IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of The High Court of Solomon Islands (Kouhota J)
COURT FILE NUMBER:	Civil Appeal Case No. 17 of 2025 (On Appeal from High Court Civil Case No. 468 of 2019)
DATE OF HEARING:	23, 24 October 2025
DATE OF JUDGMENT:	31 October 2025
THE COURT:	Muria P Gavara-Nanu JA Morrison JA
PARTIES:	DOROTHY ISAAC and HONIARA RESORT (SOLOMONS) LIMITED -V- COMMISSIONER OF LANDS & ORS
ADVOCATES:	
APPELLANTS:	J. Sullivan KC and A. Preston
1ST RESPONDENT:	B. Pitry with E. Waiwaki
2ND and 3RD RESPONDENT	R Mona
4TH RESPONDENT	A. Radclyffe
5TH RESPONDENT	
KEY WORDS:	
EX TEMPORE/RESERVED	RESERVED
ALLOWED/DISMISSED	DISMISSED
PAGES	1 - 58

JUDGMENT OF THE COURT

1. This appeal arises because of an application by the Appellants for the learned primary judge to answer preliminary questions ahead of a trial.

2. The parties to the proceedings are:[1]

   (a) Claimant - the Attorney-General representing the Commissioner of Lands;

   (b) First Defendants – the current registered owners of PN 191-082-012: (Kurilau, Gado, Rava, Nano and Tupe);

   (c) Second Defendants – surviving registered owners of PE 191-014-236 and PE 191-014-252: (Kurilau, Hanikouna and Rava);

   (d) Third Defendant – registered lessee of PE 191-014-252: (Honiara Resort (Solomons) Ltd);

   (e) Fourth Defendant – registered owner of PE 191-014-251: (Isaac);

   (f) Fifth Defendant – registered lease holder of PE 191-082-011: (Fuo'o); and

   (g) Sixth Defendant – the Registrar of Titles.[2]

3. The land the subject of the proceeding, Original Parcel 1 and Original Parcel 2, was customary land. The Commissioner sought to acquire the land by lease under Part V Division 1 of the Act.

4. The admitted purpose of the acquisition was that the land be leased to the Commissioner of Lands for 75 years.

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[1] Without intending offence, where possible we will use surnames for ease of reference.
[2] Who abided the order of the Court.

5. The orders sought by the Commissioner of Lands in the Claim are (relevantly):[3]

   (a) that the acquisition, vesting and registration of PE 191-014-235 (**Original Parcel 1**) does not comply with s 69(1)(b) of the *Land and Titles Act (Cap. 133)*, and was therefore null and void;

   (b) consequently, rectification pursuant to s 229 of the Act that:

      (i) the creation of PE 236 and PE 237 from Original Parcel 1 was done by mistake;

      (ii) the creation of PE 251 and PE 252 from PE237 was done by mistake;

   (c) the acquisition, vesting and registration of PE 191-082-005 (**Original Parcel 2**) does not comply with Part V, Division 1 of the Act, and was therefore null and void;

   (d) consequently, rectification pursuant to s 229 of the Act that:

      (i) the creation of PE 011 and PE 012 from Original Lot 2 was done by mistake;

   (e) the Registrar rectify the land register by cancelling all subsequent subdivisions or mutations from Original Parcel 1 and Original Parcel 2.

6. The stated purpose of the acquisition was to acquire land below the High Water Mark shown in LN44/82 (Plan 1981), including a portion of offshore land beginning at Rove Creek and running eastward along the coastline and ending at the boundary line between Lots 21/1/H and Lot 48/1/11. As mentioned, the acquisition was to grant a lease of the land to the Commissioner of Lands, for 75 years.

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[3] For ease of reference in these reasons, where possible we intend to refer to the various parcels by the initials "PE" followed by the last three digits of the number, e.g. PE 252.

7. The acquisition was to be by way of a lease, the stipulated term of which was 75 years. The Commissioner and the owners entered into agreements for lease in respect of the land.

8. On 14 February 2013, the Commissioner of Lands signed a vesting order, vesting Original Parcel 1 to Laugana, Kavichavi and Kurilau.

9. By notice of first registration dated 2 May 2013, Original Parcel 1 was registered in the joint names of Laugana, Kavichavi and Kurilau.

10. The steps required by s 69(1)(b) of the Act to implement an agreement for the acquisition of customary land by lease are:

> "(i) making an order vesting the perpetual estate in the land in the persons named in the agreement as lessors;
>
> (ii) requiring the persons so named to execute a lease in favour of the Commissioner in accordance with the terms of the agreement;
>
> (iii) paying to such persons any premium or rent payable in accordance with he terms of the agreement; and
>
> (iv) taking possession of the land; ..."

11. Whilst a vesting order was made, the other three steps were not taken. No lease was executed by the Commissioner or the customary owners. No premium or rent was paid by the Commissioner to the customary owners. The Commissioner did not take possession of the land.

12. On 22 April 2015 Original Parcel 1 was subdivided [by the perpetual estate owners] to create PE 236 and PE 237. Each was registered in the names of Kurilau and Kavichavi.

13. On 12 August 2015, PE 237 was subdivided [by the perpetual estate owners] to create PE 251 and PE 252. Each was registered in the names of Kurilau and Kavichavi.

14. On 25 April 2016, PE 236 and PE 252 were transferred from Kavichavi and Kurilau to Kavichavi, Kurilau and Hanikouna.

15. On 21 November 2017, PE 252 was transferred from Kavichavi, Kurilau and Hanikouna to Kurilau and Hanikouna, following the death of Kavichavi.[4]

16. The 4th defendant, Isaac, alleges that on 27 February 2019, Rava, as the person in custom entitled to replace Kavichavi, was registered as an additional joint owner of PE 252.

17. The Claim then alleges as to Original Parcel 2 (PE 005):

    (a) the purpose of the acquired was: "for registration of the entire stretch of customary land beyond the High Water Mark along the entire Honiara City boundary from western city boundary to the eastern city boundary runs out to the coastal waters bordering with central Islands province maritime boundary or as far out as allowed by relevant laws of Solomon Islands, better described as Town Land (Honiara) Order 1973, Legal Notice 83/73, 44/82 Plan No. 1081";[5] this was admitted;

    (b) the term was 75 years which indicates the intention to acquire by lease;[6] this was admitted;

    (c) the claim also contained allegations as to the subdivision and transfer of Original Lot 2;[7]

    (d) the third and fourth defendants (who are the only Appellants) answered that they had no interest in and did not plead to those allegations; that is because the third and fourth defendants have no interest in Original Parcel 2. [8]

18. The Claim pleaded that the mistakes in every case were that contrary to s 69(1)(b) of the Act:

    (a) the Commissioner did not require the owners to execute a lease in favour of the Commissioner in accordance with the terms of the agreement for lease: s 69(1)(b)(ii);

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4 There are some disputed facts concerning the transfers, principally as to who was entitled to become owner on the death of another. Those disputes are irrelevant for present purposes.
5 Claim, paragraph 18.a.
6 Claim, paragraph 18.b.
7 Claim, paragraphs 17-26.
8 Defence, paragraph 2 and 13.b.

(b) the Commissioner did not pay any premium or rent payable in accordance with the terms of the agreement: s 69(1)(b)(iii); and

(c) the Commissioner did not take possession of the land: s 69(1)(b)(iv).

19. The consequence was that:

(a) no lease was registered over the PE's notwithstanding that it had been agreed or at least anticipated by everyone that a registered lease would result; and

(b) none of the PE's in question have the encumbrance they were supposed to have, namely a registered lease to the Commissioner.

The application for preliminary questions

20. The application was made by Honiara Resort (Solomons) Ltd and Ms Issac. It sought the following relief:

> "pursuant to Rules 12.11 and/or 12.12 of the *Solomon Islands Courts (Civil Procedure Rules) 2007*, the Court hear and determine disputed questions of law arising out of the pleadings and set out in the Statement of Case".

21. The Civil Procedure Rules provide:

> "**Preliminary issues**
>
> 12.11 The court may hear legal argument on preliminary issues of fact or law between the parties if it appears likely that, if the issues are resolved, the proceeding or part of the proceeding will be resolved without a trial, or the costs of the proceedings or the issues in dispute are likely to be substantially reduced.
>
> **Hearing of question of law only**
>
> 12.12 If the parties have agreed on the facts but there remains a question of law in dispute, the court may hear argument from the parties about the question of law."

22. The questions asked were as follows:

> "1. Is the seabed adjacent to the fore shore (i.e. below the mean low water mark) out to specific limits capable of being "Customary Land" for the purposes of Part V Division 1 of the Act?"
>
> 2. If answer to question 1 is in the negative, was the registration of the perpetual estate over the sea bed in favour of the Trustees a mistake giving rise to the jurisdiction of the Court pursuant to section 229 of the Act to order rectification and cancellation of the relevant estate registers?
>
> 3. Was the failure of the Commissioner and relevant Trustees to execute a lease of the relevant perpetual estates under s 69(1)(b) of the Act, and/or the Commissioner to pay rent and take possession of each of the subject lands under s 69(1)(ii) and (iv) of the Act, a mistake giving rise to the jurisdiction of the Court pursuant to section 229 of the Act to order rectification and cancellation of the relevant perpetual estates registers and related registers?
>
> 4. If the answer to either of Questions 2 or 3 is in the affirmative, does that preclude the Court from exercising any discretion to refuse rectification in circumstances where the exercise of such discretion would otherwise be open under s 229(1) of the Act?
>
> 5. If the answer to either of Questions 2 or 3 is in the affirmative, does that preclude the operation of s 229(2) of the Act where a defence under that provision would otherwise be open?

The learned primary judge's ruling

23. The learned primary judge referred to rules 12.11 and 12.12, and said:[9]

> "I understand rule 12.11 refers to a point of law or fact that are pleaded and that are in dispute between the parties, not just any point of law or fact outside the pleadings that is not in dispute between the parties.
>
> Rule 12.12 clearly support my interpretation of rule 12.11 when section 12.12 of the rules states, "**If the parties have agreed on the facts but there remains a question of law in dispute**, the Court may hear argument from both parties about the question of law.
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> When rule 12.11 is read together with rule 12.12, it is clear rule 12.11 says the Court may only hear a question of law that is in dispute between the parties."

24. The learned primary judge declined to answer question 1 and 2, holding:

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[9] Emphasis in original.

> "With regard to question 1, while it is clearly an issue of law, I consider it is not an issue of law currently in dispute between the parties before the Court. The question has not been pleaded as part of the claim or raised by the Defendant as a defence, I had read the facts and found that the issue has never been pleaded by any of the parties, as such I feel the Court is not obliged to determine a question of law that was not pleaded by any of the parties and is not in dispute between the parties. On that basis, the Court refused to answer question 1.
>
> Since question 2 is subject to the Court's answer to question 1, since the Court refuse to answer question 1, the Court cannot answer question 2 as well."

The Appellants' contentions on Questions 1 and 2

25. The Appellants contend that the learned primary judge misconstrued Rules 12.11 and 12.12 and ought to have answered Questions 1 and 2. The contention runs thus:

    (a) neither Rule on its face requires that the relevant issues or questions of law be specifically pleaded;

    (b) Rule 12.12 is confined to the resolution of any question of law that remains in dispute after the parties have resolved their factual disputes; that suggests the prior existence of disputed legal issues; thus Rule 12.12 is apposite where a statute or principle of law has been pleaded (as it must under Rule 5.3(c) providing for a statement of case) and agreement on the facts leaves the resultant legal issue ripe for determination; and

    (c) by contrast, Rule 12.11 is far broader and, unlike Rule 12.12, makes specific reference to the resolution of a proceeding, or part thereof, by way of preliminary questions of law or fact, which might resolve a trial from the outset.

