara City Council's jurisdiction over the seaward estate below high water mark to show the absence of authority in the Provincial Government to initiate the acquisition. If the court was to accept his argument, the appointment of the acquisition officer would be beyond the power of the Provincial Assembly and the vesting void. The issue of the Provincial Assembly's power is one relevant for decision.

60. In answer to the summons to witness to produce documents the Surveyor General produced a map inscribed "Honiara Town Boundary and Town Council Boundary" endorsed Legal Notice 83/73 44/82 Plan no. 1981 [the Town Boundary Plan] which by red line, showed the Town Boundary extending well into the sea and wholly encompassing the small area in dispute in front of the Hotel and Breakwater Café.

61. While the Surveyor General was answering the summons, Mr. Suri for the 4th defendant questioned him about the plan or map. He queried the reference to the numbers at the foot, 83/73 and 44/82. Mr. Ikina, the Surveyor General, stated the plan produced was the only plan in the Department [presumably in answer to the summons]. When asked to explain the red line shown on the plan, he said it was the Town boundary, West to East and to the sea, the administrative part of the City Council. *"My understanding is the City Council has the right to administrative activities beyond the High Water mark"*. He later said the land below the high water mark was customary land according to his knowledge, but that in his judgment it was *administrative below the high water mark*. Of course these statements may well be questions for a court's determination as to effect and meaning.

62. The plan was admitted as exhibit 1.

63. Mr. Banuve for the 1st and 2nd defendants relied on the defence filed. A sworn statement of Ms. Nester Maelanga, [the acquisition officer appointed] detailed the material she had reference to when entertaining the acquisition application before her report and confirmed such material was the only relevant material in her proceedings. Counsel have had the opportunity to inspect these documents. I should say her Report was in evidence as an annexure to the statement of Mrs. Douglas.

64. The Statement of Case clearly addresses the mistake alleged to have been caused by the Commissioner and consequently the Registrar of Titles by granting a Fixed Term Estate Parcel over a greater part of the seaward estate beyond that part fronting the Breakwater Café, since the Parcel mistakenly included the seaward part in front of the Hotel previously promised to it. The Hotel did not impugne the acquisition process. The Hotel was willing to use the acquisition process adopted by Ms. Maelanga, the acquisition officer for its own purpose, to obtain an Estate over the seaward side of the Hotel land by pleading that the Commissioner of Lands had acquiesced with the Hotel proposal since it seeks an order for the grant of the seaward estate

[to the front of the hotel] on the basis of the purported agreement with the Commissioner. The pleading does not criticise the manner in which this acquisition has been carried out, rather only the mistake in the grant as it affects the hotel.

65. The 3rd defendants only take issue with the extent of waterfront described in their lease to Corina Douglas, claiming the lease mistakenly describes the whole of their seaward estate instead of only that part in front of the Breakwater Cafe. They do not seek to impugne the fact of the vesting and first registration of the whole Parcel of land to them.

The 3rd Defendant's Case.

66. The 3rd defendants lawyer, Mr. Balea who appeared in court following an adjournment to allow his clients to seek him or a representative from Mr. Balea's firm to come and represent them, had on the preceding Friday, filed the sworn statement of Vincent Kurilau, one of the defendants. I accept that statement in the 3rd defendants case , the other parties have not objected in spite of late service.

67. Mr. Kurilau was called for cross examination, although no particular paragraphs of his statement were the subject of objection, Mr Radclyffe questioned him generally in relation to his ownership in custom to the sea. Mr. Kurilau when challenged over his claim to the sea as far as the eye could see, said *"we have the right to use the reefs"*.

68. Mr. Radclyffe then referred him to the first annexure to his statement, *the"Acquisition Report of Bokona land, sea front in between Heritage Park and Aggressor Solomons Guadalcanal dated 26 April 2011"*. Mr Kurilau was taken to Mrs Maelanga's letter of appointment [dated 22 February 2012] where the Provincial Secretary appointed her *"as acquisition officer* ***to act as my agent*** *for the purpose of acquiring customary land as follows:"*

Description of lands:

1. *Land extending from the high water mark from the boundaries between Heritage Park Hotel and Mendana Hotel.*

69. It was put to him that the appointment doesn't cover the sea front of the hotel to which he answered *"my understanding is in front of Aggressor- the Breakwater"*.

