

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

Civil Case No. 185 of 2009

**BETWEEN:** RICHARD ANTHONY STEPHEN KONTOS and  
GLORIA KOFFAL

Claimants

**AND:** GILBERT DINH

Defendant

**Coram:** Justice D. Fatiaki

**Counsel:** Mr. S. Hakwa for the Claimants  
Mr. J. Malcolm for the Defendant

**Date of Decision:** 15 October 2010

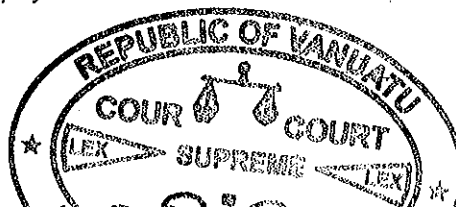
**JUDGMENT**

**INTRODUCTION**

1. This is a claim for specific performance arising out of Consent Orders and a Deed of Settlement entered into by the parties on 18 September 2009 in an effort to fully and finally settle eviction proceedings that were commenced by the Defendant in **Civil Case No. 238 of 2004**. The subject matter of the proceedings was the **Blue Water Island Resort** situated within 2 leasehold titles Nos. **12/1033/007** and **12/1033/008**. Although the history of the present proceedings dates back to 2004 and is marked by a less than congenial relationship between the parties, it is not necessary for present purposes to consider those relations which merely establish the backdrop to the present proceedings which are entirely based on the Consent Orders, the Deed of Settlement and the events that occurred after 18 September 2009.

**AGREED FACTS**

2. I am assisted by a statement of agreed (and disputed) facts filed in these proceedings as follows:-
  - 1) "On 17 July 2004 the parties entered an agreement for the sale and purchase of titles 12/1033/007 and 12/1033/008 (jointly called "the property") by way of a deposit and a monthly installment payment thereafter.
  - 2) A dispute arose between the parties as to the terms of the agreement and thereafter the payments ceased. The claimant was in possession.



Three monthly installments payments plus the deposit had been made at the time payments stopped.

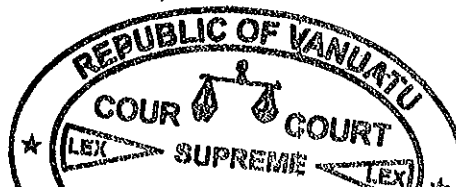
- 3) On or about 30 December 2004 the Defendant issued proceedings in civil case 238 of 2004. On 18 September 2009 the Defendant and the Claimants agreed to settle their claims in 238 of 2004 and Consent Orders (annexed Tab 1) were issued on 18 September 2009 by Justice Landers.
- 4) The parties agreed terms and conditions of settlement in a Deed dated 18 September 2009 which Deed was included as part of the Consent Orders.
- 5) In brief:
  - a) The Claimants were to pay \$1,642,000 by 4.00 p.m. on Friday 20<sup>th</sup> November 2009;
  - b) The Defendant says it was to provide on provision of such funds by the Claimants:-
    1. Executed transfers;
    2. Executed mortgage releases;
    3. Release of any charge or mortgage;
    4. Consent documentation.
  - c) The Claimants say the Defendant was to provide upon settlement to the Claimants personally or such other entity as the Claimants may choose good and unencumbered titles in the properties. In particular the Defendant was to provide (amongst other documents) the following:-
    - i. Advice of registration of withdrawal or cancellation of the Deed of Surrender of Lease dated 27 May 2004 and registered on 14 April 2005 in relation to Lease title Number 12/1033/007;
    - ii. Advise of registration of withdrawal of cancellation of the Deed of Surrender of Lease dated 27 May 2004 and registered on 14 April 2005 in relation to Lease Title Number 12/1033/008;
    - iii. Advice of registration of Discharge of the Deed of Mortgage by Westpac Banking Corporation dated 24 May 2004.
    - iv. Ministerial consent permitting the Defendant to transfer the properties to them personally or to such entity as the Claimants may choose; and
    - v. Executed Deeds of Transfer for the two (2) properties.
- 6) The Claimants were liable to provide the funds at the date and time being 1600 hours on 20<sup>th</sup> November 2009 and the Defendant says (disputed by the Claimants) prior to provision of such documentation.
- 7) The Claimants were unable to make the said payment on or before 4.00 p.m. on 20 November 2009.



- 8) *There was various correspondence passing between the solicitors of the parties and copies of such correspondence are disclosed in the affidavits filed in this matter.*
- 9) *On Monday 23<sup>rd</sup> November 2009 the Defendant gave notice making time of the essence at 8.00 a.m. on 10 December 2009. The Claimants dispute the validity of the such notice.*
- 10) *On Tuesday 8 December 2009 Ms. Ninna Ferraro who is the accountant for the Claimant's financier called and spoke to Mr. Geoffrey Gee by telephone from Australia. She advised Mr. Gee who she was and requested an extension of time so she could travel to Vanuatu to finalize the funds to enable the Claimants to settle.*
- 11) *Disputed by the Defendant the Claimants say that on Mr. Gee's advice she did an email to Mr. Gee. Mr. Gee promised to respond to Ms Ferraro's request but Mr. Gee did not respond either by telephone, facsimile or email to Ms. Ferraro's request. Ms. Ferraro made many attempts to speak to Mr. Gee with no success.*
- 12) *The Defendant says at no stage did it agree to an extension of time.*
- 13) *Ms. Ferraro arrived from Australia at about 14.30 on Wednesday 9<sup>th</sup> December 2009. She attended Mr. Hakwa's office at about 15.30 on the same day. She presented an Australian private company cheque to Mr. Hakwa for AUD\$1.8 million. The Westpac Bank was already closed on that day.*
- 14) *On 9 December 2009 (time disputed, the Claimants say 14.30. The Defendant says after office hours) Mr. Hakwa sent a letter by facsimile to Mr. Gee's office and advised settlement on 10 December 2009 and in such letter Mr. Hakwa advised the Claimants require the properties transferred not to their personal names but to a company POPCORN LIMITED and further that the documentation be prepared by the Defendant to reflect this.*
- 15) *Between 0700 and 0745 on Thursday 10 December Mr. Hakwa asserts (times disputed) he tried to contact Mr. Gee at his office by telephone. He received advice Mr. Gee was on his way to office. Later Mr. Hakwa received advice Mr. Gee was ill attending at his Doctor's surgery and that he would not be attending at his office for the whole day. Mr. Hakwa obtained details of Mr. Gee's mobile phone number from his office and called Mr. Gee.*

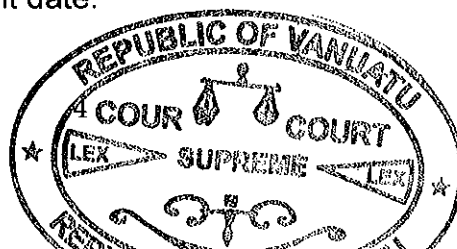
*Mr. Gee confirmed he would not be attending his office Mr. Hakwa advised:*

  - a) *Ms. Nina Ferraro has arrived with funds to enable the Claimants to settle immediately; and*
  - b) *The Claimants were ready to settle immediately.*
- 16) *The Claimants did not present a bank draft to Geoffrey Gee and Partners office prior to 8.00 am or at any time.*
- 17) *At 8.15am on 10 December 2009 the Claimants were served the cancellation notice.*
- 18) *The Claimants decided to subsequently transfer cleared funds to Mr. Hakwa's account on advice from Westpac the cheque could not be cleared for some time. The Westpac Bank advised this could be done*



the same day. On Friday 11<sup>th</sup> December 2009, Ms. Nina Ferraro and the Claimants went to the Westpac Bank at 9.00 to confirm the cleared funds were there. Ferraro directed that the funds ordered by the Court be transferred to the Registrar's account and the balance to Silas Hakwa.