26. The Appellants relies on *Attorney-General v Jui Hui Chan*[10] for the proposition that Rule 12.11 can be a useful mechanism for early resolution of proceedings, but the questions asked must be carefully framed and recorded. So much may be accepted, but that does not assist the issues on appeal.

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[10] [2017] SBCA 5 at [31]-[32], [34].

27. The Appellants does not point to authority that considers whether either Rule 12.11 or Rule 12.12 has application to issues not specifically pleaded. Indeed, the Appellants contends that the question has not previously been determined.

Consideration

28. There is no part of any of the pleadings that raises the issue as to whether the seabed adjacent to the foreshore is capable of being Customary Land. As will become apparent Mr Sullivan KC, appearing with the Preston for the Appellants, conceded that it probably should have been pleaded.

29. In our view, the context in which Rules 12.11 and 12.12 are found is important. The Civil Procedure Rules establish that context.

30. The Overriding Objective of the Rules is to enable the courts to deal with cases justly with minimum delay and expense. Rules 1.4 and 1.7 relevantly provide:[11]

> "1.4 Dealing with cases justly includes, so far as is practicable:
>
> (a) ensuring that all parties address the real **issues of the proceedings**;
>
> ...
>
> (c) dealing with the case in ways that are proportionate:
>
> (i) to the importance of the case; and
>
> (ii) to **the complexity of the issues**; ...
>
> 1.7 Active case management includes:
>
> (a) encouraging the parties to co-operate with each other during the proceedings;
>
> (b) **identifying the issues at an early stage**;
>
> (c) deciding promptly **which issues need full investigation and trial** and resolving the others without a hearing;

[11] Emphasis added.

(d) deciding the order in which **issues are to be resolved**;..."

31. The Rules themselves identify what "issues" are, in a variety of contexts.

32. Rules 5.1 and 5.2 relevantly provide for pleadings (called a "statement of case"):[12]

"5.1 A statement of case is set out in a claim, a defence, a counterclaim, a reply or a third party notice.

5.2 The purpose of the statement of case is to:

(a) set out the facts about what happened between the parties, as each party sees them; and

(b) show the areas where the parties agree; and

(c) show the areas where the parties disagree (**called the 'issues between the parties'**) that need to be decided by the court."

33. Rule 5.2(c) makes it clear that within the context of the Rules, "issues" are matters identified in and from the pleadings.

34. That is reinforced by Rules 5.11 and 5.12 which require a "statement of case" to be contained in the defence. So, too, must a reply contain a "statement of case": Rule 5.19(a). Further, a counterclaim must also contain a "statement of case": Rule 5.23.

35. The Rules also provide for amendment of a "statement of case" in Rule 5.34:[13]

"A party **may amend a statement of case** to:

(a) **better identify the issues between the parties**; or

(b) correct a mistake or defect; or

(c) provide better facts **about each issue.**"

36. As is evident from the wording of Rule 5.34, the statement of case (the pleading) is to identify the issues between the parties.

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[12] Emphasis in original.

[13] Emphasis added.

37. The identification of issues from the pleading (the statement of case) is also clear from the Court's power to give directions as to disclosure. Rule 8.3 relevantly provides:[14]

> "8.3 At a first court hearing, the court may make the orders that it considers appropriate for the proper conduct of the proceeding until trial, including;
>
> (a) **giving directions in relation to**:
>
> (i) …
>
> (v) **disclosure of documents, either in full or limited to particular issues**; …"

38. We consider it plain that the Court's identification of such issues would be from the pleadings (the statement of case). Other rules dealing with disclosure requirements follow the same pattern, making it plain that issues are identified from the pleadings. Rules 11.21, 11.26, 11.31, 11.52 and 11.61 relevantly provide:[15]

> "11.21 The court may order that a party need not disclose some or any documents if the court is satisfied that:
>
> (a) the documents are **not relevant to the issues between the parties**; or …
>
> 11.26 The court must not order documents be disclosed unless the court is satisfied that:
>
> …
>
> (c) the documents are **relevant to an issue that is likely to arise in the proceedings**; and
>
> 11.31 The court must not order documents be disclosed [from a third party] unless the court is satisfied that:
>
> …
>
> (b) the documents are **relevant to an issue in the proceedings**; and
>
> 11.52 A person may object to answering a written question only on the following grounds:

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[14] Emphasis added.

[15] Emphasis added.

(a) the question **does not relate to a matter at issue, or likely to be at issue, between the parties**; or

(b) the question is not reasonably necessary to enable the court to decide **the matters at issue between the parties**; or

11.61 A party may apply for an order that another party disclose particular documents.

11.62 The magistrate may order that the documents be disclosed if:

(a) the magistrate is satisfied the documents are **relevant to the issues in the proceedings** and disclosure is necessary to decide the proceedings fairly or to save costs; or ..."

39. That construction is supported by Rules 8.14 to 8.16, which deal with pre-trial preparation, and relevantly provide:[16]

"8.14 The purpose of the trial preparation conference is:

(a) to **identify precisely what are the issues between the parties that are to be determined** in a trial; and

(b) ...

8.15 At the trial preparation conference, the parties should be in a position to:

(a) assist the court in finally **defining the issues to be determined** at a trial; and

8.16 In particular, at the trial preparation conference the court may:

(a) ...

(c) if possible, **decide any preliminary legal issues that need to be resolved** before the trial, or fix a date for hearing these; and ..."

40. Rules 10.12 and 10.17 make provision in respect of the mediation process. They require issues to be identified and made the subject of a mediation report. It is plain such issues should be identified from the pleading, not private assertion by one or all parties:[17]

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16 Emphasis added.

17 Emphasis added.

"10.12 The court may by order refer a matter for mediation if the court considers mediation may help resolve **some or all of the issues in dispute.**

10.17 The mediation order must set out information about:

(a) the statements of the case; and

(b) the issues between the parties; ..."

41. Of particular note in the context of this case is Rule 13.55 which provides:[18]

"13.55 **A matter is in issue** until it is:

(a) **admitted** or taken to be admitted; or

(b) withdrawn, **struck out** or otherwise disposed of."

42. The admission referred to in Rule 13.55 is as to something alleged in a pleading, i.e. a "matter in issue". A matter in issue can only be "struck out" if it is a matter in the pleading.

43. It is in that context that one finds Rules 12.11 and 12.12. The text of those Rules, in our view, make it plain that the issues are to be identified from the "statement of case", in other words the pleadings. The whole structure of the Rules, which are designed to assist courts to deal with the formal proceedings of a legal cause, depend on the identification of the issues between the parties in a way that is on the record and clear to all, but especially to the body constitutionally charged with the adjudication of the dispute, and as well any appellate court called upon to adjudicate the disputes as to what was done at first instance.

44. The identification of the issues from the pleadings also serves a fundamental purpose in the adjudication of legal disputes. That is the identification of any issue estoppels, preventing a party from departing from an issue that has been admitted, or resolved by the court.

45. Were that not the case parties could manufacture issues and obtain an advisory opinion of the court. It is no part of a court's duty or obligation to give advisory opinions.

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[18] Emphasis added.

46. There is longstanding authority to support the proposition that the pleadings are the way to identify the issues between the parties.

47. As early as 1930, Scrutton LJ said, in *Blay v Pollard and Morris*:[19]

> "Cases must be decided on the issues on record and if it is desired to raise other issues they must be placed on record by amendment."

48. The High Court adopted *Blay*, in *Nimelia v Solomon Islands Home Finance Ltd*:[20]

> "The Claimant cannot come to court and seek relief of what has not been pleaded and particularized, or any party for that matter. The courts will not grant, unless they are pleaded and on record."

49. The principle in *Blay* was referred to again in the High Court, in *Alai v Kakai*:[21]

> "A party alleging an issue cannot seek relief without pleading or particularizing the issue. The courts will not grant relief, unless they are pleaded on the record. The rules related to pleading are universally applied and no exception will be granted to anyone."

50. We respectfully adopt the statements in *Nimelia* and *Alai.*

51. Other Rules after Rules 12.11 and r. 12.12, follow the same pattern of identification of the issues. Thus:[22]

> "13.53 The registrar may only issue a summons requiring a person who is not a party to the proceeding to produce a document (a summons for non-party production) if it:
>
> (a) relates to **a matter in issue in the proceeding**; and …
>
> 22.33 On application under Chapter 22.1 (Stakeholder's interpleader) or Chapter 22.2 (Sheriff interpleader) for interpleader relief, the court may make the orders it considers appropriate for hearing and deciding all matters in dispute.
>
> 22.34 Without limiting rule 22.33 the court may do any of the following:
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> (a) … and

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19 (1930) 1 KB 628 at 634.
20 [2008] SBHC 69.
21 [2009] SBHC 1.
22 Emphasis added.

(h) make any order it considers appropriate, including an order finally disposing of **all issues arising in the proceeding**.

22.43 If, in a proceeding for interpleader relief, the court directs the trial of an issue, Chapter 8 (Pre-trial procedures) and Chapter 12 (trial) apply to the trial with all necessary changes and subject to directions the court may give."

52. Mr Sullivan KC, appearing for the Appellants, frankly conceded that the Appellants probably should have pleaded the issues.

53. The Appellants, however, contend that Rule 12.11 does not depend upon issues being identified in pleadings, and that the courts are free to take up and answer preliminary questions of law upon which there are no disputed facts. In support of that proposition they contend:

(a) that a construction of the Rules does not confine the operation of Rule 12.11 to issues identified in the pleadings; we have dealt with that contention above;

(b) that certain authorities reveal the courts' acceptance of the wider operation of the Rules; in that respect they cite: *Attorney-General v Jui Hui Chan*;[23] *Success Co Ltd v Chago*;[24] *Natei v HDD Development Ltd*;[25] *Earth Movers Solomon Ltd v Attorney-General*,[26] *Vunagi v Isabel Customary Land Appeal Court*,[27] and *Ontong Java Development Company Limited v Viauli and Attorney-General*.[28]

54. At the start it should be noted that the Appellants do not contend that any of those authorities considered whether either Rule 12.11 or Rule 12.12 has application to issues not specifically pleaded. That distinguishes them immediately.

55. In *Success* the primary judge found that the factual matrix was in serious dispute and those issues required determination at a trial and not before. The appeal sought to have this Court determine mixed issues of fact and law before the trial. This Court acknowledged the principle that where the parties agree on a precise preliminary question of law to be determined, the Court may determine that question on the

23 [2017] SBCA 5 at [31]-[32].
24 [2025] SBCA 3 at [5]-[6], [27]-[28].
25 [2023] SBCA 25 at [32]-[39].
26 [2024] SBHC 55 at [15].
27 [2024] SBCA 31 at [30].
28 [2024] SBHC 52 at [4]-[5].

uncontested evidence before it, referring to *Natei.*[29] But the case goes no further than that and offers no guidance on the question here.

56. *Natei* is much the same. The case did not involve the present question at all, being an appeal from a summary judgment, albeit granted on an application that included deciding two preliminary points. The first point had been previously determined and no appeal had been brought from that decision. Therefor the Court said it was no longer a live issue.[30] As for the other, that was decided on uncontested facts in the evidence put before the primary judge. However, the facts appeared from a sworn statement which the Rules treat as an alternative to a pleading: Rule 5.45. *Natei* is therefore of no assistance to the Appellants.

