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**IN THE MATTER OF: The Land Acquisition Act (Cap. 215)**

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**AND**

**IN THE MATTER OF: An appeal against a determination of compensation by the Valuer-General under Section 9**

**BETWEEN: JOHN TARI MOLBARAV**  
Appellant

**AND: ROCKY ADAMS as the ACQUIRING OFFICER**  
First Respondent

**AND: MENZIES SAMUEL as the VALUER GENERAL**  
Second Respondent

**AND: THE REPUBLIC OF VANUATU**  
Third Respondent

**Coram: Justice D. V. Fatiaki**

**Counsels: Mr. F. Laumae for the Appellant  
Mr. S. Kalsakau for the Respondents**

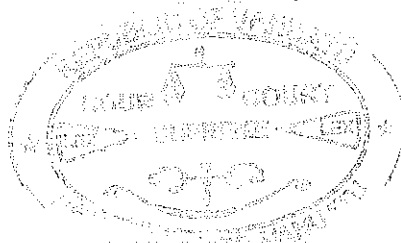
**Date of Judgment: 3 March 2017**

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## JUDGMENT

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1. This case is the sequel to Judicial Review No. 11 of 2015 (**see: Molbarav v. Minister of Lands** [2016] VUSC 104) wherein the appellant unsuccessfully challenged the compulsory acquisition of land in lease title No. 04/2641/019 by the Minister of Lands in August 2013 ("*the said land*").
2. The appellant is the declared custom owner of the said land which is comprised within a larger custom boundary called "*Nabuloaru*". I note also from the acquisition notice that the said land is "*located at Sarauta area on East Santo*".
3. Before going any further I gratefully adopt the summary of the various stages involved in the acquisition process under the Land Acquisition Act as described



in the following passages in the judgment of Chetwynd J. in Judicial Review No. 11 of 2015. After referring to Sections 2 and 3 of the Land Acquisition Act:

*"This is clearly an investigatory stage given the powers of the acquiring officer to go on the land as set out in subsection 3. The Minister is first establishing whether the land is suitable for the public purpose under consideration. This is reinforced by the provisions of section 3 which allow the acquiring officer to do whatever is necessary to complete his investigation subject to the proviso the land owner is entitled to compensation for any damage caused in that process."*

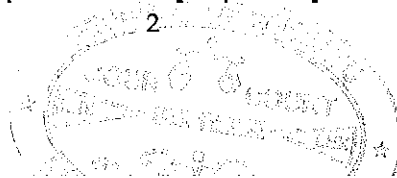
And later in relation to Sections 4, 5, 6 and 7:

*"The staged process is quite straightforward. The Minister decides he might want to acquire land for a public purpose and he gives the owner(s) notice of his intention to carry out investigations to see if the land is suitable (section 2). If he is advised it is suitable and he decides he does intend to acquire the land he must, through the acquiring officer, publish a notice of his intention (section 4). The notice of intention to acquire land invites objections to the acquisition which objections are to be made to the acquiring officer. The acquiring officer considers the objections and he has to give the objector "an opportunity of being heard". After hearing the objections the acquiring officer makes his recommendation to the Minister. After the time for objections has expired and after considering the recommendations of the acquiring officer the Minister decides whether or not to acquire the land.*

*When all that is done the next phase of the process takes effect. It is set out in sections 6 and 7 of the Act. In passing, section 5 prevents a custom owner, or person interested in the land, intermeddling in the land to either dispose of it or cause its value to alter. Moving on to section 6, it provides;*

*The conclusion of the staged procedure involved in acquiring land is again straight forward and is set out in the Act. Another notice is issued (pursuant to section 6) which sets out the declaration by the Minister that the land is required for public purposes and that it will be acquired by the State. Section 7 of the Act prescribes how custom owners and/or persons interested in the land are notified of the Minister's intentions and how claims for compensation are dealt with."*

4. Returning to the present case, the principal ground on which the appellant had challenged the acquisition of his customary land boundary was that the area of land sought to be acquired totaled 242.05 hectares and comprised a very large part of "Nabuloaru" which would be lost forever to him and his descendants. As an alternative the appellant offered about half the land sought to be acquired and, failing which, he sought VT653,500,000 as compensation. The offer was not accepted.
5. On 1 August 2013 the Minister of Lands issued a declaration of his intention to acquire all of the said land for "... the use and maintenance of Vanuatu Agriculture and Research Technical Centre located on this land". Subsequently by a Notice of Final Determination dated 14 April 2014 issued by the Valuer-General and again despite the appellant's representations, the value of the compensation offered for the compulsory acquisition of the said land was determined at VT188,460,000 being a sum significantly less than the amount sought by the appellant.
6. The appellant appealed against the Valuer-General's determination under Section 12 of the Land Acquisition Act [Cap. 215] which provides:



*"(1) Any custom owner, ... who is dissatisfied with a determination under Section 9 may appeal to the Supreme Court within 30 days after the date on which the determination is made;*

*(2) If a determination is made under Section 9 and no appeal is made under subsection (1), the decision of the acquiring officer is final".*

7. Several features are obvious from the above provision:

- The subject-matter of an appeal is "a determination (of compensation) under Section 9";
- The appellant must be a person interested in the land in respect of which the determination has been made and he/she must be "dissatisfied" with the determination;
- The determination under Section 9 becomes final after 30 days if there is no appeal lodged against it;
- The determination under Section 9(2) is "the decision of the acquiring officer";
- The absence of any mention of the "Valuer-General" in subsection (2) is in my view, significant and intentional;

8. For completeness, and reinforcing bullet points (4) and (5) above, section 13 provides the "acquiring officer" alone shall issue a written notice of final determination to the person(s) entitled to compensation.