70. When it was pointed out that the land acquired and registered included the Heritage Park [seafront] Mr. Kurilau answered, *"yes, that is what we requested"* then appeared to correct himself by saying, *"I don't know why the whole area, it was supposed to be in front of Aggressor"*.

71. This confusion reflects that of the document, the Acquisition Report, for its tenor clearly related to the larger area shown by the sketch plan and the 3rd defendants had the benefit of the larger area covered by the vesting order, yet when reciting the appointment by the Provincial Executive, it described the land to be acquired as that in front of the Breakwater café.

72. Mr. Kurilau's 2nd annexure is a letter addressed to the Registrar, Registrar General's Office dated 30th August 2012 in which he writes on behalf of the landowner/trustees requesting the immediate halting of the vesting order pertaining to LR 1086 Honiara seafront. [the vesting order in favour of the 3rd defendants]. The reasons in the letter are that the boundaries are not consistent with what were agreed and that the vesting order covers areas that are not part of the *"original deed put forward to us when we signed the agreement"*.

73. Mr. Radclyffe pointed out that the 3rd defendants list of documents did not include the letter. He did not seek to have the letter excluded. Mr. Kurilau's explanation was that he forgot to include the letter but that he had sent it to the Registrar Generals office. Later in cross examination by Mr Suri for the 4th defendant, who suggested that the letter was never delivered, Mr. Kurilau said *"it has been delivered, I gave it to the secretary at the counter at the office"*. I need not make a finding in relation to the truthfulness or otherwise of this statement for while the 3rd defendants case is predicated by this alleged mistake in description of boundaries in the lease to the 4th defendant, any purported miss-description in the lease is of no relevance as my reasons show. The seaward estate had already been disposed of by the tribes of the 3rd defendant.

74. The 4th defendant's case was supported by two sworn statements of Mrs. Corina Douglas filed respectively on the 18 January 2016 and 28 April 2016. Mrs Douglas was called , her statements were affirmed and read without objection in her case. Sworn statements by Doreen Menhunu filed 21 January 2016 and Francis Orodani of 17 January 2016 [concerning the customary tribal relationships of the Haubata or Ghaubata and Corina Douglas' standing in custom] were also read.

75. All three witnesses were cross examined. Their substantive evidence was unaffected.

The 4th Defendant's Case.

76. Before passing on, however, I shall shortly include Mr. Suri's opening for the 4th defendant, Mrs. Corina Douglas for it succinctly puts the 4th defendant's case. I have commented on various parts.

> *"Legal Issues.*
>
> *5.1 Customary Title passed before Registration.*
>
> Possession had passed but not customary title which cannot be held by a company.
>
> *5.1.1 Prior to registration, customary title had passed to 4th defendant. Registration was a mere formality.*
>
> The 4th defendant may claim to be one of the persons by custom entitled but absolute ownership may only be shown by registration under the Land and Titles Act.
>
> *5.1.2 The 4th defendant was a bona fide purchaser for value of the registered lease.*

The lease interest of the lessee is only as good as that held by the lessor and purported to be transferred. The lessors had already sold their rights to possession of the leasehold land.

5.2 Authority of Guadalcanal Province.

5.2.1 The authority of Guadalcanal Province is derived from sec. 60 of Land & Titles Act.

5.2.2 The Honiara City Council is not a Provincial Assembly for the purposes of sec. 60.

I deal with these arguments elsewhere.

5.3 Perpetual Estate

5.3.1 The claimant did not apply for the perpetual estate. It is, therefore not entitled to attack the land acquisition and registration of the perpetual estate over the sea area.

5.4 Fixed term estate.

5.4.1 The claimant applied to the Commissioner of Lands for the fixed term estate when no estate existed over the sea area.

5.4.2 The Commissioner of Lands did not give an offer to the claimant."

These arguments are also addressed in these reasons.