57. *Jui Hui Chan* was a judicial review case concerning the registration of a valuer, and a contention that the Valuer's Board had wrongly handled an application for registration. The relief sought mandatory orders directing the Board to register the valuer. No application was made for the determination of a preliminary point, but all parties agreed to have the question determined. This Court referred to the preliminary question process, commenting that it provided "a useful mechanism for the early resolution of proceedings" and also commented on the need for the proceeding to be strictly confined to the question.[31] But it does not assist on the issue in this case.

58. *Earth Movers Solomon* concerned a claim for declaratory relief concerning a letter from the Commissioner of Forest Resources to a Bank, in which the Commissioner advised that a performance bond be withdrawn because the claimants' licences had been breached and the *Forest Resources and Timber Utilization (Felling Licences) Regulations 2005* had been breached. The Claim pleaded the letter and the Commissioner filed a sworn statement attesting to the facts.[32] The court held that Rule 12.11 enabled the question to be heard.[33] The issue in this case was not argued, but in any event the issue arose of the pleadings (the Claim and a sworn statement).

59. *Vunagi* was a judicial review proceeding. An application was filed to have a preliminary point determined, namely whether the Isabel Customary Land Appeal Court's decision

[29] *Success* at [28].
[30] *Natei* at [36].
[31] *Jui Hui Chan* at [31]-[32].
[32] *Earth Movers Solomon* at [4], [8], [14].
[33] *Earth Movers Solomon* at [15].

was final and conclusive pursuant to s 10(2) of the *Forest Resources and Timber Utilisation Act (cap, 40)*. The question was directed at whether the appeal had been properly filed. If the decision of the ICLAC was final then there was no jurisdiction to entertain the appeal. This Court laid down a number of principles about deciding a preliminary point, but none of them was concerned with the question here.[34]

60. *Ontong* concerned the question whether, on the face of the Claim, the Claimant had standing to bring the proceedings, i.e. whether the claimant could bring a valid claim at all. The court raised the issue at a mention and invited submissions on the issue pursuant to Rules 12.11 and 12.12. The issue in this case was not considered. This was a case concerning the capacity to bring the proceedings at all, not an issue arising from pleadings or agreed facts. It is of no assistance on the present issue.

61. It may be accepted that the preliminary point process is a useful way to decide points ahead of a trial, as long as precision is used on the question asked, the facts are not in dispute and care is taken not to let the proceedings stray outside the limits of the question. However, that does not answer the issue in this case, namely should the point in issue emerge from the pleadings. We hold that it must.

62. In coming to that conclusion, we are conscious that there are cases where the capacity of a party to bring the proceedings is something that is patent and has not yet been pleaded.[35] In such cases the issue is one that would clearly be appropriate to decide in a preliminary way, because it affects the entitlement to bring the cause at all. We consider cases of that sort are examples of the Court exercising its inherent jurisdiction to control abuses of process, rather than a strict application of the Rules. Yet, we would still sound a note of caution against doing so without the issue being on the record (i.e. best done so in the pleadings). That is an issue quite different from that which we are considering. It does not compel the conclusion that a broader construction of Rule 12.11 should be adopted.

63. The Appellants also contend that Rule 1.14 enables a court to take a preliminary question even though not pleaded. That Rule provides:

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34 *Vunagi* at [29]-[30], referring to *Jui Hui Chan*.
35 As in *Ontong*.

> "**Court may dispense with rules**
>
> 1.14 A court may in the interests of justice dispense with compliance, or full compliance, with any of these rules at any time."

64. In essence we understand the submission to be threefold. One is that under Rule 1.14 a court could entertain a preliminary question of law, even though not pleaded at all. The second is that this Court should treat the application before the learned primary judge as being caught by Rule 1.14. The third is that if the learned primary judge was wrong to refuse to decide Question 1, Rule 1.14 enables this Court to do so.

65. There are difficulties confronting this Court's acceptance of that submission.

66. First, the case before the learned primary judge was approached on the basis that the issue did not have to be pleaded at all. The learned primary judge was not asked to invoke Rule 1.14 and therefore did not consider it. No order was made dispensing with compliance. Secondly, as discussed in *Jui Hui Chan* and *Vunagi*, the care needed in the framing of a preliminary question, and its hearing and determination, would suggest that a court would be reluctant to dispense with the Rules in such a case.

67. For the reasons given above, we respectfully consider that the learned primary judge was correct in his construction of Rule 12.11. Consequently, the learned primary judge was correct to decline to answer Question.

68. Since Question 2 only arose in the event of an negative answer to Question 1, the learned primary judge was correct to decline to answer Question 2.

Should this Court decide Question 1 in any event?

69. The Appellants contended that, if the learned primary judge was wrong to decline to answer Question 1, this Court ought to entertain and resolve the question as it concerned an important issue as to whether the sea bed could be customary land susceptible of acquisition under Part V Div 1 of the Act, on which there were at least two apparently conflicting High Court decisions, *Allardyce Lumber Company Limited v Laore*,[36] and

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[36] [1990] SILR 174.

Combined Fera Group v Attorney-General.[37] The Appellants urged acceptance of *Fera* over *Allardyce*.

70. The Appellants pointed to s 12 of the *Court of Appeal Act (Cap. 6)*, which provides:

> **"12 Powers of Court of Appeal in civil appeals**
>
> For all the purposes of and incidental to the hearing and determination of any appeal under this Part of this Act and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court of Solomon Islands and such power and authority as may be prescribed by rules of Court."

71. The Appellants accepts that even if s 12 gives this Court the power to do what they ask, it is still a matter of discretion as to where it does so, or whether it sends the matter back to the High Court to be properly considered.

72. There are powerful considerations which, in our view, compel the conclusion that if the learned primary judge was wrong to decline to answer Question 1, the matter should be remitted rather than this Court embarking upon it. They include:

(a) the issues should probably have been pleaded, as Mr Sullivan KC conceded;

(b) ordinarily a final appellate court hears appeals from a previous decision on the point in issue, that is upon a consideration of a reasoned decision by a primary judge; it rarely entertains an issue *in limine*;

(c) here the Court has not had the benefit of a primary judge's decision; the clear preference is to have the benefit of such consideration when and if the issue in Question 1 is entertained;

(d) the Appellants are the only parties to advance submissions on the substantive point in Question 1, so that this Court would be deprived of a full elucidation of the issue; it is no answer, in our view, to say that

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37 [1997] SBHC 55.

directions could be given as to submissions; that is usually what a primary court does in fulfilment of its duty; and

(e) the Appellants' fervent urging that it is an important issue for the country and this Court has a duty to resolve it, may be put aside; it is a cri de coeur that is inapt from private litigants who seek to advance their own interests against the State.

Question 3.

73. Question 3 asked:

> "Was the failure of the Commissioner and relevant Trustees to execute a lease of the relevant perpetual estates under s 69(1)(b) of the Act, and/or the Commissioner to pay rent and take possession of each of the subject lands under s 69(1)(ii) and (iv) of the Act, a mistake giving rise to the jurisdiction of the Court pursuant to section 229 of the Act to order rectification and cancellation of the relevant perpetual estates registers and related registers?"

74. As is evident, Question 3 is predicated upon the Commissioner and the Owners having failed to take the relevant steps:

(a) execute a lease of the relevant perpetual estates;

(b) pay rent; and

(c) take possession of each of the subject land

75. We will come back to the implications of the alleged breaches raised in Question 3. The phrasing raise a number of possible alternative combination of breach.

76. The Commissioner pleaded positively that none of those steps were carried out and thus s 69(1)(b) of the Act was not satisfied.[38]

77. That meant that the essential part of the question that remained was whether that failure was a mistake giving rise to the jurisdiction of the Court pursuant to s 229 of the Act.

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[38] Claim, paragraph 11.

That question does not import any facts other than the three failed steps, i.e. no lease executed, no rent paid and no possession taken.

78. The learned primary judge answered Question 3 in the affirmative. His Lordship considered the provisions of Part V Div 1, and said:

> "Part V, Division 1 of the lands and Title Act, Cap 133, clearly set out the procedure to be followed in the acquisition process. I think the provisions of section 62 to section 70 of the Lands and Title Act, sets out the procedures for answering question 3. The provisions relevant to that preliminary issue of law to be determined are set out below;
>
> ...
>
> I think the procedures set out in the sections of the Act referred to above. Are mandatory and must be complied with for any Acquisition process to be valid. No evidence had been adduced in relation to the validity of the acquisition process but the facts and material before the Court show that the provisions of section 60 to 69 of the Lands and Title Act relevant to acquisition were not be complied with in the present case. A failure to comply with any of the provisions of the Act relevant to the Acquisition process makes the process invalid. I will answer question3 in the affirmative."

79. The Appellants contend that the right answer to Question 3 should have been in the negative. The essential steps in the Appellants' reasoning in their attack on the findings by the learned primary judge are:

(a) they are wrong to say that no evidence had been adduced in relation to the validity of the acquisition process, as there were no relevant facts in issue;

(b) no consideration was given to the decision in *SMM Solomon Limited v Axiom KB Limited*,[39] referred to as *Sumitomo*;

(c) it was not contested in the case that there was compliance with the provisions of Part V Div 1 up until the point of vesting and first registration of the perpetual estates; thus two titles were validly created;

(d) once registered, the perpetual estate owners received indefeasible title;

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39 [2016] SBCA 1.

(e) the implementation process is governed by s 69(1)(b); that requires the four steps in s 69(1)(b)(i)-(iv) to be sequential; that means the lease required to executed under s 69(1)(b)(ii) must follow and cannot precede the vesting order issued under s 69(1)(b)(i);

(f) the consequences of the vesting order are that the owners are entitled to be registered once the Registrar has complied with s 70 and Part VI;

(g) the executed lease can only be granted after first registration when customary land status has been extinguished;

(h) the proper construction of Part V Div 1 is that no effectual lease can be executed until after the first registration of the perpetual estate;

(i) it is the grant of the lease by the registered owners of the perpetual estate which enlivens the Commissioner's obligation to pay the premium and rent under s 60(1)(b)(iii) and his right to take possession under s 69(1)(b)(iv);

(j) it is only on registration of the perpetual estate that the customary land status is extinguished;

(k) the practical effect of the vesting order is to confer on the Trustees (those of the customary owners entitled to the perpetual estate on behalf of their tribal members) a conditional right to first registration as owners of the perpetual estate; and

(l) therefore, first registration of the perpetual estates was effectual for all purposes and the owners immediately obtained indefeasible title.

80. As is evident the correct analysis of the implementation process is at the heart of the case.

The process of acquisition

81. The *Land and Titles Act (Cap. 133)* provides in Part V, Division 1 for the process that must be followed for an acquisition.

82. When the Commissioner seeks to acquire customary land an Acquisition Officer must be appointed: s 61(1) of the Act. That appointment was made on or about 17 May 2012.

83. Section 62 provides that:

> "The Acquisition Officer shall:
>
> (a) cause the boundaries of the land to be demarcated on the ground or upon a map or plan in such manner as to bring them to the notice of the persons affected;
>
> (b) make a written agreement for the purchase or lease of the land required with the persons who purport to be the owners or with the duly authorised representative of such owners."

84. Section 69 provides:

> "(1) An agreement shall, for the purposes of sections 67 and 68, be implemented:
>
> (a) …
>
> (b) in the case of a lease of the land, by the Commissioner:
>
> (i) making an order vesting the perpetual estate in the land in the persons named in the agreement as lessors;
>
> (ii) requiring the persons so named to execute a lease in favour of the Commissioner in accordance with the terms of the agreement;
>
> (iii) paying to such persons any premium or rent payable in accordance with the terms of the agreement; and
>
> (iv) taking possession of the land; …"

Part V Division 1 of the Act

85. Part V commences with s 60 that provides that customary land may be leased to the Commissioner, notwithstanding any current customary usage prohibiting or restricting such a transaction. For that purpose, an Acquisition Officer is to be appointed as agent of the Commissioner: s 61(1).