9. In Republic of Vanuatu v. Boetara Family [2011] VUCA 12 the Court of Appeal had occasion to consider the compensation provisions of the Land Acquisition Act and relevantly observed:

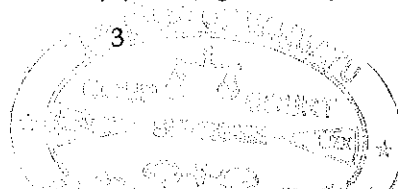
*"The process of compulsory acquisition is prescribed under the LA Act. That process was followed, at least to the point of giving notice under s.9(2) of the determination of the Director of Lands about the compensation to be paid to acquire the particular land.*

*The Minister had made a declaration on 20 May 2010 under s.6 of the LA Act that the two pieces of land were required for public purposes. It was duly published in the Gazette. Notice as required by s.7 to the custom owners had been given.*

*The next step under the LA Act is the determination of the amount of compensation to be awarded. It is important to note that the LA Act prescribes a system which requires the fixing of the compensation before the acquisition of the land can finally take place.*

*Section 9 imposes two steps in that process. The first is under s.9(1). The Director of Lands (or the Valuer-General) is required to determine the amount of compensation for the land to be acquired. ...*

*The second step is the giving of notice of the determination to the custom owners under s.9(2). In our view, the notices of 6 August 2010 referred to in [14] above were notices under s.9(2). There is no form prescribed in the LA Act, or in the Land Acquisition (Forms) Regulations (Order 32 of 1994) (the Regulations), for the giving of notice. The*



form used appears, erroneously, to have been taken from Schedule 6 to the Regulations, so it uses the title 'Notice of Final Determination'. It also has the endorsement referring to the Land Referee.... That is also clearly in error. The Land Referee has become the Valuer-General by Act 22 of 2002.

Nevertheless, it is clear what the purpose of those notices was. It was to tell the custom owners what determination had been made by the Director of Lands about the amount of compensation to be paid ...

Under the LA Act, the next step is the formal notification of final determination. ... it is a procedural step to formalize the process. There is no discretion to decline to take that step, once notice of the determination made under s.9(1) has been given under s.9(2) and there has been no appeal to the Supreme Court under s.12(1), and the 30 day period specified in s.12(2) has elapsed. ..."

(my underlinings)

10. In view of the decision in Judicial Review No. 11 of 2015 it may be accepted for present purposes, that a large portion of the appellant's custom land boundary has been compulsorily acquired and is no longer open to challenge. It may therefore be assumed ("*omnia praesumitur*") that the relevant provisions of the Land Acquisition Act up to the assessment of compensation stage have been properly complied with.
11. In this latter regard the relevant intermediary between the Minister of Lands and the affected land owner is the "*acquiring officer*" who, by definition, is the Director of Lands or any prescribed officer. It is common ground that the "*acquiring officer*" in the present acquisition is **Rocky Adams** a government valuer and senior officer in the Department of Lands. Nowhere in the relevant provisions at the investigatory and acquisition stages is there any mention of the Valuer-General being an "*acquiring officer*" nor was there any evidence produced by the defendant that he is a "*prescribed officer*" for the purposes of the Act.
12. In the absence of any such mention or prescription the Notice of Final Determination issued in the name of and signed by the Valuer-General (not the "*acquiring officer*") pursuant to Section 13 must be considered of doubtful validity. This was conceded by state counsel during the course of his submissions in court.
13. Having said that the Valuer-General is specifically mentioned in Section 3 of the Land Acquisition Act which deals with "**Compensation for damage done during investigations carried out on any land**". More particularly subsections (2); (3) and (4) provides:
  - "(2) If any person who is entitled to receive the whole or a portion of the amount of compensation assessed in respect of any land under subsection (1) and specified in the notice under that subsection, is dissatisfied with that amount or with the apportionment of that amount, he may within thirty days of the date of that notice, make a written appeal to the Valuer-General against the assessment or apportionment of compensation referred to in that notice.
  - (3) Where the Valuer-General having received an appeal under subsection (2) allows that appeal, he shall assess the compensation and make a determination which shall be final.



(4) The officer who issues a notice under subsection (1) shall –

(a) where no appeal is made within thirty days after the period specified ..., pay to each person who is entitled to compensation according to that notice the amount of compensation allowed to him by such notice; or

(b) where an appeal is so made and the Valuer-General allows the appeal within thirty days from the date of determination of the Valuer-General, pay to each person who is entitled to compensation according to that determination the amount of compensation awarded to him by that determination.”