77. A company extract concerning Heritage Park Hotel Limited was tendered by Mr. Suri and became exhibit 4 without objection. This extract may be relevant to the 4th defendants' plea that the Hotel could not apply to become registered as the holder of the fixed term estate of customary land the subject of the acquisition and thus could not hold any legitimate expectation to obtain the grant of the seaward estate from the Commissioner of Lands. I have approached this claim on other basis and need not address this argument.

78. The 4th defendant read two statements in her case. They supported her filed defence. The defendant admitted the registration of the of the 3rd defendants [with the late Savino Laughana] as the perpetual estate owners of land Parcel no. 191-017-108 consisting of the area of seabed in front of the Breakwater Café and adjoining land of the Hotel. Whilst the fact of the registration is not an issue between these two parties, it remains to be considered by the court nevertheless since it relies on the series of events preceding it.

79. The 4th defendant takes issue with the assertion in the claim that the area acquired comes within the jurisdiction of the Honiara City Council [although the appointment of the acquisition officer was by the Guadalcanal Province] and pleads that the Honiara City Council is not an authority recognised or competent in law to acquire customary land pursuant to the provisions of Part V of the Land and Titles Act.

80. The claimant, whilst presuming authority in the Honiara Council, does not assert mistake on that basis. But it expressly denies the Provincial Assembly had power in terms of the Act to appoint an acquisition officer for this purpose when the land the subject of the acquisition falls within the Honiara City boundaries; the appropriate person would be the Commissioner.

81. Mr. Radclyffe rather seeks to use this plea as a fall-back, for the mistake alleged was the failure of the Commissioner to carry out the agreement by his letter and vest the seaward estate in the claimant. I have dealt with that argument. The issue of the authority empowered to appoint an acquisition officer in this case has been pleaded by the 4th defendant; I propose to address it.

82. The 4th defendant admits the registration of the lease to her on 4 September 2012 by the 3rd defendants and further pleads she is a beneficiary entitled by custom of the Haubata Tribe and Kakau Roha Tribe to the right to occupy, use or claim foreshores and land below high water mark within, near or outside Honiara registered boundaries and by virtue of a Memorandum of Understanding of 16 December 2011 executed in her favour by the 3rd defendants [as representatives of the named tribes] she was entitled [with her husband] to call for a transfer of the registered title upon first registration [envisaged by the 3rd defendants]. The registered lease in her favour was done pursuant to the MOU.

83. The defence further pleaded her right to the seabed through her ownership of Aggressor Solomons Ltd a company which purchased from the Tribes mentioned [by their representatives] the seaward estate described and identified by sketch plan in the agreement for $50,000 on terms set out in the agreement. [Her statements confirm adherence to and satisfaction of the obligations resting on Aggressor Solomons Ltd by the agreement. I accept the agreement has been carried into effect according to its terms. It was stamped and binds the parties].

84. The 4th defendant joined issue with the claimant in relation to the alleged agreement by the Commissioner to grant the fixed term estate of the seabed in front of the Hotel to it. It also pleaded indefeasibility of title to the leasehold registered estate in Parcel no. 191-017-108 by virtue of S. 110 [1] of the Land and Titles Act. This plea may give rise to a claim for indemnity in accordance with S. 230 of the Act.

85. By her defence, the 4th Defendant admits the lease and further pleads both her customary right as a beneficiary *"to occupy, use or claim foreshores and land below high water mark within, near or outside Honiara registered boundaries"* and the right of Aggressor Solomons Ltd, [her proprietary company] by virtue of a purchase agreement dated 23 October 2009 with representatives of the Haubata and Kakau Tribes and her right to the benefit of a Memorandum of Understanding dated 16 December 2011 with the representatives named in the earlier agreement [and the late Savino Laugana] both for the use of the seaward area purchased and for a transfer of the seaward parcel to her and her husband upon registration by the 3rd Defendants of the seaward estate. The registered lease of the Parcel No 191-017-108 was given the 4th Defendant it is pleaded, in accordance with the MOU following registration of the seaward Parcel in favour of the 3rd defendants. The additional agreement ["FO-7"] between the representatives of the Haubata and Kakau Tribes, Salvino Laugana-Haubata, Cornelia Chilivi-Haubata and Onesimo Reinunu-Kakau evidenced a further payment for the sale of additional waterfront area to Aggressor Solomon Ltd and was made on the 11 January 2010. The three vendors were named as such in the original agreement dated 23 October 2009. Annexed to the agreement of the 11 January was the sketch showing the land to be sold, including the seaward estate affecting the claimant's waterfront. That sketch corresponds with the sketch, exhibit 3.

