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

CIVIL APPEAL CASE No.16 OF 2009

IN THE MATTER OF: **THE LAND LEASES ACT [CAP.163]** as amended hereinafter referred to as ("the Act")

AND IN THE MATTER OF: **THE VALUATION ACT No.22 OF 2002**

BETWEEN: **GILBERT DINH** of P.O.Box 205, Port Vila, Republic of Vanuatu
Appellant

AND: **MENZIES SAMUEL,** Valuer General, C/- Department of Lands, PMB 9001, Port Vila, Republic of Vanuatu
First Respondent

AND: **DIRECTOR OF LAND RECORDS**, C/- Department of Lands, Port Vila, Republic of Vanuatu
Second Respondent

AND: **SILVER HOLDINGS LIMITED,** Port Vila, Republic of Vanuatu
Third Respondent

AND: **JOHN PAMAVARI** of Tangoa Island, South Santo, Republic of Vanuatu
Fourth Respondent

AND: **ALLEN PALER AND GEORGE PALMER** of Tangoa Island, South Santo, Republic of Vanuatu
Fifth Respondent

Coram: *Chief Justice Vincent Lunabek*
Justice Bruce Robertson
Justice John von Doussa
Justice Nevin Dawson
Justice Daniel Fatiaki

Counsel: *Mr Felix Laumae for the Appellants*
Mr Avock Godden for the First and Second Respondents
No appearance for the Third Respondent
Mr George Boar for the Fourth and Fifth Respondents

Date of hearing: *23rd and 28th April 2010*
Date of Judgment: *30th April 2010*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

JUDGMENT

THE APPEAL

1. This is an appeal from a decision of a judge of the Supreme Court which dismissed the Appellant's claim. In the principal proceedings the Appellant sought orders setting aside the decision of the First Respondent, the Valuer General, made on 31st May 2006 pursuant to his powers under s.46 of the Land Leases Act and s.5 of the Valuation Act to enforce the forfeiture of the Appellant's interest as lessee in lease 04/2952/002 ("the lease") by determining it. Consequential orders were also sought to compel the Second Respondent to reinstate the Appellant as lessee on the Register of Land Leases. The Third Respondent, Silver Holdings Limited ("Silver Holdings), became registered on November 2006 as the new lessee of the lease after payment of a substantial premium to the lessor for the transfer of the lease.

2. The Fourth and Fifth Respondent (the lessor) represent the interest of the custom owners and the registered lessor of the lease.

3. If the relief sought by the Appellant were to be granted the interest of Silver Holdings would be directly affected. It would loose its interest as lessee and be faced with the prospects of recovering the premium payment from the Fourth and Fifth Respondents.

4. When this appeal was called on for hearing there was no appearance of Silver Holdings, and counsel for the Fourth and Fifth Respondents clarified that at no time had he represented the Silver Holdings interests. When this became apparent the Court indicated that the appeal could not proceed, and it would be inappropriate for the Court to express any view on the merit of issues raised in the principal proceedings. Further inquiries by the Court about the representation of the parties at the trial in the Supreme Court

raised serious doubts whether any of the Respondents had received proper notice of the trial.

5. For reasons which follow we are not satisfied that the Respondents, and in particular Silver Holdings, had received notice of the trial and in the interest of justice we consider the judgment in the Supreme Court must be set aside. The principle proceeding will have to be re-listed before another judge for decision on the merits. In the meantime there will be interlocutory orders to preserve the rights of all parties.

BACKGROUND FACTS – ISSUES IN THE PRINCIPAL PROCEEDINGS

6. In 1995, the Appellant became the registered lessee of the leasehold title to Urelapar Island. The lease was for a term of 75 year from 3rd June 1994, and the rental for the full term was paid in advance. The lease contained many conditions imposing obligations on the Appellant, but it is sufficient to refer to 2 only.