86. The Acquisition Officer is obliged to take certain steps.

87. The first is under s 62, which provides:

> **"62 Boundary demarcation and agreement**
>
> The Acquisition Officer shall:
>
> (i) cause the boundaries of the land to be demarcated on the ground or upon a map or plan in such manner as to bring them to the notice of the persons affected;
>
> (ii) make a written agreement for the purchase or lease of the land required with the persons who purport to be the owners or with the duly authorised representative of such owners."

88. The second is under s 63 which provides for public notice to be given:

> **"63 Publication of notice**
>
> The Acquisition Officer shall publish in such manner as he considers to be adequate or most effective for the purpose of bringing it to the attention of all persons affected thereby, notice:
>
> (a) of the agreement made under section 62 (b);
>
> (b) of the arrangements made for a public hearing by him in the area to decide any claims:
>
> (i) that the vendors or lessors named in such agreement are not the owners; or
>
> (ii) that such vendors or lessors do not have the right to sell or lease the land and to receive the purchase money or rent; and
>
> (c) requiring such vendors or lessors and the claimants, if any, to attend."

89. The Acquisition Officer is obliged to hold a public hearing, hear the claims and determine the identity "of the persons who have the right to … lease the land and receive the … rent": s 64.

90. Records must be kept of the absence of claimants and the determination, a copy given to the Commissioner, and it must be brought to the notice of the lessors and claimants: s 65.

91. A right of appeal to a Magistrate's Court is given to anyone aggrieved by "any act or determination of the Acquisition Officer", and thereafter to the High Court: s 66.

92. The duties upon an Acquisition Officer under s 63 - s 65 fall exclusively upon the Acquisition Officer. They do not fall on the Commissioner, except to the extent that the Acquisition Officer acts as agent for the Commissioner. That is why the avenue for challenge is that laid down in s 66, which applies when "Any person who is aggrieved by any act or determination of the Acquisition Officer".

93. Section 67 applies when there are no claimants or the Acquisition Officer has dismissed the claims.

94. The way in which an agreement may be implemented, partly implemented or rescinded is the subject of ss 67 and 68, which provide:

> **"67 Implementation**
>
> Where the Acquisition Officer or, in the event of an appeal under section 66, the court, has determined that there are no claimants or has dismissed the claims, the Commissioner may, when the time limited for appeal under section 66 has expired and no appeal has been made, or on receipt of the order of the court, as the case may be, implement the agreement.
>
> **68 Part implementation and rescission**
>
> (1) Where the Acquisition Officer or, in the event of an appeal under section 66, the court, has determined that any claimant has established a claim, the Commissioner may:
>
> (a) implement the agreement made under section 62 (b) only to the extent to which a claim so established has not affected the right

of the vendors or lessors named in that agreement to sell or lease any part of the land; or

(b) rescind such agreement.

(2) Where the Commissioner rescinds an agreement under subsection (1)(b), he may enter into a fresh agreement relating to the same land or any part thereof with those persons who have been found by the Acquisition Officer or the court, as the case may be, to have the right to sell or lease the land and receive the purchase money or rent, and the terms of such fresh agreement may be implemented without further notice, inquiry or hearing."

95. Sections 67 and 68 give the Commissioner a number of options. One is to implement the agreement. A second is to partly implement an agreement under s 68(1)(a). A third is to rescind the agreement. The Act does not attempt to regulate how the Commissioner must come to the decision as to what course to take, or what considerations are to be taken into account in that decision-making process.

96. It is to be noted that the Commissioner is not compelled to implement the agreement. Section 67 provides that "the Commissioner **may** … implement the agreement". The same formulation is used in s 68, namely "the Commissioner **may** … implement the agreement … or … rescind such agreement". Where rescission is the course taken, the Commissioner "**may** enter into a fresh agreement relating to the same land or any part thereof".

97. In that context, s 69(1)(b) appears. It relevantly makes provision, where the land is taken under a lease, for vesting, execution of the lease to be registered, payment and taking possession:

"69 Possession and vesting

(1) An agreement shall, for the purposes of sections 67 and 68, be implemented:

(a) …

(b) in the case of a lease of the land, by the Commissioner:

(i) making an order vesting the perpetual estate in the land in the persons named in the agreement as lessors;

> (ii) requiring the persons so named to execute a lease in favour of the Commissioner in accordance with the terms of the agreement;
>
> (iii) paying to such persons any premium or rent payable in accordance with the terms of the agreement; and
>
> (iv) taking possession of the land; …"

98. Several features may be observed about s 69(1)(b).

99. First, while it is not mandatory for the Commissioner to implement an agreement, once the Commissioner does, the requirements of s 69(1)(b) are mandatory. So much is plain from the words: "An agreement **shall** … **be implemented** … **by** the Commissioner …".

100. Secondly, the word "**by**" in the phrase "shall be implemented by" imposes a causative link between the decision to implement and the way to do that in s 69(b)(i)-(iv).

101. Thirdly, the provisions of subsections 69(b)(i)-(iv) are conjunctive. The Commissioner must do all of: (i) make a vesting order; (ii) require execution; (iii) pay premium or rent; and (iv) take possession.

102. That seems clear also from the fact that the only partial implementation which the Act acknowledges is that in s 68(1)(a), namely "only to the extent to which a claim so established has not affected the right of the … lessors named in that agreement to … lease any part of the land". Section 69(2) makes it clear that where an agreement is implemented to a limited extent, it is not to avoid any of the four steps under s 69(1)(b), but rather that the provisions of s 69(1) apply "only to the part of the land in respect of which the agreement is implemented, and the purchase price, premium or rent, as the case may be, shall be adjusted accordingly".

103. Fourthly, s 69(3) makes provision in the event that the Commissioner does not rescind the agreement for lease but does not implement it (even partly). It gives a right to the Commissioner and the lessors to institute proceedings for specific performance of the agreement:

> "(3) If the agreement has not been rescinded, and has not been implemented, the Commissioner or the vendors or lessors may, within one year from

> the date on which the time limited for appeal under section 66 expired, or from the date of the order or decision of the court, whichever is the later, institute proceedings for specific performance of the agreement."

104. Fifthly, nothing in the provisions of s 69(1)(b) impose a qualification upon the requirements to take the four steps for implementation, such that the Commissioner may avoid the consequence of not implementing the agreement.

105. The terms of s 69(3) are significant in the current context. As noted above, it gives a right to the Commissioner and the lessors to institute proceedings for specific performance of the agreement.

106. On one view, s 69(3) may provide for the only remedy where, as here, the Commissioner has not rescinded or implemented the agreement. However, in this case there is an extra feature, namely the Commissioner and the owners have taken steps on the basis that the Commissioner was taking a lease of the lands. That brings into play s 229 of the Act.

107. Section 229 provides:

> **"229 Rectification by the Court**
>
> (1) Subject to subsection (2), the High Court may order rectification of the land register by directing that any registration be cancelled or amended where it is so empowered by this Act, or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
>
> (2) The land register shall not be rectified so as to affect the title of an owner who is in possession and acquired the interest for valuable consideration, unless such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

108. Section 229(1) provides that rectification of the land register may be ordered where the Court is satisfied that any registration has been obtained, made or omitted by mistake.

The vesting order was conditional

109. One of the Appellants contentions is that the vesting order has the consequence that the owners are entitled to be registered once the Registrar has complied with s 70 and Part

VI. During oral submissions Mr Sullivan KC resisted any suggestion, such as advanced by the Crown, that this vesting order was conditional. It was said that such a construction was not mandated by s 69(1)(b)(i), and the order bore no such words.

110. That submission should be rejected for a number of reasons.

111. First, that contention cannot be sustained when proper regard is had to the nature of the agreement between the customary owners and the Commissioner. Put simply, the owners agreed to give a registered lease in exchange for their registered title. On the basis of the agreement, one could not occur without the other. The admitted purpose of the acquisition, reflected in the agreement for lease, was to grant a 75 year lease to the Commissioner of Land, ie the Government.

112. The relevant part of the provisions of Part V Div 1 of the Act deal with the following arrangements:

(a) what is sought by the Commissioner is a "lease of customary land by private treaty";[40] whilst the heading is not part of the Act,[41] that phrase accurately describes the essential transaction underlying Part V Div 1;

(b) the process commences when the Commissioner "wishes to … take a lease of any customary land";[42]

(c) an adjudication and appeal process is carried out to ascertain "the identity of the persons [customary owners] who have the right to … lease the land and receive …the rent";[43]

(d) a written agreement for lease is made between the customary owners and the Commissioner;[44]

(i) the agreement is that the Commissioner will be granted a lease over "the land required", which at that point is still customary land; and

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40 Taken from the heading of Part V.
41 *Interpretation and General Provisions Act (Cap. 85)*, s 6(3).
42 Section 61(1).
43 Sections 62-66, s 64(b). For ease of reference we will refer to them as "the customary owner", unless the context requires otherwise.
44 Sections 62(b), s 64(b).

(ii) the customary owner is to get a perpetual estate (PE) in exchange for the lease to Commissioner; and

(iii) the lease will have to be registered if it is longer than two years;

(e) the lease here was always intended by the customary owners to be registered because it was per 75 years, plainly more than 2 years; so much was conceded by the Appellants;

(f) it is evident from the agreement for lease between the customary owners and the Commissioner that there are co-dependent obligations on the customary owners and the Commissioner; those co-dependent obligations are part of the "bargain" reflected in the agreement for lease:

(i) initiated by the agreement for lease, the Commissioner cannot create the PE without the land ceasing to be customary land and coming under the Act;

(ii) a registered lease is to be granted in return for the PE;

(iii) the customary owner cannot have the PE without granting a registered lease; and

(iv) the Commissioner cannot have a registered lease without the land ceasing to be customary land and becoming registered under the Act; and

(v) in other words, each of the customary owner and the Commissioner cannot have the one without the other.

113. It follows that the customary owners must necessarily be taken to have agreed that they cannot have a vesting order creating the PE without granting the lease, and the lease can only be granted in registered form. That is why the vesting order is, as a matter of the natural construction of Part V Div 1, conditional on the registration of the lease. Put another way, the vesting order contemplated by s 69(1)(b)(i) is an order conditional upon the registration of the lease. True, it is, that the "word "conditional" does not

appear in s 69(1)(b)(i), but it does need to when it is understood that that is the only type of vesting order that can be made under that section.

114. Further, the proper construction does not mean that an impermissible approach to the construction has been made. The Appellants cautioned against construing s 69(1)(b)(i) that way, relying upon *Taylor v The Owners – Strata Plan No 11564*.[45] There the High Court said:[46]

> "[38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

115. Gageler[47] and Keane JJ had the following to say in relation to statutory construction:[48]

> "[65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always." Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
>
> [66] Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies."

116. The construction we have adopted above does not fill "gaps disclosed in legislation" or make an insertion which is "too big, or too much at variance with the language in fact

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45 [2014] HCA 9, at [38].
46 *Taylor* at [38], per French CJ, Crennan and Bell JJ. Citations omitted.
47 As his Honour then was.
48 *Taylor* at [65]-[66]. Citations omitted.

used by the legislature", nor divine unexpressed legislative intention. Rather, it involves attribution of legal meaning to statutory text, read in context.

117. Further, that the implementation is only to be done on that basis, and the vesting order must be conditional, is evident from s 60 which provides that "customary land may be … leased to the Commissioner … **in accordance with the provisions of this Division**", i.e. Part V Div 1.