- 19) The Defendant disputes the Claimant's validly or lawfully nominated Popcorn Limited.
  - 20) The Defendant disputes the Claimants were in a position to settle prior to 8.00am on 10 December 2009 or that:
    - a) The Claimants were ready and willing and able to settle; and
    - b) Disputes the Claimant attended the officers of Geoffrey Gee and Partners to settle at any time.
  - 21) The cancellation notice served at 8.15 am on 10 December 2009 was pre-dated and pre-signed by John Malcolm who was out of the country.
  - 22) The Claimant says and the Defendant disputes that:- "the Defendant did not prepare all relevant documents to enable settlement to take place at any time between 23<sup>rd</sup> November and 10 December 2009".
  - 23) The parties agree neither Geoffrey Gee nor John Malcolm were physically present at their office at Port Vila at or before 8.00am on 10 December 2009.
  - 24) The Defendant disputes that such was necessary or a condition of settlement.
  - 25) That the fax on 9 December 2009 the documentation be in the name of POPCORN LIMITED was the first time the Claimants had advised the Defendant of such nominee."
3. Although the agreed facts dates back to 2004 the crucial period for the purposes of this case extends for just under 12 weeks of which there are 4 critical dates: **18 September 2009** (when the Consent Orders and Deed of Settlement were signed by the parties); **20 November 2009** (the settlement date provided in the Deed); **23 November 2009** (the date when Notice to Settle was given by the Defendant); and **10 December 2009** (the new settlement date and the date when the Defendant's Notice of Cancellation was delivered to the Claimants).
4. Similarly, the important Notices over which there is disagreement between the parties are the Defendant's Notice to Settle and Notice of Cancellation. In respect of the former, the Claimants assert that the Defendant was not entitled to issue it because on that date, he himself, was not "ready, willing, and able" to discharge his obligations in terms of the Deed. As for the Defendant's Notice of Cancellation, the Claimants complain that it was pre-prepared and pre-signed by defence counsel before the relevant date. Counsel accepts however that the latter Notice was not served on the Claimants before the relevant date.



## THE EVIDENCE

5. The evidence in these proceedings mainly comprised sworn statements as follows:-

### For the Claimants

#### Pre – 10 December 2009 events:

- (1) Sworn statement of Richard Kontos dated 15 December 2009;
- (1) Sworn statement of Richard Kontos dated 15 December 2009;
- (2) Sworn statement of Richard Kontos dated 22 January 2010;
- (3) Sworn statement of Richard Kontos dated 10 February 2010;
- (4) Sworn statement of Gloria Koffal dated 22 January 2010;
- (5) Sworn statement of Nina Ferraro dated 20 January 2010;
- (6) Undated sworn statement of Nina Ferraro filed 20 January 2010;

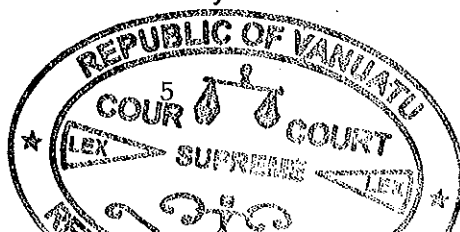
#### Post – 10 December 2009 events:

- (7) Sworn statement of Andrew Kevu dated 21 January 2010;
- (8) Sworn statement of Andrew Kevu dated 11 February 2010;
- (9) Sworn statement of Mereisi Caroline Pedro dated 21 January 2010;

### For the Defendant

- (1) Sworn statement of Gilbert Dinh dated 15 December 2009;

6. A bundle of agreed documents was also helpfully compiled by defence counsel for ease of reference. **[Note:** the bundle comprises 2 sets of documents with the first set under **Tabs A – XYZ** at **pp. 1 – 46** and the second set under **Tabs A – S** at **pp. 47 – 76**. This was supplemented by Claimant's counsel as he considered necessary. **viz** loose pages 77 – 99].
7. In so far as the Claimants' witnesses sworn statements are concerned defence counsel did not seek to cross-examine Nina Ferraro, Andrew Kevu or Mereisi Caroline Pedro. The 2 latter witnesses mainly deposed to events that occurred at the Blue Water Island Resort on 10 December 2009 after service of the Defendant's Notice of Cancellation, which events defence counsel described as "*irrelevant*" adding nothing to the body of evidence already before the Court.
8. The defence also produced the sworn statement of Geoffrey Gee but he was not made available for cross-examination despite counsel's short notice and his evidence was not relied upon. Defence counsel also stipulated and accepted that the pink hand written slips attached to the two surrender documents were written by Ms. Florrie Tasso, an officer of the



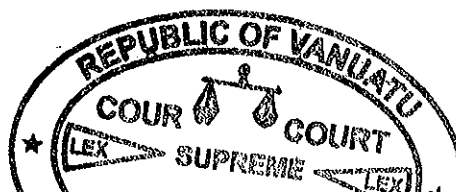
Lands Department, and were to the effect that the surrenders were not to be registered until after the mortgages on the titles were discharged.

### THE AGREED ISSUES

9. The parties also helpfully formulated the following issues for the determination of the Court:-

- a) Was the Defendant ready willing and able to settle on 20 November 2009 at 4.00pm?
- b) Was the notice to settle dated 23 November 2009 valid,
  - i. In terms of the Deed
  - ii. In law
- c) Did the notice of 23<sup>rd</sup> November 2009 lawfully make time of the essence?
- d) Was there any right for the Claimant to unilaterally suspend or extend the notice given the receipt of AUD\$1.8 million?
- e) Was the notice of cancellation delivered at 8.15am on 10 December 2009 a valid cancellation?
- f) If so are the Claimants validly estopped from denying judgment to the Defendant for the sum stipulated in Clause 5 (e) of the Deed and on the Defendant's calculation in the sum AUD\$1,642,00 plus interest and other fees paid?
- g) Were the Claimants entitled to demand the consents and transfers to be in the name POPCORN LIMITED by fax after office hours or at any time on or prior to 10 December 2009?
- h) Did the Deeds of Surrender sitting on file at the Lands Records Office for the property prior to the mortgage release affect the ability of the Defendant to be ready willing and able to transfer the good and unencumbered titles to the Claimants?
- i) Was the matter that the notice of cancellation pre-dated and signed of any relevance to the cancellation?
- j) Was it sufficient for the Defendant to have a Discharge of Mortgage on 20 November 2009 or was it required to be registered?"

10. With regard to the above issues, during the course of closing submissions counsel for the Claimant withdrew issues (b) and (c) as having no legal or factual basis for supporting them. Counsel also accepted that issue (f) was conditional on the Claimant succeeding on issue (h) which turned on the interpretation of **Clause 5(d)** of the Deed. Furthermore even if the Claimant succeeded on issue (e), counsel accepted that payments were due to the Defendant. As for issue (g) counsel accepted that there is "an *element of reasonableness*" in the exercise of the right to nominate under Consent Order 2 of the Consent Orders. Similarly counsel accepted that



the Notice of Cancellation could be signed in advance so long as it was not prematurely delivered or sent before the new settlement date and time given in the Notice to Settle had expired, accordingly, issue (i) need not be dealt with. Issue (j) raised the legal status of an unregistered discharge of a mortgage.