7. Under Clause 2(b)(i) the Appellant agreed to complete the construction of the first stage of a tourist resort and to open the resort for business no later than 5 years from the date of execution of the lease provided that this stage shall include no less than 6 new bungalows, restaurant, kitchen, water supply and additional infrastructure. Under Clause 1(a) from the 5th anniversary of the commencement of the lease the Appellant was obliged to pay additional rent of two percent (2%) of the gross turnover for goods and services supplied by the business to be conducted by the Appellant on the Island.

8. It is common ground that no construction work of the kind envisaged by Clause 2(b)(i) had taken place within the 5 years of the lease, and in fact none has taken place even now.

9. Starting in 2000 the lessor has taken steps to enforce compliance with many conditions of the lease, and had sought compensation and

threatened forfeiture of lease for non compliance with Clause 2(b)(i). There also have been negotiations between the Appellant and the lessor as to the purchase of the leasehold interest from the lessor. It is not necessary to go into detail about these matters.

10. Ultimately on 15th March 2006 the lessor served Notice before Forfeiture under s.45 of the Land Lease Act requiring payment of VT20,000,000 as compensation for non-compliance with conditions of the lease, failing which the lessor would forfeit the lease. The Notice concluded with a notation as follows:
"I draw your attention to section 46 of the Land Leases Act [CAP.163] whereby you may, if you wish to, apply to the Valuer General for relief".

11. No compensation was paid and no application was made for relief under section 46. A lessee who has been served with a Notice before Forfeiture under s.45 may apply to the Valuer General for relief, and the Valuer General may grant or refuse relief having regard to all the circumstances of the case, and if he grants relief may do so on such terms as he thinks fit.

12. The lessor applied to the Valuer General to enforce the right of forfeiture.

13. On 24th May 2006 solicitors for the Appellant wrote to the Valuer General, with a copy to the lessor, denying fundamental breach of the lease by the Appellant and saying that the attempted forfeiture was being done with an ulterior motive and must not be enforced by the Valuer General. The letter continued:
"We kindly request if you could withheld (sic) enforcement of the forfeiture notice and arrange for a round table meeting to look into circumstances surrounding the purported forfeiture of our client's lawful lease without resorting to the court proceeding. We (are) prepare(d) to make submission on behalf of our client for your consideration should you require".

14. On 31st May 2006 without first contacting the Appellant or his solicitors the Valuer General determined the lease *"for failure to build the tourism resort*

within the time specified in Clause 2(b)(1) in the lease schedule and the breach of other covenants as consequences of failing to build the tourist resort". The determination included the statement that-

"...the lessee was notified of the application and that by reason of section 46(1) of the Land Leases Act he may apply to the Valuer General for relief against forfeiture but the Lessee submitted no application or response".

15. On 26th June 2006 the Appellant commenced proceedings (Civil Case No.19 of 2006) against the Respondents to this appeal (other than Silver Holdings who at that time had not become the registered lessee), alleging that the Valuer General's determination was unlawful, and seeking damages.

16. On 26th October 2006 after the Supreme Court had pointed out to the Appellant that the relief claimed in CC 19 of 2006 did not seek an order setting aside the Valuer General's determination, the Appellant commenced a fresh action, Civil Case No.195 of 2006, seeking judicial review of the Valuer General's decision. Initially Silver Holdings and the Fourth and Fifth Respondents were not named as parties, but in February 2007 they were named as parties in an Amended Application for judicial review. These proceedings were transferred from the Vila Registry to the Luganville Registry of the Supreme Court on 14th January 2009, and on transfer the action was assigned a new action number in the Luganville Registry, CC No.9 of 2009. It is in those proceedings that the judgment under appeal to this Court was made.

17. Regrettably the Court file in CC 195 of 2006 was destroyed in the Courthouse fire in June 2007. The reconstituted file contains only the originating proceedings for judicial review filed on 24th October 2006, the amended application seeking similar relief dated 16th February 2007 and a Notice dated 26th September 2007 from George Vasaris & Co., barristers and solicitors, advising that the firm had ceased to act for Silver Holdings. The file contains no information about service of the proceedings,

responses by any of the Defendants, or whether any interlocutory applications had been filed or heard before the fire.