86. Relying on the benefits afforded by the lease of the seaward estate, the 4th Defendant, Mrs. Corina Douglas has counterclaimed against the Hotel seeking damages for encroachment onto her leasehold by a sea wall build facing the Hotel's sea boundary which she says has been built and extends below the high water mark. Damages are claimed from the 4 September 2012, the date of the lease and continuing.

87. The amended defence of the 3rd Defendants appears to plead *"non est factum"* in relation to their registered lease to the 4th Defendant, for while admitting the fact of the document, they claim by fraud or mistake on the part of the 1st, 2nd and 4th Defendants, that the lease describes a larger part of the seafront [below the high water mark] along the coast than they intended to lease, for that the lease premium in the document was not fair value in the light of the size of the seaward estate, to the knowledge of the 4th Defendant. The allegations of fraud have not been specifically pleaded.

88. The 3rd Defendants also counterclaim against the Hotel for damages for encroachment by the hotel sea wall since they claim rectification of the lease in Parcel 191-017-108 by description to be limited only to that part of the seaward area fronting the Aggressor Solomons Ltd land. Rectification would leave the 3rd defendants with the remaining part of the seaward estate, from the Heritage Hotel site to the Ports Authority land.

89. I should say that reliant on the sale agreement, the MOU and the registered lease, Aggressor Solomons Ltd had erected a breakwater running out from the café area seaward some 100 metres then southwards some 50 metres which has created a relatively protected small basin for shallow draft vessels. While no evidence is available about the value of the work done to create the breakwater, the amount of fill and rock used to build it leaves me in no doubt that it was a major construction and engineering project. In other words, the 4th Defendant would have expended considerable sums of money to further the company's business interests in Honiara.

90. After the pleadings had closed but before the hearing of this case, the Court of Appeal handed down its decision on an appeal concerning the acquisition and registration of customary land. In *SMM Solomon Ltd v Axiom KB Ltd anors*[6] the Court made clear the process of acquisition affecting customary land needed to follow the steps laid down in the legislation. In the present case, the Commissioner vested the seaward estate in the names of those whom the acquisition officer had found to be entitled in custom, whom became registered as perpetual estate holders and who then leased their estate to Mrs. Corina Douglas, the 4th Defendant. Taking comfort from the decision in that appeal case, Mr. Radclyffe argued the steps necessary for effective acquisition were not taken in this case. This process does not follow that which is laid down.

91. The Commissioner had not complied with the requisite parts of the legislation. At paragraph 322 of the judgment the Appeals Court said;

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[6] [2016] SBCA 1

"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 the 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 [paragraph {b} or the Provincial Government [para {d}] in accordance with the terms of the section 62 agreement. He must pay any premium or rent payable in terms of the agreement and take possession of the land. In the 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."

92. The process by the Commissioner in these proceedings was not in accordance with Lands and Titles Act for that the "land" was not vested in the Provincial Assembly following the steps set forth by s. 69-[1][c] of the Land and Titles Act [Cap 133] but rather in the names of the 3rd defendants.

By S. 195 [3] of the Land and Titles Act;

"No interest in land shall be registered in the names of more than one Solomon Islander as joint owners, unless there is produced to the Registrar a statutory declaration made in public by each of the joint owners setting forth the names, description or group name and, so far as is practicable, the interests of the persons beneficially interested; and where any interest is so registered no disposition of the interest shall be registered unless there is similarly produced to the Registrar a statutory declaration made in public by each of the joint owners that the persons beneficially interested have been consulted and that those of such persons in favour of the disposition of the interest are entitled to the major portion of the beneficial interests in the said interest of which the disposition is sought to be registered.