11. Defence counsel asserted that issue (f) remains extant and relates to the Defendant's counterclaim which the Claimant pleaded was "*frivolous and vexatious*".

### THE CONSENT ORDERS

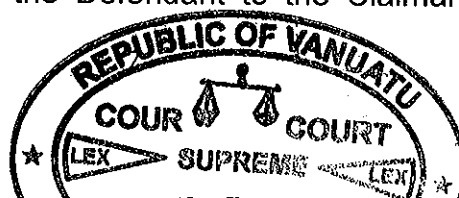
12. I set out the material parts of the Consent Orders agreed by counsels for the parties before Justice Bruce Landers on 18 September, 2009. It reads:-

- "1. *The Defendants shall pay to the Claimant the sum of AUD\$1,642,000.00 being the balance of the purchase price for Leasehold properties namely **Titles Number 12/1033/007 and 12/1033/008** which are situated and comprised in what is commonly referred to as Blue Water Island Resort, Efate (hereinafter referred to as "**the properties**") in accordance with the terms and conditions contained in a Deed of Settlement (hereinafter referred to as "**the Agreement**") which is attached hereto as Schedule A.*
2. *Upon receipt of payment referred to in paragraph 1, the Claimant shall transfer good and unencumbered titles in the said properties to the Defendants or such other entity as they may chose (sic) in accordance with the terms and conditions of the Agreement.*
3. *The Claimant's Claims and the Defendant's Counter-claims are dismissed.*
4. *There is no Order as to costs."*

**(Note:** The Defendants in the Consent Orders are the Claimants in the present case and vice versa and will be referred to as such hereafter).

### SOME OBSERVATIONS

13. In summary, the Consent Orders require the payment of a sum of money by the Claimants to the Defendant and the transfer of good and unencumbered titles by the Defendant to the Claimants. These mutual



obligations were to be performed "in accordance with the terms and conditions contained in the Deed of Settlement" which was incorporated as a schedule to the Consent Orders.

14. I make three general observations on the Consent Orders. **first**, although Consent Order 1 does not expressly prescribe a date or time within which the Claimants are required to make payment to the Defendant, Consent Order 2 requires the Defendant to transfer good and unencumbered titles "... upon receipt of payment". A literal reading of the Consent Orders prompted defence counsel to suggest that the Defendant's obligation to provide good and unencumbered titles only arises after receipt of payment and not before. *i.e.* payment is the causative or triggering event in the absence of which there is no obligation on the Defendant to provide good and unencumbered titles. I prefer however to treat the obligations as mutual obligations that were to occur simultaneously as an exchange of money for the documents enumerated in Clause 4 (b) of the Deed; **second**, the obligations were required to be performed "in accordance with the terms and conditions contained in a Deed of Settlement", but the Deed of Settlement directed payment to be made by the Claimant's solicitor to the Defendant's solicitor [Clause 4 (a)] and there is no clear option given to the Claimants to nominate the transferee of the leases in the Deed of Settlement; and finally, my **third** observation is similar to the first in that Consent Order 2 gives the Claimants a right to choose or nominate the transferee of the lease but no time limit within which the choice was to be made or notified to the Defendant. This lacuna gave rise to a **disputed fact (19)** and **issue (g)** which can be conveniently disposed of now.

### THE POPCORN LIMITED NOMINATION

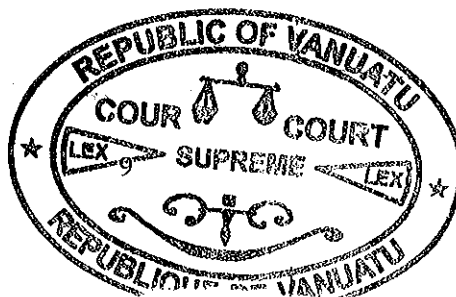
15. It is common ground that the first time that a nomination was notified to the Defendant was by a letter dated 09 December, 2009 from the Claimant's solicitor to the Defendant's solicitor requiring the consents and transfers of the 2 leaseholds to be "... to **POPCORN LIMITED**". (The nomination letter) Significantly the letter then invited the Defendant to suspend his Notice to Settle to allow for time to complete the appropriate documentation which the Claimants required at settlement (under **Tab O** at p.73 of the bundle of agreed documents).
16. In cross-examination Kontos was asked if he thought the time given in the nomination letter "was reasonable" and he replied: "Yes I did not think there was anything wrong with that". In similar vein Koffal said "I was not aware that that would cause a dramatic delay". She assumed it would take 24 hours to change the name of the transferee and accepted that the nomination letter did not give the Defendant 24 hours to do that before the new settlement date and time expired. Claimant's counsel properly accepted in his closing submissions that there is "an element of reasonableness" in exercising the right to nominate in Consent Order 2.





For completeness, the evidence of Jean Marc Pierre the Director of Land Records was that it shouldn't take weeks to obtain the Minister's consent to a transfer but he couldn't say how long it would take.

17. The first indication that the Defendant was seriously pursuing the Ministerial consent to the transfer of the leaseholds to the Claimants was in a letter from the Defendant's solicitor dated 15 October 2009 to the effect that the application for consent could not proceed because there were outstanding unpaid land rentals owing on the leasehold titles, which, in terms of **Clause 8** of the Deed, was the responsibility of the Claimants to pay. The letter also sought payment of the outstanding land rentals. (letter under **Tab N** at p. 35 of the bundle of agreed documents).
18. Claimant counsel's belated response, after a reminder letter, is dated 12 November 2009 and nowhere mentions or confirms payment of the outstanding land rentals, which was a known impediment to obtaining the Minister's consent, instead, the letter queries whether or not a Westpac mortgage on the titles had been discharged. (letter under **Tab PQ** at p. 37 of the bundle of agreed documents). It is undisputed that the Defendant paid for the outstanding land rentals. Noticeable by its absence was any nomination of **POPCORN LIMITED** as the Claimant's chosen transferee for the leasehold titles. Had there been a nomination in the letter it would have given the Defendant a week within which to amend his documentation to accommodate the Claimant's nomination.
19. Finally on settlement day 20 November 2009 defence counsel wrote to Claimant's counsel enclosing inter alia copies of transfer and consent documentation that clearly identified on the face of the documents, that the Claimants were to be the transferees of the leaseholds. In his response claimants counsel, again without any mention or nomination of **POPCORN LIMITED** being the Claimant's chosen transferee, merely advised that the Claimants were unable to attend to completion as funds had not yet been finalized. Another letter from Claimant's counsel a day earlier even when requesting copies of the discharge by Westpac Banking Corporation and consent to transfer of the two leases to the Claimant, still did not mention or nominate **POPCORN LIMITED** as the chosen transferee of the leases. (letters under **Tabs UV** and **S** at pp. 43 and 39 of the bundle respectively).
20. Remarkably, even after the settlement date had expired and after the Defendant had issued a Notice to Settle, Claimant's counsel wrote to defence counsel querying the presence of 2 Deeds of Surrender on the leasehold titles without any mention of **POPCORN LIMITED** being their nominated or chosen transferee for the transfer of the leasehold titles. Had they done so then, the Defendant would have had a fortnight within which to amend his documentation including obtaining the necessary ministerial consent.