18. These were the only papers in the file when the Chief Justice had the Registrar on 8th December 2008 issue a Notice of Conference to the parties advising that the matter would be listed before him for conference in chambers on 14th January 2008. The Notice of Conference was addressed by the Registrar to the Appellant's counsel, to the State Law Office as lawyers for the First and Second Respondents, to Silver Holdings at a post office box address in Port-Vila being the address shown for the company in the originating proceedings, and to counsel for Fourth and Fifth Respondents.

19. Silver Holdings is a company incorporated in Vanuatu. The identity of the holder of the post office box number nominated by the Appellant on the originating proceedings is not known but it is not the post office box address shown for George Vasaris & Co in the Notice of Ceasing to Act.

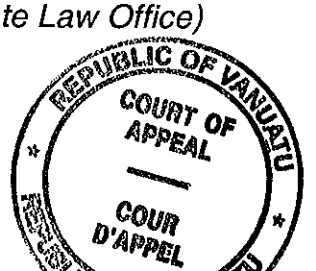
20. Counsel for the Appellant and for the First, Second, Fourth and Fifth Respondents appeared before the Chief Justice. There was no appearance for Silver Holdings. The Chief Justice, after questioning the parties about the current stages reached in both CC 19 of 2006 and CC 195 of 2006 made an order transferring CC 195 of 2006 to Santo to be dealt with, together with the CC 19 of 2006.

21. The Court file discloses that after the reconstituted file for CC 195 of 2006 was transmitted to Luganville and re-numbered, the Assistant Registrar issued a Notice of Hearing bearing the new action number addressed as follows:

"NOTICE OF HEARING

TO: *Gilbert Dinh*
(Represented by Felix Laumae, Trans-Melanesian Lawyers).

AND TO *Menzies Samuel of Valuer General & Director of Land Records (Represented by State Law Office)*



AND TO: *Silver Holdings*
(George Vasaris & Co. Port Vila)

AND TO: *John Pamavari, Allen and George Palmer*
(Represented by George Boar, Pacific Lawyers, Port Vila)."

22. There is no indication in the Court file as to how this Notice was being given to any of the parties, and if by post in the case of Silver Holdings how the envelope was addressed.

23. The time and date appointed by the Court for the hearing was 8.30am on 28th July 2009 at the Santo Courthouse.

24. On that occasion the judge's notes indicate that counsel appeared for the Appellant. A lawyer from the State Law Office was in Court but he appeared in an unrelated matter. That lawyer informed the Court that he was not aware of the matter having been listed and had no instructions. He took no part in the trial which followed. There was no appearance by or on behalf of the Third, Fourth or Fifth Respondent.

25. The trial judge proceeded with the trial of the matter, and after hearing counsel for the Appellant at some length, delivered an oral judgment dismissing the Appellant's claims for relief. Several pages of the transcript of the judgment deal with the power of the Valuer General. The Judge held that the Valuer General had jurisdiction to make the determination under challenge. The Judge then turned to the Appellant's substantive argument that there had been a breach of natural justice in that the Valuer General did not give the Appellant a sufficient opportunity to be heard, and in particular did not respond to the request to be heard in his solicitor's letter of 24th May 2006. The Judge dismissed that aspect of the Appellant's claim saying, shortly:

"In respect of the second issue of procedural fairness and natural justice, the Valuer General made clear reference to section 45 of the Land Leases Act in his determination at paragraph 4. Section 45 provides for Notice Before Forfeiture. In his own sworn statement the Claimant discloses

documents which were served on him by the lessor in compliance with section 45. These raised the breaches alleged and requested the lessee to make good the breaches within the time specified. The lessee did not do that.

In the Court's opinion, the lessor's complying with section 45 of the Act amounted to giving the Claimant an opportunity to make representation but it appears that he did not do that. He cannot therefore complain that natural justice was not afforded to him.

For this reason, the Court finds no breaches of natural justice or procedural unfairness. The Claimant's application fails in its entirety and is hereby dismissed."