(my underlining)

14. In brief, the Valuer-General's role is to hear and finally determine an appeal against the assessment or apportionment of compensation provided by the "acquiring officer" to the affected landowner for any damage caused to his land during the preliminary investigation stage of the acquisition. This is a separate and different "determination" than that which is undertaken under Section 9.

15. With those general remarks I turn to consider the provisions of Section 9 which reads:

**9. Matters to be considered in determining compensation**

(1) In determining the amount of compensation to be awarded for any land or easement acquired under the provisions of this Act, the acquiring officer or the Valuer-General under this Act shall take into consideration –

(a) the market value of the land or easement at the date of the notice of intention to acquire such land or easement;

(b) the value of damage sustained during investigations carried out under section 2;

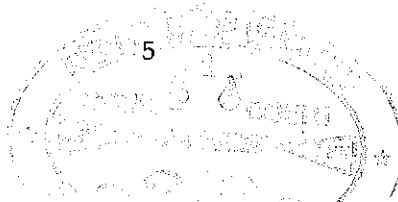
(c) the value of damage sustained by the owner or any person interested by loss of any growing crops or trees which may be on the land at the time of notice of intention of acquisition of the land;

(d) the value of damage sustained by the custom owner or any person interested at the time of notice of intention of acquisition of the land by reason of severing such land from his other land;

(e) where a part of any land is acquired, the value of damage if any sustained by the custom owner or any person interested, at the time of notice of intention of acquisition of the land by reason of the acquisition injuriously affecting the remaining part of his land and interest and any subsequent injurious affection by virtue of the use to which the acquired land or interest is put;

(f) if, in consequence of the acquisition of the land, the custom owner or the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change;

(g) if, in consequence of the acquisition of the land and the easement therein, the adjoining land and easement therein are enhanced, the value of that



enhancement which shall be deducted from the amount payable in compensation;

(h) if, in consequence of the acquisition of the land and the easement the person interested is compelled to surrender, vary or re-register any registrable interest, the costs of such change.

(2) A determination must be in writing and a copy of it must be given to the custom owner or owners of the land, and any other person interested in the land."

16. Before considering the section in greater detail I make some general observations:

- The section is plainly concerned with the determination of the amount of compensation to be awarded for any land acquired under the Act;
- The section envisages that a determination of compensation is made by either "The acquiring officer" or "the Valuer-General under the Act";
- The section directs that the person determining the compensation shall take into consideration eight (8) enumerated matters; and
- A copy of the written determination must be given to the land owner.

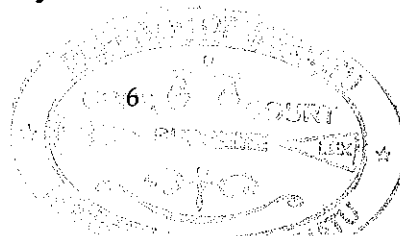
17. The particular phrase "*the acquiring officer or the Valuer-General under this Act*" was a contentious matter in appellant counsel's submissions that doubted the existence of a valid "*determination*" under the section. It was also unclear how in the general scheme of the Act, the Valuer-General who was not the "*acquiring officer*", came to be involved in the determination of the amount of compensation to be awarded for the appellant's land.

18. In the absence of any clear evidence which it was the defendant's duty to provide, State Counsel was constrained to submit that section 9 included the Valuer-General. The court was taken on an extended discourse involving the Constitution (Articles 77 and 80) and various provisions of the Land Reform Act (Part 6A Section 9B); the Land Referee Act (now repealed) and the Valuation of Land Act [Cap. 288] which establishes the office of the Valuer-General as well as its role and general functions including his particular jurisdiction as a "*Land Referee*" under Section 5 and 6 which provides:

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

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

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



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

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

(2) ***In exercising jurisdiction under section 5(c) and (d), the Valuer-General may act as arbitrator.***

(my highlighting)

19. The Valuer-General's jurisdiction as a "land referee" plainly includes the determination of "**(d) any matter which is by any other Act or law directed to be determined by the Valuer-General**". In the present case it was faintly argued that the jurisdiction is invoked under both Sections 3 and 9 of the Land Acquisition Act [Cap. 215] which mentions the Valuer-General. Furthermore and in accordance with Section 6(2) above the Valuer-General when exercising his jurisdiction under para. (d) "... may act as arbitrator" presumably where there are competing valuations or as an "expert" where there are none.

20. There can be no doubting the width and the importance of the role, function and powers of the Valuer-General in the valuation of land in Vanuatu including "to ensure the integrity of valuations under the Act" and "to act as a land referee in disputes regarding ... land values". But that alone in the absence of a specific direction in the Land Acquisition Act, is insufficient in my view, to give the Valuer-General a supervisory or pro-active valuation role in the statutory process for the compulsory acquisition of land under the Land Acquisition Act which is a complete code in itself.