21. In light of the foregoing I find as fact that at no time prior to 20 November 2009 was the Defendant or his solicitors told or made aware that the Claimants had made a choice or nomination pursuant to Consent Order 2.
22. After careful consideration I am satisfied that the right to nominate under Consent Order 2, in order to be workable, and accord with the terms and conditions of the Deed of Settlement, must be exercised well before 20 November 2009. To allow the Claimants to exercise their right to nominate after that date would tantamount to permitting them to unilaterally deny the Defendant the opportunity or ability to settle on the agreed settlement date i.e. 20 November 2009. That could never have been what was intended and I reject the Claimant's evidence that the time given to the Defendant to accommodate the Claimants nomination was neither wrong nor unreasonable.
23. Accordingly I hold that the purported last-minute nomination by the Claimants of **POPCORN LIMITED** in their solicitor's letter of 9 December 2009 was **both** unreasonable and invalid.

## **THE DEED OF SETTLEMENT**

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**DEED**

DATED 18 September 2009

**BETWEEN:** GILBERT DINH of PO Box 70, Port Vila, Vanuatu  
(hereinafter referred to as "**Than**")

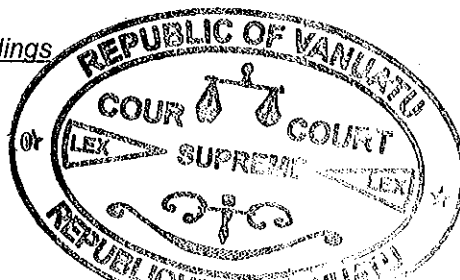
**AND:** RICHARD ANTHONY KONTOS and GLORIA KOFFAL both of Blue Water Island Resort  
(hereinafter jointly referred to as "**Kontos**")

### **WHEREAS:-**

- A. *Than is the Claimant in Supreme Court of Vanuatu Civil Case NO. 238 of 2004 (the "Proceedings") against Kontos seeking orders for the vacation by Kontos of premises belonging to Than herein referred to as "The Blue Water Island Resort" and seeking damages against Kontos for alleged unlawful occupation of the Blue Water Island Resort, Kontos has cross claimed seeking specific performance of an alleged right to remain in occupation of the Blue Water Island Resort and to obtain a Lease and for damages.*
- B. *Than and Kontos have agreed to settle the Proceedings and Than on the one hand and Kontos on the other, have agreed to mutual releases from any liability as alleged one against the other.*

**THE PARTIES NOW AGREE** as follows:-

1. Consent Orders in the Proceedings



Than and Kontos have agreed to resolve the Proceedings in terms of Consent Orders in the form annexed to this Deed and marked "A" and otherwise as provided herein. The Consent Orders will be signed by the parties' respective counsel and handed up to Court on the 18<sup>th</sup> September 2009.

2. Release of Kontos

In consideration for the settlement of Proceedings as provided for in the Consent Orders and the releases provided for in Clause 3 hereof and subject to this agreement. Than hereby releases and discharges Kontos from all damages, actions, or legal proceedings, suits, causes of actions, claims and interest on claims (including without limitation and any claim for costs, losses or expenses) or demands of any nature and howsoever arising that Than or any of its associated entities has now or may in the future have or but for the execution of this Deed could or might have had against Kontos for and in respect of:-

- a) Kontos occupation of the Blue Water Island Resort from the date of the agreement; and
- b) Any matters or claims arising out of the Sale and Purchase Agreement between Than and Kontos in respect to the Blue Water Island Resort dated 17 July 2009 (the "Agreement"); and
- c) The matters of an pertaining to Civil Case 238 of 2004.

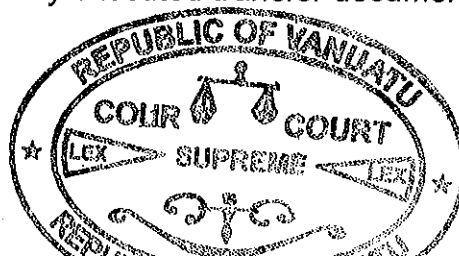
3. Release of Than

In consideration for the settlement of the Proceedings as provided for in the Consent Orders and the releases provided for in Clause 2 hereof and subject to the terms herein Kontos jointly and severally release and discharge Than from all damages, actions or legal proceedings, suits, causes of action, claims (including without limitation any claims for costs, losses or expenses) or demands of any nature and howsoever arising that Kontos or any of its associated entities or Kontos has now and may in the future have or but for the execution of this Deed could or might had had against Than for and in respect of:-

- a) Than's sale of the Blue Water Island Resort; and
- b) Any matters or claims arising out of the sale and purchase agreement; and
- c) The matters of an pertaining to Civil Case 238 of 2004.

4. Settlement

- a) Kontos by his solicitor will pay to Than by his solicitor the sum of AUD\$1,642,000 on or before 4.00pm Friday 20<sup>th</sup> November 2009.
- b) Than will provide Kontos:-
  - i. duly executed transfer documents; and



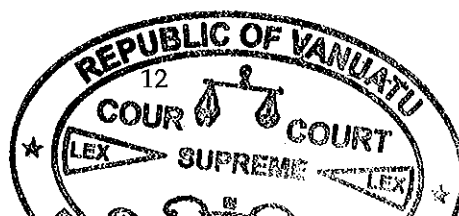
- ii. *duly executed mortgage releases if any such mortgage remains over the property;*
- iii. *the release of any charge or mortgage over the said titles namely those Leases comprising Blue Water Island Resort, 12/1033/007 and 12/1033/008 (the "Leases");*
- iv. *Requisite consent documentation.*

5. Settlement Date

- a) *Settlement date be the 20<sup>th</sup> November 2009 on or before 4.00pm.*
- b) *In the event Kontos fails to settle on or before such date interest will run thereafter at 10% p.a. on the judgment sum.*
- c) *Either party may give notice to settle fifteen days thereafter.*
- d) *In the event such settlement does not take place Than may elect to cancel this Deed in which case Kontos shall forthwith vacate the property removing only his personal possessions and the payments made totaling AUD\$358,000 will be treated as forfeit.*
- e) *In such event (paragraph 5d) Than may proceed against Kontos in damages at 10% interest per annum on an accrual basis on the judgment sum of AUD\$1,642,000.00 from possession date namely 19 July 2004 and this agreement may be pleaded as an estoppel.*
- f) *In the event Than fails to provide transfers, consents to transfer and releases from any mortgage or charge over the said titles Kontos may remain in possession of the property pending determination and issue proceedings for specific performance or specific performance damages and this agreement may be pleaded as an estoppels.*

6. Fixtures and Fittings

- a) *Neither Than or Kontos shall have any claim against the other in respect to any of the assets, chattels, vehicles or other moveable items on or attached to Resort. All such items as currently exit*



shall from the time of execution of this Deed be the property of Kontos in an as is where is condition.

- b) Kontos shall have no claim against Than in respect to any assets, chattels or items as contained in the agreement for sale and purchase dated 17 July 2004 and asserted to be damaged or missing.

**(Note: the original Deed did not have a clause 7)**

- 8. Kontos shall be liable for payment of any VAT, Land rentals future and/or past, government dues or rates, stamping duties or other Government charges on the property, any Labour or VNPF levies of Kontos/Blue Water Island Resort and incidental to business only any employment claims or other claims whatsoever dated 19 July 2004.