Provided that the Registrar may dispense with such statutory declaration in any case in which he is satisfied on such evidence as he may require that the joint owners alone are the persons beneficially interested:

Provided further that no statutory declaration shall be required in the case of a lease executed in pursuance of section 69 [1][b][ii]."

93. Since the time of the first registration Savino Laugana had died and whilst he was expressed to be a joint owner with these other 3rd defendants, neither the acquisition report nor the material in evidence before me touches on any statutory declarations *"setting forth the names, description or group name and, so far as practicable, the interests of the persons beneficially interested;"* I say this for in the report, while Mrs Maelanga *"determined that Savino Laugana, Vincent Kurilau, Renato Kavichavu and Moses Botu are being identified and declared as the true representatives, trustees and therefore has the right to sale the said coastal land and to receive the purchase money"*, nowhere does it explicitly set out the groups or interests of those groups

to this land. This is particularly relevant for the remaining three registered owners denial of the fact of the extent of land leased to the 4th defendant must raise questions about their representative capacity in relation to the tribe formally represented by the deceased, Salvino Laugana who had been aware of the previous agreements for sale to Aggressor Solomons Ltd since moneys had been paid him under the agreements in his representative capacity . For on the death the surviving joint owners in the absence of the appointment of a substitute, are deemed in equity to hold the late Salvino Laugana's interests on behalf of those beneficially entitled and that is difficult to determine in the absence of the statutory declarations envisaged under the Act to be kept by the Registrar of Titles. The very problems which the statutory declarations may address have arisen here; the remaining registered owners appear to have denied any interest the late Salvino Laugana and his Tribe may have had in the two agreements and the MOU evidenced in these proceedings. Those agreements left me in no doubt that moneys paid were in consideration for the extended land included in the registered lease. It is these *post facto* disputes which make these agreements so problematical. In the absence of evidence about the statutory declaration envisaged by S. 195 [3], *the interests of the persons beneficially interested in the land,* [interests previously held by the late Salvino Laugana] there must be a lacuna in terms of the 3rd defendant's representative capacity in these proceedings. This is made plain since the evidence of Mrs Douglas and Mr. Orodani shows moneys were paid to the deceased pursuant to these agreements. I consequently do not accept the assertion by Mr. Vincent Kurilau, in paragraph 6 of his statement where he says;

> *"I say further that had the fourth defendant informed us or had we knew of the fourth defendant's intention to lease the land stretching from the seafront of Heritage Park Hotel to SI Ports Area, we would have rather asked her to settle on much higher payment that would be deem fair and reasonable in an open market given the size, site and value of the land."*

94. I accept the written agreements for sale correctly state the facts and Mr. Kurilau is mistaken.

95. Mr. Radclyffe pointed to Mr. Vincent Kurilau's statement, and the exhibited **Acquisition Report of Bokona land, sea front in between Heritage Park and Agressor Solomons, Guadalcanal** particularly the letter of appointment of acquisition officer, Mrs. Nestor Maelanga dated 22 February 2011. In that Public Notice of Appointment the Provincial Secretary of the Guadalcanal Provincial Assembly states that; **"I have appointed Mrs. Nestor Maelanga an Acquisition Officer to act as my agent for the purpose of acquiring Customary land** *at High water mark land between the boundaries of Heritage Park Hotel and Mendana Hotel* **for the purpose** *of Commercial development."*

96. The point Mr. Radclyffe sought to make by reference to this appointment is that the Province has no jurisdiction within the Honiara City Boundaries. He said the Commissioner of Lands was the appropriate authority to appoint the acquisition officer, but while the Commissioner had power, the seaward estate is within the Honiara Town boundary and the acquisition expressed to be for commercial purposes. While there is no issue on the absence of any approval by the City Council to the construction of the breakwater, it is clear the Provincial Government was not

concerned with the breakwater construction, rather relied upon it in the letter of appointment as reason for the acquisition for commercial purposes.