21. Notably on 8 January 2014 the appellant's lawyer wrote to the "acquiring officer" in the following almost prophetic terms:

*"We are surprised to receive copies of correspondences between Mr. Menzies Samuel of Valuer General regarding valuation we requested Mr. Steven Tahi to make to assist our client to ascertain the true value of his land for purposes of consideration of compensation value you will provide for purposes of the acquisition. **It is unfortunate to seek the Valuer General tampering with the acquisition process. His interference is improper and that he has no statutory authority to do so.** It is clear he has vested interest which put his office in conflict situation. As such we are opposing any involvement of the Valuer General in the acquisition process. He must keep out as he is partial".*

(my emphasis)

22. I am satisfied that the Valuer-General in his limited "directed" role under the Land Acquisition Act in hearing an appeal under Section 3(2) and (3) is exercising his jurisdiction as a land referee and "acting as an arbitrator" between the "acquiring officer" who made the disputed determination and the dissatisfied land owner(s). And in so doing, the Valuer-General is obliged in terms of Section 9, to take into consideration any relevant factors enumerated in paras. (a) to (h).

23. The Valuer-General's limited appellate role under the above provisions, is confined to the assessment and final determination of compensation payable not



for the land but, for any damages caused or occasioned during the preliminary investigations carried out on the land by the "acquiring officer" or his authorized representative. I therefore do not accept State Counsel's submission, that the Valuer-General has a greater statutory role under the Land Acquisition Act merely because he is mentioned in Section 9, or that the determination of the ~~amount of compensation to be awarded for any land acquired under the Land~~ Acquisition Act (as opposed to any damages caused during the investigation stage) is, in the words of Section 5(d) of the Valuer-General's land referee jurisdiction "... directed (by the Act) to be determined by the Valuer-General".

24. I am fortified by the other provisions of the Land Acquisition Act especially those dealing with the processes leading up to the determination of the compensation ie. Sections 2 to 7 which identifies the "acquiring officer" (or his authorized representative) as the sole public official(s) concerned in the acquisition process including the determination of the compensation payable for any damage and for the land and thereafter as the official who issues the notice of final determination (see: Section 13) and who eventually takes possession of the land on behalf of the government at the end of the acquisition process (see: Section 16).
25. The confusion that surrounds the Valuer-General's role may be explained by examining the legislative history of **Part III** of the Land Acquisition Act.
26. The immediate predecessor of the present Land Acquisition Act before it was amended, is the original Land Acquisition Act **No. 5 of 1992** which contained a Section 8 (now repealed) which required the "acquiring officer" to conduct an inquiry into four (4) enumerated matters including – "the market value of the land"; and "such claims for compensation notified to him within the time allowed". The acquiring officer was also given power in conducting the inquiry to summon witnesses and documents and to examine them under oath and prepare a summary of their evidence and retain a certified copy of any documents produced. He was not bound by the rules of evidence. Thereafter the "inquiring officer" was required to make a decision on every claim for compensation for the land acquired under the Act (see: Section 11 also now repealed).
27. Interestingly Act **No. 5 of 1992** provided an unsuccessful or dissatisfied claimant separate avenues of appeal to different bodies. The unsuccessful claimant could appeal to the Supreme Court against the rejection of his claim for compensation and the "dissatisfied" claimant could appeal against the compensation sum awarded by the "acquiring officer", to the "Land Referee" (who later became the Valuer-General with the passing of the Valuation of Lands Act in 2002).
28. Section 12 was later repealed and substituted with the present provision by the Land Acquisition (Amendment) Act No. 34 of 2000. The effect was to remove the right of a "dissatisfied" landowner to appeal to the "Land Referee" against the determination made by the acquiring officer under Section 11.
29. It is clear that in **Act No. 5 of 1992** the functions of the "acquiring officer" and the "Land Referee" (Valuer-General) were kept separate and distinct where the "Land Referee" retained only an appellate role under Sections 3 and 12 and the "acquiring officer" retained this primary role as the official who made all determinations at first instance (for want of a better expression). Unfortunately that clear separation has become blurred with the repeal of Section 11 thereby



diminishing the primacy and exclusivity of the acquiring officer's role in determining the compensation to be awarded for any land acquired under the Act.