26. It should be noted that section 43(1) of the Land Leases Act which contains the power for a lessor to forfeit a lease says that the power is subject to any provisions of the contrary contained in the lease. It seems that the Judge's attention was not drawn to clause 7 of the subject lease which requires disputes and differences arising under the lease to be referred to the Land Referee Act [CAP.148] (now replaced by the Valuation Act [CAP.288]). That clause may have been of importance to the Appellant's arguments.

PROCEDURAL ISSUES

27. When it became apparent to this Court that counsel for the Fourth and Fifth Respondents was not and never had acted for Silver Holdings the Court enquired of counsel for the Appellant whether he or anyone on the Appellant's behalf had served the Notice of Appeal or given notice of the hearing before this Court to Silver Holdings. Counsel was unable to say that this had occurred. There was nothing in the Court file to suggest that Silver Holdings has ever been informed about the judgment given in the Court below, let alone that an appeal had been instituted from that judgment. As pointed out at the commencement of this judgment the

Appellant is seeking orders that would deprive Silver Holdings of its leasehold interest for which it has paid substantial money.

28. The Court adjourned the hearing of the appeal to enable the parties to search their files to ascertain if there was additional information available about service of the Notice of Appeal on Silver Holdings, or about the giving of notice to the Respondents about the trial date. When the matter was called on again the State Law Office had placed a number of documents before the Court which are not in the re-constituted Court file. No other information was placed before the Court by any of the other parties, and counsel for the Appellant conceded that the Notice of Appeal had not been served on Silver Holdings. After the Court had reserved judgment further documents were filed on the Appellant's behalf, but with the exception of one letter found on file of the Appellant's lawyers those documents add nothing new to the facts already known.

29. The additional material from the State Law Office shows that the amended application for judicial review was served on Silver Holdings in late February 2007, and that on 2 March 2007 Silver Holdings filed a response giving its address for service as C/- Vasaris & Co. The letter from the file of the Appellant's lawyers is to the Court with a copy to them from Vasaris & Co dated 7th July 2009. This letter advises that Vasaris & Co had received the Notice of Hearing referred to in paragraph 21 above, but went on to advise that they had not been served with proceedings in CC 9 of 2009 but nevertheless they had no instructions from Silver Holdings and all future notices should be served directly on Silver Holdings.

30. All Respondents including Silver Holdings were represented by lawyers at a conference held on 20 March 2007 but as earlier noted Vasaris & Co filed a notice of ceasing to act on 26th September 2007. The additional information does not show that Silver Holdings received any communication thereafter from any of the parties or from the Court.

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31. It is a fundamental principle that a Court should not make orders that directly affect the interests of a person unless and until that person is a party to the proceedings and is given sufficient notice thereof to enable a response to be made to the claim for relief sought against that party. Adequate notice requires that the proceedings be served, and that each party who files a response is duly notified of hearings at which the Court is asked to make orders adverse to that person, or to decide issues which may affect the interests of that person.

32. In **Pegang Mining Co Limited v. Choong Sam** [1969] 2MLJ 52, at 55-6 the Privy Council discussed the kind of interest which this principle is designed to protect and said:
*"It has been sometimes said as in **Moser v. Marsden** [1983] 1 Ch 487 and in **Re IG Farbenindustrie AG** [1944] Ch 41 that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. **A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"*** [Emphasis added]

33. The requirement to join a person whose rights will be directly affected is an inflexible one. An order which directly affects a third person's rights against or liabilities to a party should not be made unless the person is joined as a party: see **New Limited v. Australian Rugby Football League Ltd** [1996] 139 ALR 193 at 298 and **Rarua v. Electoral Commission of the Republic of Vanuatu** [1999] VUCA13.

34. The Civil Procedure Rules (CPR), in Rule 3.1(2), makes provision for joinder of a representative party, but the principle remains. The party

whose interests are affected must be before the Court, albeit in such a case through a representative party.

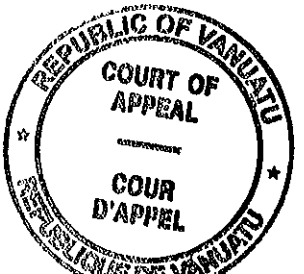
35. Once a party is joined, the question of service arises. Again the inflexible rule is that the proceedings must be served either personally on an individual, by service in a recognised manner on a corporation, or in accordance with an order for substituted service if regular service is not possible, for example where a person cannot be found or he is avoiding personal service. The CPR, Part 5, deal more specifically with how service is to be affected.