9. Confidentiality

The contents of this Deed shall be kept confidential and shall not be disclosed to any person without written unless ordered or as part of lawful proceeding.

10. Entire Agreement

This Deed and the Consent Orders constitute the full and complete understanding between the parties with respect to subject matter of this Deed. This is no other oral understanding, agreement, warranty or representation whether expressed or implied in any way extending, defining or otherwise relating to the provisions hereof or binding on the parties with respect to any of the matters to which this Deed relates.

11. Governing Law

This Deed shall be governed by and construed in accordance with the laws of the Republic of Vanuatu excluding such French Laws as may otherwise have application within the jurisdiction by virtue of the constitution.

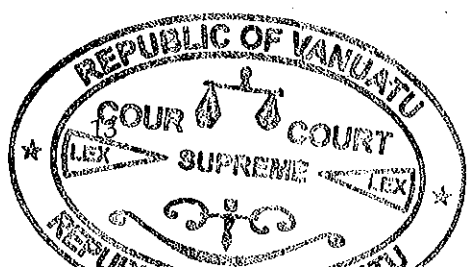
12. Amendments

No modification or alteration of this Deed shall be valid or binding upon any party unless made in writing and duly executed or signed on behalf of such party under its seal or by its proprietors or representatives or attorneys then and duly authorized in the case of any individual by such party under his hands.

**EXECUTED** as a Deed.

**SIGNED, SEALED AND DELIVERED** by GILBERT )  
DINH in the presence of:- ) .....  
.....  
Witness.

**SIGNED, SEALED AND DELIVERED** by RICHARD )  
ANTHONY KONTOS in the presence of:- ) .....  
.....  
Witness.



SIGNED, SEALED AND DELIVERED by GLORIA )  
KOFFAL in the presence of:- )

.....  
Witness."

### SOME OBSERVATIONS

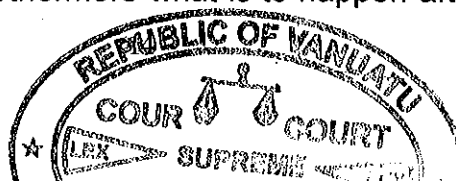
24. As the Deed and Consent Orders constitute the full and complete understanding between the parties with respect to its subject matter, I do not propose to go beyond its terms nor did I understand the parties to suggest that there had been any amendment or variation of its terms as permitted under **Clause 12**. No parole evidence was tendered in that regard nor was the Court asked to rule or admit such evidence.

25. It is also clear in the Deed that the agreed settlement date was "... 20 November 2009 on or before 4.00 p.m." This is 2 months after it was signed recognizing that the parties would require that amount of time to fulfill their respective obligations under the Deed. What those obligations are is clearly set out in **Clause 4** and required the Claimants "to pay to Than by his solicitor the sum of AUD\$1,642,000 on or before 4.00 p.m. on Friday 20 November 2009".

26. In **Jamsheld Khadaram Irani v. Burjorji Dhunjibhai** (1915) 32 TLR 156 Lord Haldane delivering judgment of the Privy Council discussed the form of language which would prevent equity intervening to ameliorate strict compliance with contractual requirements as to time, said at p. 157:

*"The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as really and in substance intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that long at its foundation."*

27. In this regard I am satisfied that the language of **Clauses 4 and 5** of the Deed of Settlement show an intention that the time was very much of the essence and lay at the foundation of the terms of settlement. This is so because the parties have not merely fixed a precise date and time for settlement (after allowing 2 months for the parties to achieve a state of readiness to settle) but they have also directed their minds specifically to the period of time which must elapse after an initial default before the right to rescind arises and furthermore what is to happen after an initial default



has occurred, and, after rescission of the Deed including the creation of estoppels.

28. For his part, the Defendant was required to provide to the Claimants:-

- i. *"duly executed transfer documents; and*
- ii. *duly executed mortgage releases if any such mortgage remains over the property;*
- iii. *the release of any charge or mortgage over the said titles namely those Leases comprising Blue Water Island Resort, 12/1033/007 and 12/1033/008 (the "Leases");*
- iv. *Requisite consent documentation."*

**(Note:** The difference (if any) between document (ii) and (iii) is not readily apparent but a requirement of registration is marked by its complete absence).

29. Nowhere in the Deed is there an obligation imposed on either party to search, monitor, investigate, or satisfy himself as to the capacity or ability of the other party to comply with his obligations on the agreed settlement date, yet, a great deal of the correspondence and actions of the Claimants and their counsel prior to the settlement date, was devoted to doing just that. I am also satisfied that the Defendant's obligation did not extend to the registration of any the documents enumerated in **Clause 4 (b)**.

### **THE NOTICE TO SETTLE**

30. **Clause 5 (c)** of the Deed relevantly provides where settlement does not occur on 20 November 2009 then "*either party may give notice to settle fifteen days thereafter*". Although the clause could have been more clearly worded, I am satisfied that its plain meaning and purpose was to enable either party to make time of the essence by nominating a new settlement date not earlier than 15 days after the expiration of the settlement date fixed in the Deed. In this regard and in the absence of a comma after the word "*settle*", I understand and read the word "*thereafter*" as referring to the situation where settlement has not occurred by the settlement date fixed in the Deed and **not** as referring to the earliest date when the **Notice to Settle** may be given after the settlement date fixed in the Deed has expired.

31. I find some support in the judgment of Mahon J. in **Sullivan v. Moodie** (1977) 1 NZLR 643 where the learned judge said at p.649:



*"... where there is a contractual date for completion, which means that each party has previously formally agreed to the nomination of that date, and where one party fails to complete on that date, why should the other party not be entitled on the day after the agreed completion date, to give immediate notice making time of the essence of the contract and in that respect stipulating a reasonable future date for completion?"*

Later Mahon J. answered the question when he said at p.650:

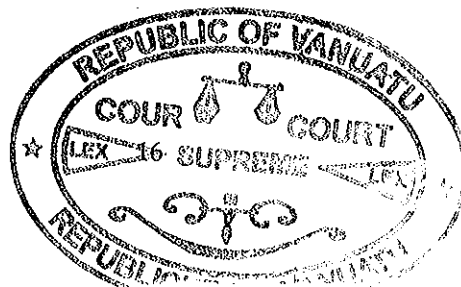
*"I must reject the submission that ... the vendor had to wait for some indeterminate time after the contractual completion date before he gave notice making time of the essence. In fact, the vendor did not give notice until seven days later but in my view he could validly have given notice on the day following the completion date, or, even on the completion date itself, once the omission or refusal to complete had been established."*

32. In the present case before me, not only had the parties agreed to a settlement date and time in the Deed but they also expressly agreed that Notice to Settle could be given by either party where settlement did not occur on the settlement date and, finally, the parties agreed that fifteen (15) days was the reasonable additional time to give in the Notice fixing the new settlement date. Here the Defendant gave notice on 23 November 2009 and the new settlement date was fixed 15 clear days later on 10 December 2009.