118. Section 69 provides that "the Commissioner may … implement the agreement". In context, the word "implement" means "enforce". Enforcement of the terms of the agreement to lease necessarily contemplates enforcing the obligation to give a registered lease in return for the registered PE.

119. As mentioned earlier, the Appellants conceded that the parties (owners and Commissioner) contemplated that the executed lease was to be a registered lease. That concession is rightly made and confirms the analysis that leads to the conclusion that the vesting order referred to in s 60(1)(b)(i) is a conditional order. That is, the vesting from which registration of title is possible, is conditional on a registered lease back to the Commissioner. The customary owners of Original Parcel 1 and Original Parcel 2:

    (a) agreed to give a lease conditional upon it being registered, and agreed that would be registered as an encumbrance on their title; that is conceded as well;

    (b) it follows that they knew that their title to the registered perpetual estate would be acquired only on the basis that the lease would be registered as an encumbrance;

    (c) never agreed to take their registered title unencumbered; so much follows from the Appellants' concession;

    (d) did not execute a registrable lease;

    (e) did not seek to compel specific performance under s 69(3) of the Act when the lease was not executed;

(f) knew that the implementation had to be fully completed in order for title in their name to be perfected; so much follows from the Appellants' concession;

(g) knew that the implementation had not been fully completed; and

(h) knew when the PE was registered without a lease being registered that their title was yet to be perfected; so much also follows from the Appellants' concession.

120. Secondly, the provisions of the Act support that construction.

121. Under Part V customary land may be acquired by purchase or lease by the Commissioner or the Provincial Assembly: s 60. Implementation comes under s 67-69. Under s 69(1) there are different vesting orders that apply:

(a) in the case of purchase of the land, the vesting order is one which is stipulated as one "**vesting the perpetual estate** in the land in the Commissioner for and on behalf of the Government, **free from all other interests**": s 69(1)(a)(iv);

(b) likewise, in the case of a purchase by the provincial Assembly, the vesting order is one which is stipulated as one "**vesting the perpetual estate** in the land in the Provincial Assembly for and on behalf of the people of that Province, **free from all other interests**": s 69(1)(c)(iv);

(c) however, the vesting order for a lease by the Commissioner or the Provincial Assembly is significantly different; in each case it is stipulated as one "**vesting the perpetual estate** in the land in the persons named in the agreement for lease": 69(1)(b)(i) and 69(1)(d)(i).

122. The legislature has therefore specifically provided for two types of vesting order.

123. That assumes some significance when s 70 is considered. It provides that upon receipt of a vesting order made under s 69 (it covers all variants under s 69) the Registrar shall

compile registers "in respect of the perpetual estate in the land comprised therein". Plainly, where the vesting order expressly vests the perpetual estate "**free from all other interests**" the registers will be reflect that. However, where the vesting orders do not have that proviso the register must reflect the perpetual estate the subject of the agreement for lease. The task of compiling the register must therefore take into account the conditional nature of the vesting order. Registration should not follow until the incidents of the perpetual estate are reflected in the entry.

124. Section 112 also lends support to that approach. It provides:[49]

> **"112 Perpetual estates**
>
> A perpetual estate in land consists of **the right to occupy, use and enjoy in perpetuity** the land and its produce, **subject to the performance of any obligations for the time being incident to the estate,** and subject to such restrictions as may be imposed by or under this Act or any other written law."

125. The perpetual estate is one "subject to the performance of any obligations for the time being incident to the estate". That would, in our view, include the lease which is at the heart of the grant of the perpetual estate.

126. In our view that points to the vesting order under s 69(1)(b) being a conditional one.

127. Thirdly, it seems to run counter to submissions made in the Appellants' written outline:

    (a) that a vesting order creates equitable but defeasible "title", which can only become indefeasible on registration;[50]

    (b) that the "practical effect of the vesting order is to confer on the Trustees a conditional right to first registration as owners of the perpetual estate which lays the foundation for the necessary application for the Trustees to become "owners' of the perpetual estate **by registration**";[51] and

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49 Emphasis added.
50 Paragraphs 126, 129, 158.
51 Paragraph 171. Emphasis in original.

(c) by s 219 of the Act, a judicial vesting order shall not have any effect of vesting any interest until it is registered; "a fortiori a vesting order made under s 69(1)(b)(i) should be construed the same way".[52]

128. The conclusion we reach is that the only vesting order that can be made under s 69(1)(b)(i) is a conditional vesting order. The owners therefore received only a conditional registered title, that is, conditioned on the registration of the lease. The position is similar to that where a registered proprietor takes as trustee. In deed we consider that to be applicable to the owners in this case, namely they held that title on trust for the Commissioner to the extent necessary to enable the lease to be registered.

Implementation sequence

129. The Appellants contend that "it is not disputed that there was compliance with the provisions of Part V Div 1 up until the point of vesting and first registration of the perpetual estates".[53] That contention depends on several steps in reasoning:

(a) that the four steps in s 69(1)(b) are sequential;[54]

(b) the lease referred to in s 69(1)(b)(ii) must follow and cannot precede the vesting order and the registration of the perpetual estate in favour of the trustees;[55]

(c) the lease could only be granted after first registration when customary land status has been extinguished; no effectual lease could be executed until after fist registration;[56] and

(d) the grant of the lease to the Commissioner by the Trustees as registered owners then enlivens the obligation to pay the premium or rent, and the right to take possession.[57]

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52 Paragraph 174.
53 Appellants' submissions, paragraph 127.
54 Appellants' submissions, paragraph 155.
55 Appellants' submissions, paragraph 156.
56 Appellants' submissions, paragraph 163.
57 Appellants' submissions, paragraph 164.

130. The opening part of this contention is in error. The Commissioner does dispute that there was compliance with the provisions of Part V Div 1 before first registration of the perpetual estates. Specifically, the Commissioner contends that the requirements of execution of the lease, payment of premium or rent, and taking possession of the land, should have but did not occur. The Commissioner contends that the vesting order, execution of the lease to be registered, payment and taking possession should all occur at the same time. Thus, it is said, the Commissioner is then in a position to take the steps that fulfil the bargain between the parties, namely, lodge the perpetual estate and the lease for simultaneous but sequential registration. In that way, there is no lacuna after the first registration of the perpetual estate, and no risk of the Commissioner's interest as registered lessee being impacted or even defeated.

Appellants' contended implementation sequence

131. Consistently with their contention that registration of the perpetual estate comes before execution of the lease, the Appellants contend that the implementation process should be looked at in the totality of the necessary steps.[58]

132. The opposing contentions of the Appellants and the Commissioner as to the correct sequence of events is reflected in the following table, done for comparison purposes. Mr Pitry, appearing for the Commissioner, assured the Court that the Commissioner's propounded sequence was that which actually happens in practice.

Appellants	Commissioner
1. making a vesting order by the Commissioner in favour of those successful in the adjudication – s 69(1)(b)(i)	1. the land is properly surveyed according to the boundaries demarcated as per s 62 and where claims do not affect those boundaries (s 68); the result is a survey map that identifies the surveyed lot's boundaries and area
2. delivery by the Commissioner of the vesting order to the Registrar, putting the Registrar on notice of the proposed registration – s 70	2. the Commissioner makes a vesting order as per s 69(1)(b)(i) but the order states that the vesting is conditional on a

[58] Appellants outline, paragraph 180.

	lease being registered to the Commissioner
3. preparation by the Surveyor-General on relevant instructions (in practice, they come from the Registrar after receipt of the vesting order) of the registry map in respect of the subject land and delivery of the same to the Registrar (thereby giving the necessary certainty as to the boundaries of the area to be leased) – ss 70 and 93	3. ideally at the same time as 2 above, the intended perpetual estate owners and the Commissioner sign a lease instrument as per s 69(1)(b)(ii), with the parcel number left blank until such time as the Registrar informs the Commissioner about the parcel number; this step is to guarantee that the intended perpetual estate holders have committed to leasing the whole of the land area that is subject of the acquisition has in fact been acquired by the Commissioner
4. compilation of the perpetual estate register and entry in that register by the Registrar of the perpetual estate in the subject land in favour of the Trustees (at which point the Trustees become registered as the "owners" of the perpetual estate and are in a position to grant a lease of the land identified in the registry map) – ss 70, 88, 89(c) and 90	4. also ideally at the same time as 1 and 2 above, the Commissioner hands over payment for the land so acquired as per s 69(1)(b)(iii)
5. preparation by the Commissioner of a draft lease in registrable form (Form 9) containing the terms and conditions agreed between the Commissioner and the Trustees during the adjudication phase – s 143 and 146	5. also ideally at the same time as 1, 2 and 3 above, the Commissioner takes possession of the land as per s 69(1)(b)(iv); this does not mean that the Commissioner has to physically take possession; it can be a statement in a notice to confirm government occupation of the land to the exclusion of everyone else
6. delivery of the draft lease to the Trustees and a requirement by the Commissioner for the Trustees to execute the lease – s 69(1)(b)(ii)	6. the vesting order is delivered by the Commissioner to the Registrar, s 70
7. negotiation of precise terms of the formal lease	7. the Registrar prepares the Registry Map (in reality this is done by the Surveyor General but under instructions from the Registrar); once the Registry Map is done, then the parcel number is created
8. execution of the formal lease by the Trustees and the Commissioner	8. the parcel number is inserted on the previously prepared lease instrument, and

	Commissioner lodges the lease instrument with the Registrar for registration
9. creation of the lease register in the name of the lessee (the Commissioner), filing the lease and registration of the lease by entry of the lease in both the perpetual estate register (as an encumbrance) and in the lease register – s 146	9. the Registrar prepares the perpetual estate register as per s 70
10. payment of the initial rent and any premium by the Commissioner to the Trustees as registered owners of such perpetual estate – s 69(1)(b)(iii)	10. ideally at the same time as in 9 above, where a lease is being acquired, the Registrar should also prepare the Lease Register, based on the lease instrument handed by the Commissioner to the Registrar for registration
11. taking possession of the subject land by the Commissioner – s 69(1)(b)(iv).	11. the perpetual estate and the lease are registered simultaneously, thereby preventing the owners of an unencumbered perpetual estate from seeking to register any other dealings that would otherwise impinge on the Commissioner's lease.

133. We consider there are difficulties in adopting the Appellants contended sequence of events.

134. First, registration of the perpetual estate at a point when the lease has not even been prepared in registrable form, let alone executed, is entirely contrary to the agreement that the perpetual estate is in exchange for the registered lease. From the moment of first registration the owners would be capable of transferring to a bona fide purchaser for value, with the consequence of defeating the Commissioner's interest. Further, that sequence defeats the admitted purpose of the acquisition.

135. Secondly, registration ahead of the lease and without the lease, is contrary to the accepted characterisation of the vesting order as conditional.

136. Thirdly, there is no reason why the draft lease in registrable form cannot be prepared at the same time as the vesting order is made. The parcel number will not then be known but that can be left blank for insertion once it is known.

137. Fourthly, there is no reason why payment must be postponed until after registration of the lease. The requirement in s 69(1)(b)(iii) is to pay the premium or rent "to such persons ... in accordance with the agreement". The "agreement" referred to is the agreement for lease, not the lease in registrable form or the lease as registered. It is not beyond the realms of human expectation that the customary owners might, in the agreement for lease, specify that they receive a payment earlier than registration. If so, the obligation under s 69(1)(b)(iii) is to pay it earlier.