36. Once a party is served with an initiating proceeding, the CPR, Rule 4.4 requires that parties against whom a claim is made are to file a response which places on the court records an address for service. Thereafter documents to be served and notice of events scheduled to occur in the matter can be sent to that address by the other parties. On proof of service or notice given at that address the Court will assume that proper notification is thereby given unless by evidence adduced by a party the Court is persuaded otherwise.

37. If no response is filed, CPR Part 9, contains provisions for a party to proceed to a judgment in default. The Claimant can proceed to obtain that judgment without serving further papers, but once judgment is obtained the Claimant must serve the judgment, in this way giving the party whose rights are adversely affected a further opportunity to be heard.

38. Two very important points are to be noted, and they cannot be over emphasized.

39. The first point concerns service. There seems to be an assumption afoot that the Court has an obligation to serve notices, particularly notices of hearing, on the parties. The Court has no such obligation. The Civil Procedure Rules, Part 5.1 is perfectly clear. That Rule says:



"5.1 (1) If these Rules require a document to be served, the party who filed the document is responsible for ensuring that the document is served."

(2) The party responsible for service may apply to the court for an order that the document be served by an enforcement officer or other person.

(3) The court may order that the document be served by an enforcement officer or other person if the court is satisfied that the circumstances of the proceeding require it."

40. Rule 5.1(2) and (3) make provision for a party to obtain an order for service by an enforcement officer or other person, but the primary obligation stated in Rule 5.1(1) continues to apply. The party who files a document which requires service must serve it or arrange for it to be served.

41. The Supreme Court often issues notices of hearing or notices of conference, as to which see CPR Part 6, and endeavours to circulate them to all the parties. However this is an administrative step taken as a convenience to the parties and to move matters along. This practice of the Court in no way lessens the obligation under Rule 5.1. The party who files an application, that is the party who is seeking an order or remedy, is responsible for serving it. If the document initially does not clearly state when the Court will deal with the matter, it is the continuing responsibility of the party seeking the order or remedy to completely discharge the intention of Rule 5.1(1) by informing all the parties concerned of the time and date appointed by the Court. This may mean that parties are sometimes twice notified of the hearing date, once by the notice from the Court and once by the party who is seeking the order, but so be it. It is always the responsibility of the party seeking that order to ensure that all the parties whose interests may be directly affected are duly notified. Further, it is the duty of that party to ensure that evidence proving that notice has been given is available to the Court in the event that a necessary party does not appear.

42. As this Court has said on many occasions, parties should use a telephone if necessary to ensure that other parties are properly on notice; and when a party fails to appear that party should be contacted, if necessary from the Court, to confirm that notice was given. Parties whose rights are affected must be given a reasonable opportunity to answer the claim being made. This principle may not apply in a case where the orders sought are not final in nature and deal only provisionally with the rights of the parties, for example in respect of interlocutory orders, as to which see CPR Rule 7.1, and in respect of formal conference hearings, as to which see CPR, Rule 7.2(3). However, as a general proposition a party must be given the opportunity to answer a claim which affects that party's rights.

43. The notion that it is a smart or clever practice to ambush an opponent by giving minimum or inadequate notice is simply wrong. Where the Court detects such a practice, orders made in consequence are usually set aside with a costs order against the party or the lawyer responsible. Where the rules require that a particular period of notice be given, that period must be given unless there are special reasons for the Court to otherwise order. As to the meaning of such time provisions see s.33 of the Interpretation Act [CAP.132], and observations made by this Court in Civil Appeal No.2 of 2010, VCMB v. Claire Dornic in which judgment is being delivered today.