30. If I may say so with respect, the repeal without replacement of Sections 8 and 11 ~~was unfortunate in that the transparent inquiry that the "acquiring officer" was~~ mandated to conduct in determining the validity of the claims and his distinctive role in assessing the amount of compensation to be paid for the land acquired under the Act became blurred and the inquiry process which would inevitably occur became shrouded in secrecy.
31. In the result the "*acquiring officer*" was no longer required to keep a record of the evidence and documents that he had received, consulted and referred to in that "*hidden*" process and no record of the process is available which could be produced in any appeal against his determination(s). Certainly none was produced in the present appeal and the inquiry process is not clarified by a sworn statement from the "*acquiring officer*" **Rocky Adams**. It appears that it was during this "*hidden*" process that the Valuer-General first became involved in the compulsory acquisition of the appellant's land without the knowledge or agreement of the appellant.
32. This absence of an inquiry record is exemplified by the Appeal Book filed by the appellant which comprises a collection of Public Notices; the Valuer-General's valuation report; and a series of letters from the appellant's counsel and valuation expert. Other than a single letter from the Valuer-General dated 26 November 2013 responding to the appellant's expert, there is nothing included in the Appeal Book from the respondent's side as might be expected if there had been written responses to the appellant's letters and representations.
33. It is common ground in this case that the Valuer-General in determining the compensation payable to the appellant under Section 9 was acting as an "*expert*". That was a usurpation of the statutory process and power granted to the "*acquiring officer*" under Section 7(2)(d) which directs claims for compensation for acquired land to be "*made to the acquiring officer*", and under Section 9 of the Land Acquisition Act.
34. I say "*usurpation*" advisedly because the role of the Valuer-General in Section 9 is not an unlimited general supervisory one, rather, it is limited and confined by the words "... *under this Act*" which must have some meaning and which can only refer to a provision other than Section 9. This appears to have been overlooked in State Counsel's submissions to the contrary.
35. As already pointed out the singular role of the Valuer-General under the Land Acquisition Act is to be found in Section 3(2) and is limited to hearing appeals against any determination by the "*acquiring officer*" (or his authorized representative) of the value of compensation payable for any damages caused to the land or anything on it at the investigation stage, by the entry onto the land to be acquired. In the absence of an appeal under Section 3(2), the Valuer-General has in my view, no other role in the statutory process for the acquisition of land and the assessment of compensation for such acquired land under the Land Acquisition Act.



36. A possible reason for the inclusion of the Valuer-General in Section 9 is because Section 3(2) and (3) which directs the Valuer-General to make a final determination in respect of damage sustained during the investigations stage, does not set out any matters that the Valuer-General must consider in making his determination under the section. Secondly, to obviate the need for the ~~Minister to make regulations under Section 22. This is the meaning and effect of~~ the phrase "... in so far as such basis is not specified in this Act" contained in Section 22(2)(c).
37. Looking more closely at the items enumerated in Section 9 it is plain in my view that item (b) is directed at the "*acquiring officer*" and not the Valuer-General who, in the sequence of events in the statutory scheme under the Act, would have no need to consider that item as that is already reserved to him to finally determine under Section 3 and his determination would be paid out within 30 days. Likewise item (c) which is concerned with the value of damage sustained "*by loss of any growing crops or trees which may be on the land*" before the acquisition process commenced is plainly a relevant factor in a determination under Section 3.
38. Furthermore the undesirability of involving the Valuer-General in two (2) difference capacities in the same Act initially, as a person hearing an appeal under Section 3 and then, later, as the person making the determination under Section 9, is in my view, both real and obvious and ought to be avoided if at all possible. That is not to say that the "*acquiring officer*" cannot consult with the Valuer-General or other experts during the course of making his determination under Section 9 provided that the determination remains his alone.
39. The foregoing is sufficient to dispose of this appeal in so far as this Court is firmly of the view that the determination of the Valuer-General is "*ultra vires*", null and void. However if I should be wrong in construing the relevant provisions of the Act then I turn next to consider the appellant's grounds of "*dissatisfaction*" which are two-fold:
- (1) The Valuer-General had used the wrong method of calculation and valuation approach in his determination under Section 9; and
  - (2) The Valuer-General was biased and had a conflict of interest in making his determination.
40. In support of the grounds of appeal the appellant besides preparing an appeal book, filed three (3) sworn statements from himself and a sworn statement from his valuation expert **Steven Tahi** annexing a valuation report prepared on 23 August 2013 in respect of the said land in the sum of VT653,500,000.
41. The respondents filed three (3) sworn statements from **Menzies Samuel** the Valuer-General, in response. Unfortunately no sworn statement was filed by the relevant "*acquiring officer*", **Rocky Adams**.
42. It quickly became obvious that both counsels were treating the appeal as if it was a "*de novo*" hearing or a trial on the merits as to which of the competing valuations should be accepted by the court. Counsels also requested to cross-examine the deponents on either side. I did not agree with that treatment and in the absence

of any guidance in the Land Acquisition Act, counsels agreed to file written submissions on that issue as well as three (3) other agreed issues as follows:

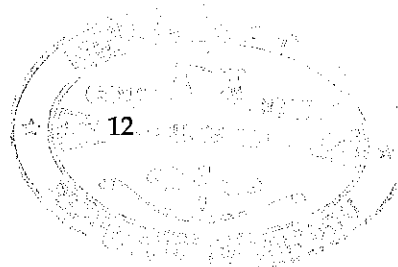
- (a) What is the nature and limits (if any) of an appeal under Section 12? Can evidence be introduced in the appeal? (see also: Manlaewia v. Maripopongi [2015] VUSC 119)
- (b) Is the appellant's second ground of appeal (of bias and conflict of interest) permissible under Section 12?
- (c) What order(s) can this Court make in the event it upholds the appeal:  
(i) On ground (1)? and/or  
(ii) On ground (2)?
- (d) Does the appellant's evidence of "bias" and "conflict of interest" disclose a disqualifying interest?
43. State counsel submits that the appeal under Section 12 is a "statutory appeal" limited to a challenge to the amount of compensation awarded in a determination made under Section 9 and confined to the enumerated items. As to whether evidence should be allowed in such an appeal counsel submitted on the precedent of Kilbride Ltd. v. Republic of Vanuatu [2014] VUSC 24 that additional evidence may be received and cross-examination allowed. Counsel referred to Articles 47 and 49 of the Constitution and the provisions of the Judicial Services and Courts Act [Cap. 270] and submitted that the Court had unlimited jurisdiction and inherent powers to hear and determine any matters before it including power to receive further evidence from the parties to the appeal.
44. Appellant's counsel also accepts that the appeal under Section 12 is a "statutory appeal" and in the absence of express power, the Court has a discretion to receive additional evidence "if the Court thinks it is necessary or expedient in the interest of justice".
45. As to the orders which the Court could make in the event of allowing the appeal both counsels are united in submitting that this Court has power to quash the determination, make declarations and thereafter return the matter for re-determination in accordance with any view(s) expressed by the Court in its judgment. Neither counsels submitted that the Court could make its own determination of the compensation to be paid under Section 9.
46. I confess that the answer to the questions is not an easy one given the complete absence of any provisions including the absence of any indication of what orders the Court may make in the event of allowing an appeal under Section 12. Having said, that I agree with counsels submissions as to the limited nature of the appeal and the Court's power to receive fresh evidence but, such evidence, must still satisfy the characteristics recently identified by the Court of Appeal in Tari v. Begley [2016] VUCA 18 where, in rejecting a submission that the fresh evidence in that case should be received "... to clear up issues and assist this Court making a fair judgment", the Court said:

"The primary consideration for the admission of fresh evidence (on an appeal) are (1) whether or not that evidence was unavailable at the time of hearing or could not have been ascertained by reasonable enquiry (2) whether the evidence is relevant and (3)

whether the evidence, if given at trial, would have had a significant effect on the outcome of the trial". (see also: Salwai v. Boulekone [2012] VUCA 19 at para. 12)

(my numbering)

- ~~47. In the present appeal the evidence sought to be led in the sworn statements from the appellant and his expert and from the Valuer-General is neither new or "fresh" nor is it "relevant". This Court is not required in the appeal, to go beyond the challenged determination and the reason(s) given for it. Nor is the Court required to determine the relative merits of the competing valuations with a view to preferring one or the other. Whatsoever the fact that the legislation does not empower the court to make its own determination is another reason for disallowing the production of disputed evidence at the hearing of the appeal.~~
48. With those preliminary observations I return to consider the appeal proper. In doing so and given the absence of an inquiry record, I shall refer to the undisputed evidence in the parties' sworn statements where relevant.
49. Before dealing with the competing submissions on this first ground of appeal I can quickly dispose of State Counsel's submission that the Valuer-General and the appellant is confined to the provisions of Section 9 and the 8 enumerated matters which "are exhaustive". I disagree.
50. In my view the 8 enumerated matters are the essential minimum factors that must be taken into consideration by the person making the determination under Section 9 but they are not exhaustive. The section does not use any confining words or phraseology such as, "only" or "... and no other" nor does the section purport to refer to the nature and type(s) of evidence, representations, reports or investigations that the person making the determination is required to receive, request, or undertake in making his determination. Indeed if the Valuer-General were to be literally and strictly confined to the "heads of claim" enumerated in Section 9 then there would be no need for him to consider other factors or any representations made on behalf of the custom owner of the land since that is not an enumerated factor. I cannot agree that that is either the meaning or intent of the legislature in enumerating the "heads of claim" in Section 9 when read with the "open" invitation in Section 7(2)(d).
51. In his written submissions on ground (1) appellant's counsel submits that the Valuer-General erred in law in not giving the appellant the opportunity to be heard on his compensation claim or to object to him making the determination because of his perceived bias. Secondly, counsel submits that the Valuer-General never considered the valuation report submitted by the appellant's expert which assessed the appropriate compensation for the appellant's land at VT653,500,000.
52. I propose for convenience and brevity to confine my consideration of ground (1) to the latter submission dealing with appellant's competing valuation report which it is common ground had been submitted to the "acquiring officer" at the relevant time and was available to the Valuer-General when he made his determination under Section 9.



53. As already mentioned the appellant's expert Valuation Report was prepared on 23 August 2013. The report noted that the interest to be valued is: the "custom land value" excluding improvements and non-existent leasehold interests. By way of background the report noted that:

~~"... the subject land has been used as a coconut research centre for over 33 years during which time no land rent has been paid to the custom owners for the use of the land. It is estimated that 50% of the land's best use will be high residential sub-division and about 50% of the land is suitable for agricultural purposes which is the current use of the land".~~

54. The valuation report adopted a "comparable method" of valuation based on past compensation paid where government compulsorily acquired customary land for public purposes and making adjustments for variables and differences in area, and "grid adjustments". After identifying three comparable valuations the author adopted Comparable 2 described as follows:

"Land Title 04/2643/005 with area 47ha29a80ca was compensation to the custom land owners in the sum of VT196,888,300 in 2011. The land is situated about 3 minutes drive to the subject land. The land is where the Agriculture College is situated and ancillary facilities. The interest compensated here is a customary land interest similar to the interest value on the subject land".