138. Fifthly, simultaneous but sequential lodgement of the registrable instruments is in accordance with the agreement between the owners and the Commissioner, and the admitted purpose of the acquisition. Each side agrees that their registered interest would not be obtainable without the other. To insist on a sequence of registration that defeats that is contrary to the foundation of the bargain, a breach by the Trustees of the duties to their beneficiaries, and contrary to the purpose of the acquisition.

139. Sixthly, simultaneous but sequential lodgement of the registrable instruments complies with s 143 and s 146 which provide that an "owner of an estate ... may lease land comprised in that estate", by it being registered.

140. Seventhly, preparation of the relevant registers must be done ahead of the lodgement for registration. Section 89 provides that the compilation shall be from, inter alia, details of ownership which **would entitle** the person to registration, and leases of customary land under Part V Div 1. The Registrar knows that a lease of customary land under Part V Div 1 proceeds on the basis that its registration is to be in exchange for the registration of the perpetual estate. The way to achieve that is simultaneous but sequential registration.

141. Eighthly, the Appellants' approach proceeds on the basis that separate registrations must take place, first of the perpetual estate, and then of the lease. So much is true, however simultaneous but sequential registration achieves that without doing violence to the Act or the bargain between the owners and the Commissioner or to the purpose of the acquisition The registrations here were by mistake because they allowed the owners to be registered as holders of the perpetual estates free from the encumbrance they had bound themselves to take.

142. We reject the contention that the owners of the perpetual estates took their title free of the necessity to grant the registered lease.

Impact of *Sumitomo*

143. *SMM Solomon Limited v Axiom KB Limited*[59] is said by the Appellants to be authority for the proposition that acquisition of customary land is a two-part process. First, is the adjudication process in ss 62-66 of the Act where the customary owners are identified. Next is the implementation process:[60]

> "295. The status of customary land is confirmed by Part XXVI which sets restrictions on any changes of status. It is not intended to prevent change to registered land but to ensure steps are taken to protect the customary owners by providing a special procedure to ensure the change is properly made. Division 1 of Part V provides that procedure. Once it is properly completed, the land is liable to, and ready for, registration. Until it is, the land continues to be customary land and any attempt to register it will be contrary to the purpose of Part V Division 1."
>
> "307. There is no provision in the Act outside Part V permitting the sale or lease of customary land and it is notable, therefore, that any such disposition is only permitted to the Commissioner of Lands or to a Provincial Assembly."

144. So much may be accepted for present purposes. *Sumitomo* does provide guidance in the present case. When commenting on the process under Part V Div 1, the Court said[61]

> 324. Once the Commissioner of Lands' vesting order is received by the Registrar of Titles and the registry map has been prepared, the Registrar will compile registers in respect of the perpetual estate in the land under Division 2 of Part VI of the Act. By sections 2 and 88 of the Act, the 60 Civil Appeal No. 34 of 2014 land register will be comprised of the relevant registers (leaves) in respect of the perpetual estate and, where the land was leased to the Commissioner of Lands or the Provincial Assembly, of that lease.
>
> 325. Until the section 62 agreement to purchase or lease is implemented fully, there is no sale or lease to register as required under section 89(c) of the Act."

145. Then speaking of the effect of the steps under Part V Div 1, this Court said:[62]

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59 [2016] SBCA 1.
60 *Sumitomo* at [295] and [307].
61 *Sumitomo* at [324] and [325].
62 *Sumitomo* at [353]-[354]. Emphasis added.

"353. Those facts show a number of failures to follow the requirements of Part V Division 1. The result was that the protective intention of the Division was avoided. The first protection is to prevent any lease other than to the Commissioner of Lands or a Provincial Assembly. Once the agreement to lease is prepared, the Commissioner of Lands, in order to implement it, must take the steps in Section 69(1) (b). (According to the vesting order, he was acting under subsection (1) (a) (iv) which relates to purchase of the land and requires an order vesting the perpetual estate in the Commissioner for and on behalf of the Government). In fact the vesting order he made was in the appropriate form for a lease under subsection (1) (b) (i) as was necessary to vest the perpetual estate in the land respondents. **By subsection (1)(b) (ii), (iii) and (iv) he must also require the persons in whom the perpetual estate is vested to execute a lease in favour of the Commissioner of Lands** who must then pay the lessors any premium or rent in terms of the agreement to lease and take possession of the land. There is no evidence any of the provisions of (ii), (iii) or (iv) were performed. Until they were, the land remained customary land and could not be, and should not have purportedly been, registered.

354. Those were serious and fundamental failures by the Commissioner of Lands. His duty was to ensure the controls enacted to protect customary land and the landowners from exploitation were properly followed. The manner in which the Commissioner of Lands signed a vesting order which he must or should have realised was incorrect and failed to carry out the requirements under section 69 was a clear derogation of his duty."

146. In *Sumitomo* this Court then turned to questions concerning when the customary land status was lost:[63]

"358. The provisions for registration under the Act do not cover customary land. If that is to occur, the first and essential preparatory step, as recognised by Allen, must be to change its status as customary land. Part V Division 1 provides the method by which that can be ascertained and its status as customary land can be extinguished. It is then eligible for registration and the indefeasibility of title which arises from it. **Customary status can only be extinguished if and when the protective processes in Part V Division 1 have been followed and it is then registered. It is only when its status has been extinguished that it can be registered. Failure to comply properly or fully with those provisions must mean that the land has not lost its status as customary land and its title cannot be registered.**

147. The Court then turned its attention to the result if Part V Div 1 was not complied with:[64]

[63] *Sumitomo* at [358] - [360]. Emphasis added.
[64] *Sumitomo* at [364]. Emphasis added.

"364. The requirements of Part V Division 1, although forming a self-contained code, are part of the Act. **The purported registration following the Commissioner of Lands' failures to comply with the requirements of Division 1 was an attempt to create a registered interest otherwise than in accordance with the Act. By section 117 (1) such an attempt was ineffectual to create such an interest. To leave it uncorrected would clearly be in direct contravention of the intention of the section."**

148. This Court also gave consideration to the result if the process in Part V Div 1 was not followed:[65]

"380. **Whilst Part V of the Act does not indicate the consequences of failure to comply with its terms, we are satisfied that it means the land remains customary land and any attempt to register it will be ineffectual under section 117.** The respondents' submission that, once registration has taken place, there is no way in which anything which occurred prior to registration can be used as a basis for challenge ignores the warning in such cases as *Cassegrain* and *Quito*. **The particular provisions of the Land and Titles Act not only provide special provisions for customary land but also render any attempts to circumvent that ineffectual.** The title the Commissioner of Lands was purporting to vest in the second respondents did not exist and, as Palmer ACJ pointed out, albeit in a different context, in *Malaita Development Authority v Ganiferi and Ors* [2002] SBHC 5: "The Commissioner cannot give what [he] does not have."

149. Then, this Court turned to the impact of non-compliance with Part V Div 1 of the Act:[66]

"383. It is not, as the Commissioner found, an attempt to dilute the Act by reading in a principle of deferred indefeasibility. We note that the terms of section 229 already effectively provide a potential to defer indefeasibility where rectification is sought. Section 229 is an acknowledgment that incorrect registrations may be entered by mistake or fraud and, when that occurs, justice requires that a person adversely affected should have some remedy. It is difficult to understand why, when errors as serious as those in this case occur because of carelessness or inefficiency of public officials, the persons who are adversely affected should not have as strong a right to correct it. The Torrens system, as we have been so frequently reminded by counsel in this case, is one of title by registration and so, where as has occurred in the present case, the register purports to record a title which never existed, it is important that it is rectified as soon as reasonably possible.

384. **There is good reason for strict compliance with Part V Division 1. When in the particular case of customary land, there is a failure on**

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65 *Sumitomo* at [380]. Emphasis added.
66 *Sumitomo* at [383]-[386]. Emphasis added.

the scale of the present case to observe the requirements, there is a real risk that many of the landowners may not agree, yet their wishes may not have been properly solicited or considered. Some may remain unaware of the suggested change from customary to registered land or the consequences until it has happened. Is it seriously to be suggested that they should be deprived of rights to their land by a stealthy imposition of an indefeasible title? What is certain in the Land and Titles Act is that, once registration has properly taken place, it will not be possible ever to revert to customary land and so proper and adequate notice of such an intention is essential.

385. Many people in Solomon Islands still live on their customary lands often in relative isolation and dependent solely on the land to provide the needs of life. Many benefits and obligations under custom still arise from their presence on, and use of, the land. They are the people who most need the protection of Part V Division 1. Without it, they are the people who may suffer most and yet will have the least voice.

386. The move to have the land registered may be initiated and implemented by the more educated or worldly members of their tribes who may no longer live on the land or even in the same province. If they are in paid employment, they may never even intend to return. (We see no reason to suggest that is the position in the present case but we consider the description by some of the second respondents of themselves as peasant farmers is, perhaps, misleading.) **Once the land is registered, it may be leased to others who may have scant regard for the welfare of any remaining customary owners and may not even allow present residents 72 Civil Appeal No. 34 of 2014 to continue their occupation of the land. It is those considerations which lie behind the provisions in Part V. They are there for very strong reasons. We do not accept they can be regarded as anything but mandatory** and we have not been directed to any provision in the Act to suggest they were intended to be treated otherwise.

150. The Court then turned to the ramifications of failure to comply with Part V Div 1 of the Act. In that case the failure was on a different scale to the present case, but the comments are apt to apply:[67]

"393. We do not consider it is necessary or desirable to follow the reasoning in *Emas Estate*. Section 229 of our Act allows rectification where the court is satisfied the registration was obtained, made or omitted on grounds of fraud or mistake and we consider that provides an adequate remedy in most challenges to registration. In such cases, judicial review may also be appropriate.

67 *Sumitomo* at [393]-[395]. Emphasis added.

394. Neither, it should be mentioned, do we accept this appeal supports the Appellants' submission that there is, in the provisions of the Land and Titles Act, any tension between the two aims of the legislation. **The provisions in Part V Division 1 are a code which apply only to customary land and may be applied independently of the provisions in the rest of the Act. We see no need to look to the *Emas Estate* case in order to avoid the principle of indefeasibility where it has arisen, as in the present case, from an entry in the register purporting to record a title which did not, at the time the entry was made, exist.**

395. **If that occurred through misapplication of, or failure to observe, the requirements of the Act by a public official, as was the case of the Commissioner of Lands' conduct, it may be appropriate to seek an order under chapter 15.3 of the Rules. Where an entry has been made by any fraud or mistake, the appropriate procedure will be under section 229. In either case, the appropriate remedy will include rectification.**"

151. Whilst the scope of non-compliance with Part V Div 1 in *Sumitomo* was far greater than the present case, the principles are nonetheless applicable to this case. Further, Sumitomo is a case where the purpose of the acquisition was defeated, just as it was in the present case.

152. One of the Appellants' contentions was that it was only upon registration of the perpetual estate that the land's status as customary land was changed, and *Sumitomo* was authority for that proposition.

153. *Sumitomo* is certainly authority for some propositions relevant to the present case:

(a) the agreement between the Commissioner and the customary owners can only be implemented by performance of the steps in Part V Div 1;[68]

(b) when land has been leased, the perpetual estate will be vested in the landowner's representative **and** a lease executed by them in favour of the Commissioner;[69]

(c) once the vesting order has been received by the Registrar of Titles, and the registry map has been prepared, the Registrar will compile registers

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[68] *Sumitomo* at [321].
[69] *Sumitomo* at [323].