33. In similar vein the Supreme Court of Fiji in refusing special leave to appeal in **Hollows v. Scofield** [2006] FJSC 10 said:

*"... the case does not raise any question about the reasonableness of the time allowed for completion in a notice which seeks to make time of the essence for completion. It concerns the effect of a particular clause which enabled the vendor to give the purchaser, who was already in default under a time of the essence contract, a final opportunity to remedy the default and settle before he rescinded the contract."*

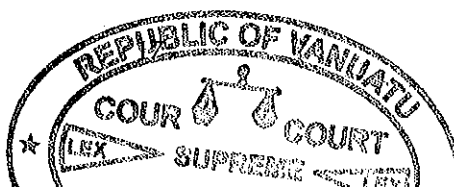
34. I am satisfied that the Defendant was entitled to issue a Notice to Settle on or immediately after 4pm on 20 November 2009 and did in fact do so on 23 November 2009 making time of the essence at 8.00 a.m. on 10 December 2009.





## DEFENDANT'S READINESS TO SETTLE

35. The Claimants assert that the Defendant was not "ready willing and able" to settle on the settlement date and therefore the Defendant lacked the legal capacity to issue the Notice to Settle that he purported to do on 23 November 2009. (See: in this regard the Claimant's pleadings in paragraphs 37 to 39 of the Amended Statement of Claim). However **Clause 5 (c)** does not distinguish between a defaulting or non-defaulting party nor does it clearly require the party giving the notice to settle to be ready, willing and able to settle at the time of giving the notice. Indeed, I can see much force in permitting even a defaulting party to give notice to settle especially where, as in this case, interest began to run against the defaulting party once default has occurred.
36. In brief, the Claimants point to Consent Order 2 which requires the Defendant "to transfer good and unencumbered titles in the said properties to the (Claimants) or such other entity as they may choose in accordance with the terms and conditions of the (Deed)", and counsel lays emphasis on the meaning of "unencumbered titles" which phrase would, in counsel's submission, extend the obligations of the Defendant at settlement, to the provision of more documents than is set out in **Clause 4 (b)** of the Deed. A convenient summary of the nature of the additional documentation may be found in **Agreed Fact 5 (c)** and includes:-
- i. "Advice of registration of withdrawal or cancellation of the Deed of Surrender of Lease dated 27 May 2004 and registered on 14 April 2005 in relation to Lease title Number 12/1033/007;
  - ii. Advise of registration of withdrawal of cancellation of the Deed of Surrender of Lease dated 27 May 2004 and registered on 14 April 2005 in relation to Lease Title Number 12/1033/008;
  - iii. Advice of registration of Discharge of the Deed of Mortgage by Westpac Banking Corporation dated 24 May 2004 "
37. Something needs to be said about the meaning of "good and unencumbered titles" in the context in which the phrase is used in Consent Order 2. The word "unencumbered" is defined in the Shorter Oxford Dictionary as meaning: "free from liabilities" and an "encumbrance" is defined in the Land Leases Act [CAP. 163] as "a liability to which a registered lease is subject and includes a sublease, mortgage, easement, restrictive agreement, and a profit". Each of these liabilities is further defined in the Land Leases Act and clearly do **not** include a Surrender. Even if the surrender of a lease could be considered a "disposition" of the lease as that term is defined in the Act, the surrender would still be



ineffectual if it were not done in accordance with the Act **and** if it were not registered [**See:** sections 22 (1) and (2) of the Land Leases Act] which, by definition, is evidenced by an appropriate entry in the Land Leases Register maintained under the Land Leases Act.

### **THE DEEDS OF SURRENDER**

38. Section 49 (1) of the Land Leases Act [CAP. 163] clearly enumerates the chronological steps whereby the Surrender of a lease is to be effected as follows:

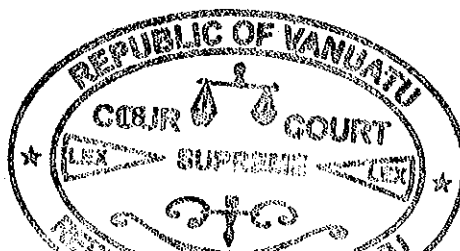
- "(a) an instrument shall be prepared in the prescribed form;*
- (b) the instrument shall then be executed by the lessee and lessor;*
- (c) the Director shall then cancel the registration of the lease; and*
- (d) the instrument shall then be filed."*

39. I am satisfied from the evidence led before me that the Claimants have established steps (a) and (b) occurred with regard to the Surrenders in this case, but equally, I am **not** satisfied that steps (c) and (d) has been fulfilled or that the surrenders have been "*registered*" by the making of an appropriate entry in the relevant Land Leases Register maintained in respect of the Defendant's leasehold titles.

40. Defence counsel relies strictly and literally on the specific documents enumerated in **Clause 4 (b)** of the Deed which makes no mention of surrenders or requires registered discharges or cancellations of the same to be provided to the Claimants at settlement. Additionally, counsel points to the evidence of the Director of Lands in cross-examination to the effect that to effectively transfer the leasehold titles the Defendant had to provide the following documents:

- "(1) discharge of mortgage;*
- (2) transfer documents; and*
- (3) consent of the lessor ie. the Minister of Lands to the transfers."*

41. Reference was also made to the letter of the Acting Senior Lands Officer dated 7 December 2009 to the effect that the two titles the subject matter of the Consent Orders and the Deed "... are free of encumbrances and there are no documents lodged or pending which would prevent (the Defendant) from transferring these titles to a third party subject to (the Defendant) obtaining the necessary consent of the Minister of Lands as lessor". (letter under second **Tab S** at p.76 in the bundle of agreed documents).



42. Claimant's counsel does not accept the letter is a sufficient or complete answer to the two (2) Deeds of Surrender which counsel asserts "... *adversely affects the two (2) titles*" (letter at **Tab 0** at p. 73 of the bundle of agreed documents). Counsel did not articulate how? or in what way? the titles are adversely affected by the Surrenders, but in any event, the Director of Lands Jean Marc Pierre was adamant in his testimony that, despite the registration details at the back of the surrender documents, the Surrenders were, in fact, not actually registered, because "*the registration stamp has not been signed by the Director of Land Records*" [**see also**: sections 5 and 21 (1) of the Land Leases Act]. The Director was also shown the relevant lease Registers pertaining to the leasehold titles and he confirmed from the absence of any relevant entries, that the Surrenders had not been registered on the titles. (Lease Registers under **Tab HI** at pp. 19 and 21).

43. It is also common ground, that each Surrender had a pink slip of paper attached to the top right corner of the front page with a handwritten note on it which reads:

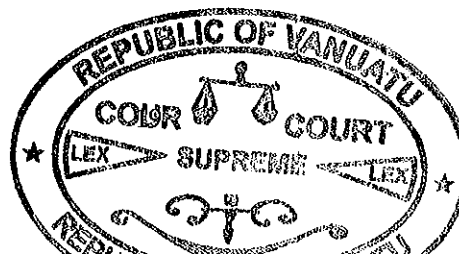
***"Not to register this surrender until the Mortgage is discharge"***  
**F. Tasso**

44. In this latter regard section 49 (2) of the Land Leases Act [CAP. 163] clearly prohibits the surrender of a lease which is subject to a mortgage "*without the consent in writing of the proprietor of the mortgage*" which, in the present case, was Westpac Banking Corporation. There is no evidence of a written consent being provided by Westpac authorizing the surrender of the Defendant's leases over which it maintained its mortgage(s) nor do I accept that a duly executed and registered mortgage discharge amounts to the same thing.

45. Accordingly, I hold as a matter of law that the Deed of Surrender of the subject leases were ineffectual and did not encumber the leasehold titles so as to prevent the Defendant from fulfilling his obligation in terms of Consent Order 2 to "*transfer good and unencumbered titles ... to the Defendants*". I am also of the firm opinion that the Claimants were not entitled to insist on the removal of the Deeds of Surrender before they would settle.