97. The Provincial Government Act [Cap 118] at Schedule 1 delineates the provincial boundaries and when dealing with Guadalcanal Province, specifically excludes Honiara. By Warrant establishing the Honiara Town Council [since named City Council] dated 4th August 1992 [subsidiary legislation pursuant to the Local Government Act Cap 117] by clause 4, the area of authority of the Council shall be that area shown as Honiara in Plan no. 1981 held in the Office of the Commissioner of Lands. The Town Plan no. 1981 has been exhibited and includes the area of sea the subject of these proceedings. As well, the Council, by clause 7 is able to perform all or any of the functions set out in the Schedule to the Local Government Act. The Schedule, in accordance with s. 45 of the Act, lists the functions of Council and while the published schedule in the "Green Volumes of Laws" may not be up to date, I am not concerned to see to the claimant's criticism following Mrs Corina Douglas' oral evidence that planning approval for the construction of the breakwater was not obtained from the Honiara Town and Country Planning Board before commencement. That is not an issue in these proceedings.

98. I find that clause 6 of the Warrant is effective in enabling the Honiara Town Council to stand in place of the Provincial Assembly where so named in Ss. 60, 61 of the Land and Titles Act for by clause 6 the Honiara Town Council may exercise *"all the powers, duties and functions conferred upon a Provincial Assembly and a Town Council by the Local Government Act and <u>any other law for the time being in force.</u>"*

99. The reference to any other law I take to include the Land and Titles Act.

100. I accept Mr. Radclyffe's argument on the absence of power in the Province to appoint, although he does not go so far as to say the City Council had the right to appoint. He says the proper person was the Commissioner. I find that the Guadalcanal Province has no jurisdiction over the area of the Honiara Town for the town area has been excluded from the Province. Consequently the presumed authority by the Provincial Secretary to appoint an acquisition officer is absent. Neither the Commissioner nor the Honiara City Council had sought to appoint. The appointment is void in any event.

101. Before proceeding, I wish to make some comments about "agency conflicts" touched on earlier. Put simply, an agency relationship arises whenever one or more individuals [in this case the Provincial Government] called *principals*, hires or appoints one or more individuals, called *agents* [the Commissioner of Lands] to perform some service and delegates decision-making authority to the *agents*. Since the expressed purpose is to purchase a particular land parcel from individuals, to the benefit of the *principal* [who takes for the people of the Province], the *agent* is not morally concerned to see to the interests of the individuals selling the land parcel. It cannot then in terms of the *principal/agent* relationship be said to be without potential conflict of interest were the *agent*, the Commissioner of Land to act as an intermediary in any arrangement. Conversely, the Commissioner may not be expected to have business acumen to such an extent as to determine a commercially satisfactory outcome for the individuals selling and the *principal*. That outcome rests with the parties.

102. The 1st and 2nd defendants have argued, in reliance upon S. 13 of the Town and Country Planning Act, that while accepting the Honiara City Council as the regulatory authority for the City, such authority does not extend to customary land.

103. This argument is mistaken for the section deals with control of development of land by the Minister by notice; no notice has been exhibited and no development the subject of an order has been mentioned in the proceedings. It is not relevant to point to a phrase, *" provided no order ... shall apply to customary land"* without proper justification.

104. It can be seen from the above that there were issues about the actual areas intended to be acquired by the acquisition officer for the letter of appointment was restrictive and was not that area subsequently vested following enquiry, but an enquiry which made clear that the officer was dealing with the larger parcel. No proper objections were raised in the hearing or since until now. There is no need for me to deal with these issues between the 3rd and 4th defendants since the matter may shortly be dealt with on other basis.

105. The first, of course is that of the absence of authority in the Provincial Assembly to presume to appoint an acquisition officer.

106. The second basis is that to be found in the decision of the Court of Appeal. In the case of purchase by a Provincial Assembly [or Town Council], where the Provincial Secretary has appointed an acquisition officer, the Commissioner of Lands need follow the steps set out in s. 69 [1][c] of the Land and Titles Act before making his vesting order. Failure to follow the steps will vitiate the order. The Public Notice appointing Mrs. Nester Maelanga acquisition officer as the agent of the Provincial Secretary for the purpose of acquiring customary land, related to purchase, not lease, in the absence of any restrictive words as to purpose.