"in respect of the perpetual estate **and where the land has been leased to the Commissioner of Lands, ... of that lease**";[70] and

(d) "Until the s 62 agreement to ... lease is implemented fully, there is no lease to register".[71]

154. However, on the issue of when customary land status is extinguished in the current context, *Sumitomo* said:[72]

> "358. The provisions for registration under the Act do not cover customary land. If that is to occur, the first and essential preparatory step, as recognised by Allen, must be to change its status as customary land. Part V Division 1 provides the method by which that can be ascertained and **its status as customary land can be extinguished. It is then eligible for registration** and the indefeasibility of title which arises from it. Customary status can only be extinguished if and when the protective processes in Part V Division 1 have been followed and it is then registered. **It is only when its status has been extinguished that it can be registered.** Failure to comply properly or fully with those provisions must mean that the land has not lost its status as customary land and its title cannot be registered."

155. As appears in that passage, *Sumitomo* considered that the customary land status was lost **before** registration.

156. Any doubt as to what this Court meant in *Sumitomo* was dispelled by the following passage:[73]

> "369. The *Lever Solomon case* correctly states the intention of the law under the Land and Titles Act and this Court has repeated it many times. The Appellants do not challenge it. The issue raised in the present case and not raised in the *Lever Solomon case*, is the purpose of Part V Division 1 and whether it forms a separate Code within, but independent of, the remainder of the Act. **That code is to allow the (otherwise impermissible) alienation of customary land** to the Commissioner of Lands or a Provincial Assembly and, where that is the wish of the Commissioner of Lands or a Provincial Assembly, to establish a process of adjudication to ensure the rights of the customary land owners are properly protected. **Once their interests are considered to have been properly determined, the code provides for the vesting of the perpetual estate in the Commissioner of Lands on behalf of the**

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70 *Sumitomo* at [324].
71 *Sumitomo* at [325].
72 *Sumitomo* at [358]. Emphasis added.
73 *Sumitomo* at [369]. Emphasis added.

> **government or individual lessors of the customary land so the title to the interest may be registered. Once that is done, the customary status of the land is extinguished and it is subject to registration** and the consequent principle of indefeasibility under the Act outside Part V."

157. The reference to "once that is done" is plainly a reference to "vesting of the perpetual estate". If it were, as the appellant submitted, a refence to registration, the sentence would have read differently, and the sentence staring "Once that is done, the customary status of the land is extinguished and it is subject to registration" would have read differently.

158. In our view the appellant is mistaken in contending that *Sumitomo* stands for the proposition that the status of customary land is not lost until registration. It is lost at the point of a vesting order. However, it is also the case that, just as the vesting order imposes a conditional status, the loss of customary land status under Part V Div 1 is also conditional. Thus, for example, if the implementation process is abandoned after a vesting order is made and nothing more is done, the status of the customary land reverts back to customary land. So much is supported by *Sumitomo* when this court said:[74]

> "380. **Whilst Part V of the Act does not indicate the consequences of failure to comply with its terms, we are satisfied that it means the land remains customary land and any attempt to register it will be ineffectual under section 117.** The respondents' submission that, once registration has taken place, there is no way in which anything which occurred prior to registration can be used as a basis for challenge ignores the warning in such cases as *Cassegrain* and *Quito*. **The particular provisions of the Land and Titles Act not only provide special provisions for customary land but also render any attempts to circumvent that ineffectual.** The title the Commissioner of Lands was purporting to vest in the second respondents did not exist and, as Palmer ACJ pointed out, albeit in a different context, in *Malaita Development Authority v Ganiferi and Ors* [2002] SBHC 5: "The Commissioner cannot give what [he] does not have."

159. The Appellants' contentions are that:

    (a) there was no mistake as to the registration of the perpetual estate and the discretionary power to rectify the land register is not enlivened; and

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74 *Sumitomo* at [380]. Emphasis added.

(b) s 229 is only concerned with registrations and is not concerned with correcting matters subsequent to registration.[75]

160. This is said to follow from these propositions as to the process followed in this case:[76]

(a) each of steps 9-11 in the table at paragraph 132 above necessarily occur after step 8, which in turn necessarily comes after all the preceding steps with the lease to the Commissioner following upon registration of the perpetual estate;

(b) it is implicit from the undisputed pleadings that none of the steps 1-4 are in dispute and all were taken in accordance with the Act up to and including the first registration of the perpetual estates in PE 235 and PE 005 in favour of the relevant Trustees;

(c) none of those steps were taken in *Sumitomo*, which is thus distinguishable not only in respect of the adjudication process but also in respect of the implementation process up to first registration of the perpetual estate;

(d) in the present case, after the first registration of the perpetual estates by which the Trustee's title became indefeasible, the Commissioner failed to comply with steps 5 and 6 to require the Trustees to grant a lease and, as a consequence, he did not pay rent or take possession; and

(e) in circumstances where it is not alleged that the agreement had lapsed or been terminated, that failure of the Commissioner to require a lease cannot now operate to defeat that which is indefeasible.

161. We reject the Appellants' contentions for reasons which we have articulated earlier. Further, the Appellants' contention ignore that the mistake as to the execution of the lease is one to which they are party, as is made clear in Question 3.

162. The Appellants' contentions are that on first registration the PE owners had title that was indefeasible and could not be impeached or rectified under s 229 simply because the implementation steps were not completed. If that be accepted, the consequences

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[75] Appellants outline, paragraph 188.
[76] Appellants outline, paragraphs 181-18.

would set Part V Div 1 of the Act at nought. The result would be that the PE title holders could sell immediately after first registration to a bona fide purchaser for value, and the Commissioner could not perfect that which the registered owners had agreed to do (give a registered lease) and that which the implementation process in Part V Div 1 was designed to achieve, and thereby defeat the admitted purpose of the acquisition.

163. The answer to that difficulty is not, as suggested, that the Commissioner could seek to compel specific performance under s 69(3) of the Act. The time limit for such action is only one year. If that time had passed but the implementation steps were not complete, the same problem exists, namely the registered owners could sell to a bona fide purchaser for value, thus setting at nought the Part V Div 1 process, defeating the Commissioner's rights and the owner's obligations under Part V Div 1.

164. The title to which the owners were entitled was conditional on the registration of the lease which they had agreed to give in exchange for the perpetual estates. The obligation to give the lease in exchange was one that did not fall on just the Commissioner, even though the Commissioner had the responsibility to require the lease to be executed and therefore the responsibility to prepare the lease in registrable form. The owners had the same obligation to grant the registered lease. They cannot shrug that responsibility off by pointing to the fact that they gained first registration wrongly.

165. The First Respondent referred to the High Court decision in *Solomon Motors v JQY Enterprise Ltd*,[77] as authority for the proposition that Part V Div 1 must be fully complied with in order to gain its protection.

166. In Solomon Motors the acquisition was for the purpose of granting a lease to the Commissioner over customary maritime land, for the public interest in the Honiara International Seaport and coastal and maritime activities.[78] That was reflected in the agreement for lease.

167. That purpose was defeated when the Commissioner, having failed to comply with s 60(1)(b)(ii)-(iv), registered a PE giving private ownership to the lessors (the customary owners who had signed the agreement for lease).[79]

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77 [2020] SBHC 108.
78 *Solomon Motors* at [9]-[11].
79 *Solomon Motors* at [16].

168. In *Solomon Motors* the learned judge, citing *Sumitomo*, held that to acquire land under Part V Div 1, all the provisions had to be complied with:[80]

> "16. Closely examining the facts and evidence of this acquisition, it is very clear the acquisition deviated in a material way from what the law required, especially the completion part of the acquisition. There was no appeal. So COL should implement the Agreement under *Section 69* (repeat paragraph 15 x). Instead of implementing the Agreement as per the requirements of *Section 69 (b) (i) (ii) (iii) and (iv)*, the (i). COL vested the PE in the Lessors, but (ii). COL did not execute a lease with the determined Lessors, (iii). COL did not pay premium or rent to the Lessors and (iv). COL did not take possession of the land from the Lessors, for the intended public purpose. Instead the COL gave possession of the land to the Lessors (for private ownership), by registering the PE and giving the acquired original plot away to the surviving Lessors (Mr. Kurilau and Renato on 15/08/2017). The COL has deceived the interests of Honiara City. For the COL set out to acquire the original PE plot for **Honiara international seaport, maritime and coastal activities**, as per the purposes of the acquisition notice, put out to the public. So how will the Government achieve the purpose of the acquisition, now that ownership is in the private hands of the Lessors? What happened here is that, in the name of public purpose, the COL had expended public money, to acquire the larger original plot/land, so that a few private individuals and tribes could own what was acquired through public resources. This looked like a big trick, whether by design or default. So I find that Mr. Limopu's whole acquisition, was made in violation of the requirements of *Division 1 – Sections 60 - 70 - Part V, of the LTA*. Attorney General admitted to this in its defence at paragraphs 8 and 9 (Page 10, of Court Book). Attorney General agreed that the acquisition of **PN 9,** should be declared null and void.
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> 28. The case of *SMM* makes it plain clear that where COL wish to lease customary land, it must acquire the land under the requirements of *Division 1 – Part V, of LTA*. And must lease the acquired land from the determined trustees (Lessors in the Agreement, put out publicly prior to acquisition). The COL cannot acquire the land and give it away to private hands, under the requirements of *Section 69 (1) (b) (i), (ii), (iii) and (v) of LTA* – (repeat paragraphs 15 and 16 above)."

169. In essence that is what occurred in this case. The characterization of *Sumitomo* or *Solomon Motors* as being distinguishable because they involved what was called a sham or trick, avoids the plain fact that in each of those cases the purpose of the acquisition was defeated by the registration of an unencumbered PE to the very owners who had signed the agreement for lease and promised a registered lease. So it is in this case.

[80] *Solomon Motors* at [16] and [28]. Emphasis and underlining in original.

170. It is of some passing interest that one of the owners in *Solomon Motors* who took registered title was Kurilau, one of the owners of Original Parcel 2 in this case. The decision in *Solomon Motors* was delivered on 22 May 2020, a month prior to Kurilau transferring PE 012 (derived from Original Parcel 2) to the First Respondent.[81]

171. That may possibly be a matter to take into account when the question of the application of s 229 is eventually considered.

172. For the reasons above, we are of the view that Question 3 was correctly answered in the affirmative.

Question 4

173. Question 4 depended on an affirmative answer to Question 3. It was:

> "If the answer to … Question 3 is in the affirmative, does that preclude the Court from exercising any discretion to refuse rectification in circumstances where the exercise of such discretion would otherwise be open under s 229(1) of the Act."

174. The learned primary judge answered this question in the affirmative. His Lordship said:

> "Having answered question 3 in the affirmative effectively means the Court declare that the acquisition process in this case, vesting and registration of parcel numbers 191-082-005 (Original Parcel Numbers) does not comply with Part V, Division 1, of the Lands and Title Act [cap 133] (as amended) therefore, it is null and void. Consequently, any subsequent dealings by the parties with the parcel numbers the subject of this claim are also null and void. In view of this, question 4 must be answered in the affirmative."

175. His Lordship was asked to clarify the ruling and said:

> "Counsel for the Appellants now applied to the court to clarify its ruling and to answer question 4 and 5. I think question 4 has been answered in the last sentence of the ruling of 7th June 2024. I think the court went on to answer question 5 because having answered question 4 in the affirmative it is not necessary to answer question 5 because the answer to question 5 would be the opposite to question 4. However, since the court was asked to answer the question 5, I will answer the question in the negative."

[81] Further Amended Claim, paragraph 25.

The meaning of Question 4

176. Question 3 asked was the failure of:

(a) the Commissioner and relevant Trustees to execute a lease; and/or

(b) the Commissioner to pay rent; and

(c) the Commissioner to take possession,

a mistake giving rise to the jurisdiction of the Court pursuant to section 229.