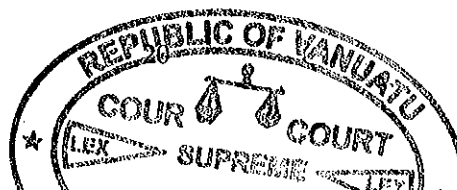
### **THE UNREGISTERED MORTGAGE DISCHARGES**

46. It is common ground that on 20 November 2009 the mortgage discharges although properly executed, were undated and unregistered. In this latter regard section 54 (1) of the Land leases Act [CAP. 163] states:-



*"The Director shall, if required by the mortgagee, or on proof of the satisfaction in whole or in part of a mortgage, in either case, in the prescribed form, register the discharge in whole or in part of the mortgage."* (my underlining).

47. In this case "*the mortgagee*" of the relevant mortgages was Westpac Banking Corporation and not the Defendant. I note also that a '*mortgage*' is expressly excluded from the definition of a '*disposition*' and, although section 22 (2) of the Land Leases Act requires "... every instrument ... disposing of a registered ... mortgage (to be) ... registered", I hold that the discharge of a mortgage although an "*instrument*" is **not** one disposing of it and therefore is not required to be registered. Be that as it may, I am satisfied that the mortgage discharges were eventually registered on 9 December 2009 and were available to be handed over to the Claimants at 8.00 a.m. on 10 December 2009 the new settlement date if settlement had proceeded.
48. I turn next to consider the evidence as it relates to the Defendant's ability and readiness to discharge his obligations in terms of Clause 4 (b) of the Deed on the agreed settlement date namely 20 November 2009.
49. The relevant documentary evidence comprises an exchange of letters between the parties lawyers commencing on 14 October 2009 and culminating with defence counsel's letter of 20 November 2009 enclosing copies of "*the discharge, the consent and the transfer*". [letters under **Tabs M to W** between pp 33 to 44 of the bundle of agreed documents]. The relevant mortgage discharges although properly signed and witnessed by Westpac officials are undated and unregistered; the unregistered consent to the transfers of the relevant leaseholds in the claimants names are signed by the Minister of Lands and dated 11 November 2009; and finally, signed copies of the transfers of the two leaseholds to the Claimants jointly are dated 12 November 2009 and they too are unregistered. (documents under **Tabs D to F** at pp 9 to 16 in the bundle of agreed documents).
50. Speaking about the discharge of Westpac's registered mortgages Mrs. James acknowledged that as a matter of common and ordinary banking practice mortgage discharges are not normally dated. Likewise she said that registration of a mortgage discharge was normally attended to by the client/mortgagor and the banks interest in its mortgage ceased once its debt was fully repaid and a signed discharge issued to the mortgagor. In respect of the Defendants' mortgages, both signed discharges were issued to him on 29 September 2009. The discharges were subsequently dated 4 December 2009 and registered on 9 December 2009.
51. In cross-examination upon being shown the above documents Kontos said that when he saw the Ministerial consents they "*were unsigned*" and the mortgage discharges "... *were undated*". The transfers and discharge



documents also had "... *COPY ONLY*" written on them although he accepted that they were signed by the Defendant. Kontos was unable to explain why he considered the noted omissions and over-writings on the documents affected the Defendant's ability to settle on 20 November 2009 and his answers to defence counsel's questions struck me as both argumentative and evasive. It also revealed a distinct lack of appreciation of defence counsel's purpose in sending the "*over-written*" documents or of the fact that they were not the actual documents that would be tendered at settlement. He did not impress as a credible witness and I am disinclined to believe his evidence.

52. Conversely, I accept the Defendant's evidence that "*at all material times I have been ready, willing and able to settle*". The Defendant also produced in evidence the unmarked original signed ministerial consents (**Exhibits 17A and 18A**) and executed transfers of the leases to the Claimants personally (**Exhibits 17B and 18B**) dated 11 November and 12 November respectively.
53. For the foregoing reasons I am satisfied and find as a fact that the Defendant was ready, willing, and able to settle on 20 November 2009 and 10 December 2009.

#### **CLAIMANTS READINESS TO SETTLE**

##### **A. AT 4.00 p.m. on 20 November 2009**

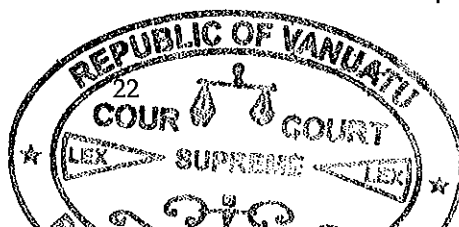
54. It is common ground and I so find, that on the above settlement date and time fixed in the Deed, the Claimants did not have the necessary funds either in their personal bank accounts or deposited with their solicitor so as to enable the Defendant to be paid in terms of **Clause 4 (a)** of the Deed.
55. This is clearly confirmed by **agreed fact (7)** that "*the Claimants were unable to make the said payment on or before 4.00 p.m. on 20 November 2009*" and, is evidenced by their own counsel's letter of 20 November 2009 which advised inter alia, "*... that unfortunately our clients are not able to attend to completion of the transaction today, as arrangements for the funds to enable them to complete the transaction are not yet finalized*". (see: **Tab UV** of the bundle of agreed documents). Counsel also requested in the letter "*... an extension of time to complete the transaction in accordance with the Consent Orders*". This request was granted in the Defendant's Notice to Settle which extended the settlement date and time to 8.00 a.m. on 10 December 2009.
56. In my view the Claimant's payment obligation required them to pay cash or its equivalent. The time of 4.00 p.m. on 20 November 2009 which was a Friday, is significant in that the undisputed evidence of Mrs. Mariana May James the Credit Risk Manager of Westpac, Vanuatu was that "*the bank closed for international business transactions at 15.45 p.m.*" She also



testified that a cheque drawn on an overseas branch of Westpac "would take a day and a night before funds would arrive to enable the cheque to be cleared. Normally it takes 5 weeks to clear an Australian dollar foreign cheque". Likewise, she said that it would "take 2 to 4 days to clear a telegraphic transfer (T/T)". She also testified that the bank had a duty to verify the source of foreign funds under domestic anti-money laundering legislation before paying it out.

**B. AT 8.00 a.m. on 10 December 2009**

57. In respect of the payment in this case Mrs. James identified and produced a T/T for the amount of AUD\$1,800,000 in favour of Nina Ferraro received from Westpac's Modbury branch in South Adelaide and payable out of Westpac, Port Vila Branch, Vanuatu. The T/T had a "processing date: 10 December 2009" which was a Thursday (**Exhibit 11**). She then wrote a letter also dated 10 December 2009 to Nina Ferraro confirming receipt of the funds which "are yet to be cleared". (**Exhibit 12**). Finally Mrs. James produced an email dated "11 December 2009 12.35PM" from the Modbury branch which confirmed that the funds for Nina Ferraro "... are definitely cleared funds". (**Exhibit 13**).
58. Mrs. James produced a letter of instruction received from Nina Ferraro dated 11 December 2009 for the payment out of the AUD\$1,800,000 (see: **Tab JK** at p. 25 in the bundle of agreed documents). She also identified two (2) T/Ts processed on the same date in favour of the Chief Registrar's Trust Account maintained with ANZ Bank Vanuatu.
59. I digress at this point to record that these latter payments were made pursuant to the Court's orders which were granted ex parte in circumstances of some urgency late on Thursday afternoon 10 December 2009. In particular Order (3) required the Claimants to "pay into Court of sum of AUD\$1,642,000 together with interest of 10% accrued since 21 November 2009 by way of Bankers Cheque on or before the close of business on Monday 14 December 2009." The papers were ordered to be served on the Defendant and liberty was reserved to the parties to apply on 3 days notice. The injunction application was then adjourned for an inter-partes hearing on 17 December 2009.
60. On 17 December 2009 both parties appeared before me and the injunction was extended by consent with 2 minor variations. The Defendant who appeared with counsel was adamant that he no longer wished to continue with the Deed which he had already cancelled by notice served on the Claimants on 10 December 2009. Nor was he willing to accept or receive the monies that had been paid into Court pursuant to the ex-parte injunction order. In other words the Defendant was only interested in pursuing his remedies in terms of **Clauses 5 (d) and (e)** of the Deed which deals with the situation where settlement does not take place.