After arriving at an adjusted hectare rate of VT2,700,000 the total compensation arrived at was (242.05 hectares x VT2,7 million) = VT653,500,000.

55. Despite receiving the above valuation report the Valuer-General completely ignored it in his determination. He neither mentions it in his valuations nor does he criticize it or disagree with the basis of valuation or the selected comparators. Indeed in his own "Comparable Method" analysis the Valuer-General completely ignores the 3 comparables selected by the appellant's expert even to the extent of omitting them from the Sale Schedule he used in assessing the "per hectare" value of the appellant's land and arriving at a much reduced figure of VT750,000 per hectare.

56. The definition adopted by the Valuer-General for "market value" is:

"(the) estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had acted knowledgeably, prudently and without compulsion".

57. I accept that the "market value of the land" is the statutory basis of valuation provided for in Section 9, but, as earlier observed it is not the only consideration or factor relevant to the assessment of compensation under the Section. I mean no criticism when I say that the adopted definition of "market value" based on a "willing seller" and "willing buyer" where neither party has acted "without compulsion", may not be entirely appropriate in a compulsory acquisition of customary land under the Land Acquisition Act.

58. I say this because the very nature of the acquisition under the Act is compulsion and as clear from the predecessors of the appellant whose earliest correspondence to the First Secretary of the Ministry of Lands dated 26 February 1988 states concerning the said land:

*"(1) I do not wish that this named title be declared public land to certain reasons and would like the minister responsible to retain my rights for customary ownership".*

And:

*"(4) I will not accept compensation for the land and would proposed that there be a lease between myself and the Government".*

59. In similar vein and more graphic, the appellant in objecting to the acquisition noted that the land to be acquired "... is the biggest part of my customary land Nabuloaru" and if acquired: "I will lose the perpetual interest of my land and my descendants will have no more land for gardening ... This effectively means my future generations would be landless". Plainly the appellant was a reluctant participant in the compulsory acquisition of his custom land boundary.
60. I accept however that under Article 80: "the government may own land acquired by it in the public interest" and upon payment of compensation assessed in accordance with prescribed criteria "appropriate to persons whose interests are adversely affected ..." by such acquisition (see: Article 77).
61. However the importance of land to the indigenous ni-Vanuatu including the appellant cannot be doubted and is a paramount consideration behind the provisions of Chapt. 12 in the Constitution and especially Articles 73 which declares that all land in Vanuatu "belongs to the indigenous custom owners and their descendants" and by Article 75: "Only indigenous citizens of Vanuatu ... shall have perpetual ownership of their land". (see: Enbue v. Family William Bras [2011] VUCA 12 esp. paras. 8 – 11).
62. As was said by the First Minister of Lands Hon. Sethy Regenvanu in the **Introduction** to: "The Politics of Land in Vanuatu" by Howard Van Trease:
- "Land to ni-Vanuatu is what a mother is to a baby. It is with land that he defines his identity and it is with land that he maintains his spiritual strength. Ni-Vanuatu do allow others the use of their land, but they always retain the right of ownership".*
- In my view this cultural normative value of the importance of land to the indigenous custom owners needs to be given some prominence in the acquisition and in the assessment of compensation involving the compulsory acquisition of customary land.
63. The idea of a "market value" for customary land is also inappropriate in so far as while the land remains "customary land" there could not have been a sale on the open market but such a sale is inherent in the idea of a "market value" and therefore the law requires the officer making the determination under Section 9 to make a contrary assumption and consider the hypothesis of a sale on the "open market" by a "willing seller" and "willing buyer" on the date of the notice of intention to acquire the land.
64. A further notable omission in the Valuer-General's determination is an award of compensation under Section 10 for "... loss of rents and loss of financial gains for the period from the date of the notice of intention of acquisition till

*compensation awarded under Section 9 is paid in full*. I say this because by the Valuer-General's own admission in his valuation report: "... *the purpose of the acquisition is to regularize the State ownership over the site and the scientific agricultural researches and technical activities of the Vanuatu Agricultural Research and Technical Centre (VARTC)*" which is owned and financed by the Vanuatu government and which has occupied the said land since 1994 until the present day.