177. The first thing to note is that Question 3 focusses on two distinct groups involved in the failures to comply with s 69(1)(b) of the Act. One is the Commissioner **and** relevant Trustees to execute a lease. The other the Commissioner in relation to the payment of rent and taking possession.

178. The second thing to note is that is that some of the alternatives are both cumulative and separate, denoted by the use of the "and/or". The four possible combinations are:

(a) the first is: the Commissioner and relevant Trustees (execute a lease), **and** the Commissioner (pay rent and take possession);

(b) the second is: the Commissioner and relevant Trustees (execute a lease), **and** the Commissioner (pay rent);

(c) the third is: the Commissioner and relevant Trustees (execute a lease);

(d) the fourth is: the Commissioner (pay rent and take possession).

179. Only on the fourth alternative is there no consideration of the owners' failure to comply with their obligations, or the owners' participation in the Commissioner's failures, in terms of whether that had an impact upon the jurisdiction under s 229 arising.

180. We consider that the owners' involvement in the Commissioner's mistakes could have such an impact. For example, upon being required to execute a lease under s 69(1)(b)(ii),

the owners had an obligation under the agreement for lease, and s 69(1)(b)(ii), to execute the lease so that it could be registered. So much also flows from the conditional nature of the vesting order. A denial of the Commissioner's requirement, or a refusal to execute the lease, would cast the Commissioner's failure (or mistake) in a particular context.

181. However, the fourth alternative in Question 3 was limited to consideration of the conduct of only one party to the agreement for lease (the Commissioner). Nothing in that alternative required consideration of the effect of the owners' failure on the enlivening of jurisdiction under s 229, or what might result if that jurisdiction was enlivened.

182. At no point did the learned primary judge consider the separate alternative combinations. There is nothing in the appeal record that would suggest His Lordship was asked to consider each alternative combination. By the way this question was addressed by the Appellants on the appeal, it seems plain that it was not done below.

183. Question 4 asks: if the answer to either of Questions 2 or 3 is in the affirmative, "**does that**" preclude the Court from exercising any discretion to refuse rectification in circumstances where the exercise of such discretion would otherwise be open under s 229(1) of the Act.

184. The phrase "does that" refers to the findings that could have come from a proper analysis of Question 3, that is dealing with each alternative combination and answering the question in respect of each. Properly understood, Question 4 asks: is the discretion that otherwise exists under s 229(1) excluded by the fact that the jurisdiction is enlivened by any of the alterative combinations of mistakes.

185. But that was not done or answered by the learned primary judge. Therefore Question 4 was inapt as it was impossible to answer.

186. It is a good example of the warnings expressed in *Jui Hui Chan* and *Vunagi* as to the necessity to properly frame the preliminary questions to be asked in this sort of application.

187. The Appellants approach the Question 4 issue by reference to:

(a) what has happened with the PE's since first registration, highlighting the differing positions of the various perpetual estate holders or lessees;[82]

(b) considerations of the law of trusts and the application of that to customary land and customary owners;[83]

(c) the nature of the discretion under s 229;[84] and

(d) the factors that might influence the exercise of that discretion.[85]

188. In none of those submissions is consideration given to the extended focus of Question 3 (that is, by the various alternative combinations of mistakes) or the proper scope of Question 4.

189. This serves to eloquently illustrate the dangers, referred to in *Jui Hui Chan* and *Vunagi*, of allowing the debate in the preliminary question process to stray beyond the proper limits of the question asked.

190. The learned primary judge did not make a finding on the proper scope of Question 4, because the parties did not elucidate the question by its actual meaning. Therefore, the finding by the learned primary judge was in error and should be set aside. However, for the reasons above the question is inapt to be answered and this Court should not embark upon it. For the same reasons there is no point in remitting that question to the High Court.

Question 5

191. Question 5 relevantly asked:

> "If the answer to … Question … 3 is in the affirmative, does that preclude the operation of s 229(2) of the Act in circumstances where a defence under that provision would otherwise be open?"

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82 Appellants' written submissions, paragraphs 194-197.
83 Appellants' written submissions, paragraphs 199-209.
84 Appellants' written submissions, paragraphs 217-220.
85 Appellants' written submissions, paragraphs 221-228.

192. We have referred to the impermissible breadth of Question 3 in paragraphs 176 to 181 above. This question is tainted with the same difficulties, as is the consideration of it by the learned primary judge. We repeat what we have said above in paragraphs 185-186 and 189-190 above, as applicable to this question.

193. The phrase "does that" in Question 5 has the same effect as it does in Question 4 and requires consideration of the alternative combinations once again. Therefore, properly understood, Question 5 asks: do the various alternative combinations of mistake preclude the operation of s 229(2) of the Act in circumstances where a defence under that provision would otherwise be open?

194. At no point did the learned primary judge consider the separate alternative combinations. There is nothing in the appeal record that would suggest His Lordship was asked to consider each alternative combination. By the way this question was addressed by the Appellants on the appeal, it seems plain that it was not done below.

195. The learned primary judge first considered that Question 5 was not necessary to answer "because the answer to question 5 would be the opposite to question 4". However, His Lordship answered the question in the negative in the clarifying ruling.

196. His Lordship said in his first ruling:

> "Having answered question 3 in the affirmative effectively means the Court declare that the acquisition process in this case, vesting and registration of parcel numbers 191-082-005 (Original Parcel Numbers) does not comply with Part V, Division 1, of the Lands and Title Act [cap 133] (as amended) therefore, it is null and void. Consequently, any subsequent dealings by the parties with the parcel numbers the subject of this claim are also null and void. In view of this, question 4 must be answered in the affirmative."

197. His Lordship was asked to clarify the ruling and said as to Question 5:

> "Counsel for the Appellants now applied to the court to clarify its ruling and to answer question 4 and 5. I think question 4 has been answered in the last sentence of the ruling of 7th June 2024. I think the court went on to answer question 5 because having answered question 4 in the affirmative it is not necessary to answer question 5 because the answer to question 5 would be the opposite to question 4. However, since the court was asked to answer the question 5, I will answer the question in the negative."

198. Thus, the learned primary judge held that the mistakes (under s 69(1)(b)(ii)-(iv) of the Act) do not preclude the operation of s 229(2) of the Act in circumstances where a defence under that provision would otherwise be open.

199. Section 229 provides:

> **"229 Rectification by the Court**
>
> (1) Subject to subsection (2), the High Court may order rectification of the land register by directing that any registration be cancelled or amended where it is so empowered by this Act, or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
>
> (2) The land register shall not be rectified so as to affect the title of an owner who is in possession and acquired the interest for valuable consideration, unless such owner had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

200. As is plain, the operation of subsection (1) is subject to subsection (2). Relevantly, the court may grant relief by way of rectification where it is satisfied that any registration has been obtained, made or omitted by mistake. Thus, the court may order rectification where it is satisfied that any registration has been obtained, made or omitted by mistake, but not if subsection (2) applies.

201. If subsection (2) applies, it imposes a prohibition on rectification, but only in respect of a specific class of owner. The prohibition is on rectification of the title of "an owner who is in possession and who acquired the interest for valuable consideration". However, the prohibition does not apply if the owner:

    (a) had knowledge of the omission or mistake; or

    (b) caused such omission or mistake; or

    (c) substantially contributed to such omission or mistake.

202. The "defence" referred to in Question 5 is the prohibition is on rectification of the title of an owner who is in possession and who acquired the interest for valuable

consideration. It is not an absolute defence because of the proviso to its operation. Further, to say that the defence is "open" is not to say that the defence is established.

203. This exposes the second vice in Question 5. It asks if the various alternative combinations of mistakes preclude the operation of s 229(2) of the Act in circumstances where a defence under that provision would otherwise" be open". It does not proceed on the basis that the defence is established.

204. The Appellants contend that the defence is an absolute defence, but that is only true if the relevant owner: (i) is in possession and (ii) acquired the interest for valuable consideration, and the matters in the proviso are found not to exist. That is, it is only an absolute defence if the court is satisfied that the owner:

(a) did not have knowledge of the omission or mistake; and

(b) did not cause such omission or mistake; and

(c) did not substantially contribute to such omission or mistake.

205. The Appellants also contend that if s 229(1) is engaged the provisions of s 229(2) "automatically arise for consideration".[86] We do not accept that construction of s 229. The proviso only arises if it is pleaded or otherwise raised as applicable. The Appellants submissions in reply make it clear that proof of disputed facts is necessary in order to determine if the proviso is applicable.[87]

206. The Appellants refer to *Billy v Daokalia*[88] for the proposition that s 229(2) contains protective provisions, as well as "the key … which can unlock that protective clause". The protective provisions are those that provide that there shall be no rectification of the title of an owner who is in possession and who acquired the interest for valuable consideration. The key to unlock that protective clause is the proviso. In our view, *Billy* supports our conclusion above as to the operation of s 229(2).

207. That then leads to the further issue with answering Question 5.

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86 Appellants' submissions in reply, paragraph 50.
87 Appellants' submissions in reply, paragraph 52.
88 [1995] SBCA 5 at page 28.

208. The Appellants contend[89] that they have pleaded that:[90]

(a) the second appellant, Honiara Resort (Solomon) Ltd, is in possession and acquired its interest for valuable consideration;

(b) and that it had no knowledge of and did not cause or substantially contribute to the relevant mistake, and has no knowledge of any mistake.

209. The allegations are denied and in issue.[91] Thus there are disputed questions of fact that affect the resolution of Question 5.

210. It may be noted that the same allegations are not made by the third appellant, Isaac. However, she alleges that her interests derive from the same series of registrations and subdivisions from which the third appellant derives its interest.[92] That, too, is denied.[93]

211. Question 5 assumes that certain disputed facts will be established. That is an inappropriate basis to propound a preliminary question.

212. In our respectful view, for the reasons above, Question 5 should not have been answered by the learned primary judge.

Costs

213. The Appellants raised all issues that were argued before this Court, including an attack on the answer to Question 5, which was then made the subject of the cross-appeal. Whilst the cross-appeal has failed that was because Question 5, propounded below and before this Court, was advanced by the Appellants. Consequently, the outcome of the appeal and cross-appeal derives principally from the stance taken by the Appellants.

214. The Second and Third Respondents played little part in the appeal, by and large contenting themselves to adopt the Appellants' submissions.

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[89] Appellants' submissions, paragraphs 239-240.
[90] Defence paragraph 36.
[91] Reply and Defence, paragraph 28.
[92] Defence paragraph 37.
[93] Reply and Defence, paragraph 28.

215. The Fourth Respondent filed submissions that engaged on Questions 1 and 2, expressing the view that the seabed was unlikely to be capable of being customary land. In that sense the Fourt Respondent, somewhat diffidently, contended for a "No" answer, and therefore opposed the Appellants' position. On Question 3, the Fourth Respondent submitted that if the court said "Yes" to Question 1, then it should say "Yes" to Question 2. On Questions 4 and 5, the Fourth Respondent contended for "No" answers to each. In the result, though the Fourth Respondent occupied only a small portion of the time in the appeal, it had a measure of success.

216. The Fifth Respondent took no part in the appeal, abiding the order of the court.

217. Accordingly, the burden of costs as far as the First and Fourth Respondents are concerned, including the costs of the proceedings below, should fall on the Appellants.

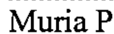
Result

1. Set aside the answers to Questions 4 and 5.

2. The appeal is dismissed.

3. The cross-appeal is dismissed.

4. The Appellants must pay the First and Fourth Respondents' costs of the appeal and cross-appeal, and the proceedings at first instance, to be taxed if not agreed.



Muria P

Gavara-Nanu JA

Morrison JA