107. The agreement in terms of s. 62 [b] was expressed to be for sale of customary land but recited no price or consideration and the date of its coming into effect was not apparent on the document in the absence of a date. The document is manifestly deficient in material particulars. It is not an agreement for the purposes of S. 62 of the Act.

108. The introductory recital of the parties described Nester Maelanga the acquisition officer as *"agent of the Commissioner of Lands/ ~~Clerk to~~ Provincial Assembly [Purchaser]"* . Her authority, if any could only be derived from the letter of appointment by the Provincial Secretary dated 22 February 2011. The Province had no power to appoint.

109. The first step in the case of a purchase of land by a Provincial Assembly where the Provincial Secretary has appointed an acquisition officer following report is by the Commissioner *"receiving from the Provincial Assembly and paying to the persons named in the agreement as vendors the purchase money;"* [s. 69-[1][c][i]]. No moneys were recited as changing hands although the acquisition officer intimated that moneys had been paid the 3rd defendants by the 4th defendant. No moneys from the Province passed to the 3rd defendants.

110. The last two steps by the Commissioner were; *" allowing the Provincial Assembly to take possession of the land"*; and *"making an order vesting the perpetual estate in the land in the Provincial Assembly for and on behalf of the people of that Province, free from all other interests; "* [s. [69][c][iii][iv]].

111. None of these steps have been followed; the possession of the land [the seaward estate] always remained with the customary landowners until by agreement it was granted to Aggressor Solomons Ltd; the Provincial Government never purchased it and the perpetual estate was not vested on behalf of the people of the province, rather it passed directly to the customary landowner representatives.

112. I should say Mr. Banuve in his written submissions said this claim by the Hotel was not a challenge to the acquisition process, rather restricted to its outcome. That may have been the original intention of the claimants but the Court of Appeal decision in *SMM Solomons Ltd* has overtaken it, [a fact acknowledged by Mr. Radclyffe]. Mr. Banuve says the challenge by notice was never made [to the validity of the process] by the Claimant as required under the Act and the finding of the acquisition officer may not be challenged on this point.

113. This later submission may not stand uncorrected for notwithstanding the focus of the original challenge by the claimant in its pleading, where this court is appraised of the decision of the Court of Appeal dealing with and informing of, the proper manner of acquisition, this court is bound to apply that decision to the facts of this case unless they are distinguished. It may not ignore the finding. The failure to plead the erroneous process cannot be reason for this court to ignore the decision of the Appeals Court were I to find such error. That Courts finding is binding on me unless it has been distinguished and I do not accept that it has. The facts of this case satisfy me of the failure of the acquisition process for it did not comply with the strict procedural requirements of the Act which amount to a Code.

114. The hierarchical system of courts exists in the Solomon Islands. Each tier shall accept [and apply where appropriate on the facts] the decision of the upper tier. In spite of the apparent continuing failure to follow the strict regime laid down by Part V of the Land and Titles Act *"the only judicial means by which decisions of the Court of Appeal can be reviewed is by the court itself"*.[*per* Lord Wilberforce in *Miliangos v. George Frank [Textiles] Ltd]*[7].

115. The claimant pleads mistake for that the Commissioner should have vested the seaward estate in the Hotel in accordance with the "promise". That mistake has not been made out. But mistake has been shown to have occurred on the face of the Record of the Acquisition. No consideration passed from the Commissioner to the customary landowners. The registered parcel proprietors, the 3rd defendants were not in possession of the seaward estate at the time of the acquisition, so the Commissioner was never in possession of the seaward estate. The agreement for sale was no "agreement" in terms of S. 62. The land register may be rectified.

116. The registered owners cannot claim the protection of S. 229 [2];

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[7] [1976] AC 443 at 459.

"[2] The land register shall not be rectified so as to affect the title of an owner who is in possession and acquired the interest for valuable consideration, unless...", for the vesting and initial registration is invalid and the 4th defendant's registration, reliant on the initial registration by the 3rd defendants, cannot stand.