65. The Valuer-General's report while setting out the "*heads of claim*" *ie.* paras. (a) to (h) of Section 9 including Section 10, nowhere clearly shows that each item other than the "*market value*" under **para. (a)** was separately considered in the report as it should have. In the result the report failed to consider and/or value any damage sustained "*by reason of the acquisition severing (the appellant's) land and injuriously affecting the remaining part of the appellant's land*" [**paras. (d) and (e)**]. This consideration would have been obvious from the fact that the acquisition took "*the biggest part of (the appellant's) customary land Nabuloaru*" including "... (the appellant's) *only water source for his village use for their day to day survival and adversely "affected the public road which (the appellant's) family has been using over the years to access our gardens up inland along road to Fanago and our river which we have been using for swimming*".
66. Similarly no consideration was given to the fact that the appellant's family lived on the acquired land and the acquisition would have "... *compelled (them) to change ... residence*" thereby incurring moving and relocation expenses [**para. (f)**] (**see also: Livingstone v. Molbarav** [2012] VUCA 15 at para. 26).
67. Given the above failures and the complete ignoring of the report of the appellant's expert valuer in the Valuer-General's report it cannot be said there was a full and complete consideration of the mandatory "*heads of claim*" that the Valuer-General was legally obliged to consider in making his determination.
68. As was said by the Court of Appeal in Ifira Trustees Limited v. Family Kalsakau [2006] VUCA 23:

*"When Parliament grants a power to make decisions, the decision-maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision-maker must faithfully apply fair and proper processes and procedures"*.
69. This Court is satisfied that the Valuer-General's assessment of the amount of compensation to be awarded for the acquisition of the appellant's land did not constitute a "*determination*" in accordance with Section 9. It is accordingly quashed and the matter is returned to the "*acquiring officer*" to consider and re-determine the compensation to be awarded for the acquisition of the appellant's land.
70. I can now deal briefly with the ground of "*bias*" and "*conflict of interest*" which is admitted because of the involvement of the Valuer-General in the determination under Section 9 without the knowledge and agreement of the appellant.
71. In this regard the appellant submits that the Valuer-General who was a former Director on the board of the VARTC which was and is located on the appellant's

land has, by virtue of that past association, a conflicting interest and perceived bias in making his determination under Section 9. In counsel's words:

*"... the Valuer-General of Vanuatu must uphold rules of justice, he should strive to make the parties and the community feel that he is just. He owes this to himself, to the law and to the position he holds"*.

72. State Counsel in opposing this ground submits that given the accepted evidence the appellant has failed to articulate a logical connection between how the Valuer-General's past dealings as a Director of VARTC could raise an issue of perceived bias in his determination. The bare assertion of a conflict of interest is insufficient (see: Matarave v. Talivo [2010] VUCA 3; Tabouti v. Health Department [2010] VUCA 7 and Vohor v. Public Prosecutor [2004] VUCA 23).
73. The test articulated in the above cases requires the court's assessment of the perception which the circumstances would give rise to in the mind of a fair minded lay observer informed of the facts. It require a 2-stage approach first, the court must ascertain all the circumstances which have a bearing on the suggestion that the Valuer-General is biased and secondly, the court should ask whether these circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the Valuer-General is biased (see: Porter v. Magill [2002] 2 AC 357).
74. The circumstances that have a bearing in this case may be summarized as follows:
  - (1) It is an undisputed fact that between the years January 2002 to end of January 2006 the Valuer-General was a government appointed Director of VARTC and had actually lived and worked at the offices of VARTC at Sarautu;
  - (2) In that capacity as a founding Director, he would have acquired a close working knowledge of the functioning of VARTC, its staffing, finances, and day-to-day operations and he would be aware of Government's concerns and any ministerial directions and guidelines issued to VARTC Board (see: the Vanuatu Agricultural Research and Technical Centre Act (Cap. 286) which commenced on 1 January 2003);
  - (3) In his capacity as the person making the determination under Section 9 he would have been well aware of the appellant's objections to his involvement in the valuation process since 2014;
  - (4) His failure to give the appellant the opportunity to make representations to him about his involvement in the valuation process and specifically the allegation that he had a conflict of interest before making his determinations;
  - (5) The less than open and transparent manner in which he became involved in the valuation of the appellant's land without the appellant's knowledge and agreement;
  - (6) His awareness and outright rejection of the valuation report of the appellant's expert valuer even to the extent of ignoring it completely in his determination;
  - (7) His adoption of a significantly lower "*per hectare*" rate in the face of the rate adopted in the Agriculture College acquisition referred to by the appellant's expert and with which the appellant was closely associated; **and**



- (8) His complete failure to make an award under the mandatory provisions of Section 10 for "loss of rent" from the date of the acquisition notice (1 August 2013) till the date of determination (27 February 2014).
75. In my view the fair-minded observer on being informed of the above facts would ~~unhesitatingly conclude that there is a real possibility that the Valuer-General~~ was biased in the sense of approaching his determination with a closed mind and preconceptions and without an impartial consideration of all relevant factors.
76. For the above reasons also the Valuer-General's determination must be considered null and void.
77. If I may say so it is unfortunate that the Valuer-General in the course of arriving at his determination became distracted by the unflattering correspondence he exchanged with the appellant's expert in November/December 2013 and this may have contributed to the several shortcomings in his determination to the detriment of the appellant.
78. The appellant having succeeded on both grounds of appeal, the appeal is allowed with costs to be taxed if not agreed.

**DATED at Port Vila, this 3<sup>rd</sup> day of March, 2017.**

**BY THE COURT**



**D. V. FATIAKI**  
**Judge.**