44. The second point is a corollary of the first. It is the function of a judge or court officer hearing an application where a decision or order finally affecting the rights of a party is sought to ensure that due service and notice of the hearing has occurred. Where a party does not appear at the hearing the judge or court officer should inquire why, and not proceed unless satisfied that due service or notice, as the case may be, has occurred. If the party seeking an order or relief cannot satisfy the Court, no order or decision that materially affects that person's rights should be made. The matter will have to be adjourned to enable confirmation of service or notice to be obtained, or for a party who is not notified to be given notice. The adjournment may well be subject to a costs order against

the party who is not in a position to establish that due notice has been given.

45. These formalities need not be followed when the Court in the presence of a party adjourns a matter to a fixed date. The party present has then received adequate notice for the next hearing.

46. There will occasionally be exceptional circumstances where the Court considers that urgency requires orders affecting an absent party to be made even when due notice has not been given or properly proved. Applications for injunctions and other urgent relief provide examples. However in these cases the Court should refrain from making any final order. Whatever orders are made should be interlocutory only and the orders should include a specific order adjourning further considerations of the matter to a fixed time and date not too far in the future. Thus, when the interlocutory order is served the absent party whose rights are affected by the order has an early opportunity to place material on the Court file and to attend before a judge to have the order reconsidered. On reconsideration the parties are accorded an opportunity to argue that the interlocutory order should not have been made or should not be converted into a final order.

47. The distinction is clear between an interlocutory order made in the absence of a party where that order can be reconsidered on the merits if the absent order wishes to be heard at a later date, and a case where a final order that gives an absent party no opportunity to answer the claim.

APPLYING THESE PRINCIPLES TO THE PRESENT CASE

48. When the matter was before the Chief Justice in January 2009 there was no need for the Chief Justice to refrain from making the orders which he did. The orders were in the nature of directions. They were plainly interlocutory and did not relevantly affect the interests of Silver Holdings.

49. However, once the matter was before the Court for hearing on the merits it was incumbent on the Appellant, as the party seeking orders that would

affect the property interests of Silver Holdings, to establish to the satisfaction of the trial court that Silver Holdings was aware of the hearing date.

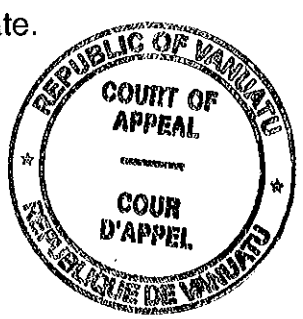
50. The Court was entitled to assume Silver Holdings had been served with the originating proceedings because Vasaris & Co would not have filed a notice that they were no longer acting if they had not earlier filed a response. However, further enquiry would have revealed that the notice of conference issued at the request of the Chief Justice was at best posted to a post office box which was an address nominated by the Appellant, and not one filed by or on behalf of Silver Holdings. And it is now known that when Vasaris & Co received the Notice of Hearing for the trial they advised the Court and the Appellant's solicitors that as they were not acting the proceedings would have to be served directly on Silver Holdings.

51. When the case was called for trial, the information received by the judge that the State Law Office were not aware of the hearing, and the absence of the Fourth and Fifth Respondents should have put the Court on notice that something could be amiss.

52. The Appellant has failed to satisfy this Court that Silver Holdings was given notice of the trial. In these circumstances we consider that the justice of the case requires that the judgment under appeal be set aside, and the matter remitted for trial before another judge where the natural justice arguments put to this Court can be considered along with the possible relevance of clause 7 of the lease.

CONCLUSION

53. The appeal must be allowed; the orders of the Court below are set aside including the order as to costs; there will be no order as to costs below, and the Appellant must pay the costs of the First, Second, Fourth and Fifth Respondents in this Court at the standard rate.



54. The Appellant must bear the order for costs in favour of the Respondents as procedural irregularities, ultimately the responsibility of the Appellant, have resulted in their appearances before this Court being a pointless exercise.

DATED at Port-Vila this 30th day of April 2010

BY THE COURT

.....
Chief Justice Vincent LUNABEK

.....
Justice Bruce ROBERTSON

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU

.....
Justice John von DOUSSA

.....
Justice Nevin DAWSON

.....
Justice Daniel FATIAKI