117. By subsection [1] the court has the power to order rectification of the register by cancelling or amending any registration where the court is satisfied the registration has been "obtained, made or omitted by fraud or mistake". While "fraud" has not been suggested, "mistake" surely is apparent on the face of the record; it avails the 3rd and 4th defendants nought to argue that it has not been pleaded by the claimant for this court, when satisfied that the facts [undisputed in this case] illustrate such mistake, shall follow precedent and find that such mistake enlivens the courts power to rectify under S. 229 [1] of the Act.

118. It follows that the Commissioners vesting order is void ab initio and of no effect.

119. Before I proceed to make my orders, I wish to touch on matters raised in argument, matters which do not need my determination since they have not been raised by the pleadings. It is clear that the Commissioner of Lands accepted the presumed power to acquire the seabed, in accordance with the Act. The seabed is claimed by the customary landowners who by agreement, granted its use to Aggressor Solomons Ltd. The Honiara City Council had apparently declined to apply any planning powers which it may have in relation to the seabed although the area in question is within the city boundaries. Whether it lacks jurisdiction or just declined to act when the breakwater was erected was not an issue for determination in this case.

120. Customary landowners claiming the sea-bed *"as far as the eye can see"* as was suggested in this case would surely impinge on the States right to claim dominion over the Solomon Islands were customary landowners individually able to claim such dominion about all the sea boundaries of the State and seek perhaps compensation with respect to all constructions existing or envisaged about the coast and to have an exclusive right to treat with any person, body or foreign power in relation to the seabed. Section 10-[4] of the Land and Titles Act provides;

"[4] The Commissioner may apply to be registered as the owner on behalf of the Government of the perpetual estate in such land-

[a] below mean low water; and

a. *[b] between the points of mean high water and mean low water,*
b. *as vested in him under paragraphs [a] and [b] of section 47 [1] of the repealed Act."*

121. There was no evidence in these proceedings as to whether or not the seabed claimed by the customary landowners along the Honiara coast had ever been vested in the Commissioner in times past. If so then the Commissioner may apply to become registered as the owner of a perpetual estate in the seabed. That question was addressed by the Chief Justice in Land Appeal

Case no. 4 of 1993, *Combined Fera Group anors v. Attorney General*[8] and while the facts of that case are clearly distinguishable to those of this case, the Chief Justices careful enunciation of the applicable law affecting the sea coast would appear relevant today. Any enquiry relating to ownership of the seabed has as an incident, *"current customary usage"* defined to mean *"the usage of Solomon Islanders obtaining in relation to the matter in question at the time when that question arises, regardless of whether that usage has obtained from time immemorial or any lessor period."*

122. The facts of this case show that Mrs. Douglas is a member of and intimately connected with the landowning Tribes concerned with the seabed. That relationship does not however, address the issue of *"current customary usage"* and that issue of ownership of the seabed about the Honiara coast or elsewhere, may need to await resolution another time.

ORDERS

In accordance with powers to be found in S. 229-[1] by reason of the mistakes which void the purported act of the Commissioner in vesting the land the subject of the registration, I make the following orders;

1. Rectification of the Perpetual Estate Register in respect of Parcel no. 191-017-108 by

   [a] cancellation and

   [b] cancellation of the registered lease between Savino Laugana, Vincent Kurilau, Moses Botu and Renato Kavichavu , lessors and Corina Douglas, lessee as it affects Parcel no. 191-017-108;

2. The vesting order by the Commissioner of Lands following purported acquisition proceedings in relation to the land parcel which became registered in the Perpetual Estate Register as No. 191-017-108 I declare void.

3. The cross claims of the 3rd and 4th defendants are dismissed.

4. I grant liberty to the 4th defendant to apply if need be in relation to any claim for indemnity arising out of my order 1 [b].

5. The 1st and 2nd defendants shall pay the other parties costs on the 3rd schedule basis.

BY THE COURT

[8] [1997] SBHC 55; HC-LAC 004 of 1993