61. For the sake of completeness mention should be made of an application (in the absence of both counsels) by Mr. B. Bani on behalf of a Mr. Ivan Peter Lewis on 20 January 2010 which further varied the injunction orders as follows:

*"That upon the undertaking given by Ivan Peter Lewis to repay the said sums into the Chief Registrar's Trust Account with ANZ Bank Port Vila within 7 days of receipt of a notice from the Court in or after March 2010. Order 3 is substituted with the following order: 'That the amount of AUD\$1,650,547.34 and VUV1,139,064 paid into the Chief Registrar's Trust Account at ANZ Bank Port Vila on 11 December 2009 be repaid forthwith to Mr. Ivan Peter Lewis or as directed by him'."*

62. Returning to the evidence of Mrs. James which was largely undisputed. She identified the various documents received by Westpac dealing with the transfer of AUD\$1.8 million from its Modbury branch in Adelaide to Westpac, Port Vila and she described the verification process that was involved in clearing the funds and the time it would take to achieve that. In particular when asked a direct question by defence counsel she replied:

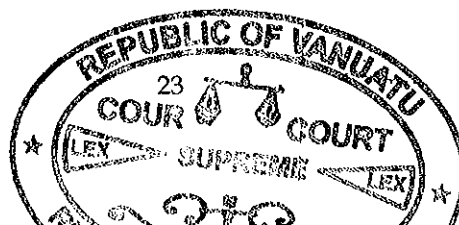
**Q:** *What was the earliest date on this T/T (Exhibit 11) that Mr. Silas Hakwa could write a cheque to Defendant for AUD\$1.6 million?*

**A:** *It would be in the afternoon of 11 December 2009."*

63. In re-examination Mrs. James confirmed that the funds were not cleared before the afternoon of 11 December 2009 which was also the date when the bank received written instructions from Nina Ferraro as to where to transfer the funds. By then, the new settlement date fixed in the Defendant's Notice to Settle had expired and the Notice of Cancellation had been served.

64. In light of the foregoing I find that neither the Claimants nor their solicitor had in their possession or control sufficient funds to enable the Claimants to discharge their obligation "... to tender settlement of the sum of AUD\$1,642,000.00 ... ON OR BEFORE 8.00 a.m. on Thursday 10 December 2009", in terms of the Notice to Settle. The Claimants were in breach of the Notice to Settle and the Defendant was entitled to cancel the Deed.

65. I am fortified by the judgment of Privy Council in **Union Eagle Ltd. v. Golden Achievement Ltd.** [1997] AC 514 where the purchaser tendered payment of the purchase price of a flat on Hong Kong island, 10 minutes after the time for completion had passed and the vendor declared that the



contract was rescinded and the deposit forfeited. Their Lordships in refusing specific performance and in dismissing the purchaser's appeal:

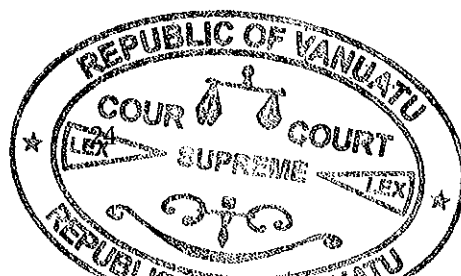
*"Held: .... That failure to complete on time was a repudiatory breach of contract rendering performance by the purchaser impossible and entitled the vendor to reject the later tender of the purchase price and to rescind the contract; that equity would not normally intervene when an ordinary contract for the sale of land was rescinded for non-compliance with an essential condition as to time and the fact that the purchaser was only slightly late in completing did not justify departure from that general principle even though the result of the rescission was that the purchaser had forfeited, the equitable interest in the land arising under the contract."*

66. Lord Hoffmann delivering the judgment of the Court said in recognizing the crucial importance of a completion time in a contract for the sale of land and of the vendors right to rescind, at p.518:

*"It is true that until there has been acceptance of a repudiatory breach, the contract remains in existence and the party in breach may tender performance. Thus a party whose conduct has amounted to an anticipatory breach may, before it has been accepted as such, repent and perform the contract according to its terms. But he is not entitled unilaterally to tender performance according to some other terms. Once 5 p.m. had passed, performance of the contract by the purchaser was no longer possible. The vendor could be required to accept late performance only on the grounds of some form of waiver or estoppel." (my underlining)*

67. In the present case the Defendant had made his position crystal-clear by way of a Notice to Settle personally served on the Claimants which foreshadowed that failure to complete on the new settlement date and time would result in the remedies specified in **Clauses 5 (d) & (e)** of the Deed being actioned, and later, in a letter from his solicitors to the Claimant's solicitor dated 4 December 2009 (ie. 6 days before the new settlement date) an unsigned copy of a Notice of Cancellation was enclosed with a warning that failure to meet the new settlement date and time would result in the Notice being served on the Claimants and the agreement in terms of settlement "*will forthwith cancel*".

68. The result is that the claim is dismissed in its entirety and judgment is entered for the Defendant as follows:-





- (a) A declaration that the Defendant has validly cancelled the Deed of Settlement on 10 December 2009 and is no longer bound to sell leasehold title Nos. **12/1033/007** and **12/1033/008** to the Claimants;
  - (b) An order that the Defendant is entitled to forfeit the sum of **AUD\$358,000** pursuant to **Clause 5 (d)** of the Deed of Settlement;
  - (c) An Order that the Claimants pay the Defendant a sum of **AUD\$12,119.22** being a payment in terms of **Clause 5 (b)** of the Deed of Settlement for the period from 21 November 2009 till 17 December 2009 when payment of further interest was suspended;
  - (d) An order that the Claimants pay to the Defendant a sum of **VT1,139,064** being reimbursement of land rentals for which under **Clause 8** of the Deed the Claimants were liable, but did not pay;
  - (e) Interest of **10% per annum** on the sums ordered in paragraphs **(b)** and **(c)** above, to run, in the case of **Order (c)** from 2 November 2009;
  - (f) An order that the Claimants vacate the leasehold title Nos. **12/1033/007** and **12/1033/008** within 14 days;
  - (g) Costs which are summarily assessed at **VT100,000**;
69. For the sake of clarity I record that I make no orders in respect of the Defendant's entitlement to claim damages under **Clause 5 (e)** of the Deed of Settlement.

**DATED at Port Vila, this 15<sup>th</sup> day of October, 2010.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

