IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Jurisdiction

BETWEEN:	MICHAEL TOHINA	*Plaintiff*
AND:	ATTORNEY-GENERAL Case No.: 236/2003	*Defendant*
BETWEEN:	BILLY GIZO SAENUMUA	*Plaintiff*
AND:	ATTORNEY GENERAL Case No. 275/2003	*Defendant*
BETWEEN:	JOHN SELA CHAN	*Plaintiff*
AND:	ATTORNEY-GENERAL Case No. 237/2003	*Defendant*
BETWEEN:	CELETINE MILTON LANETELIA	*Plaintiff*
AND:	ATTORNEY-GENERAL Case no. 055/2004	*Defendant*

Practice and Procedure-originating summons -declaratory orders- plaintiffs claiming declarations of entitlement against the Government for recompense-loss and damage suffered in the "ethnic tensions" about the time of the "coup" in 2000-whether proceedings available in the circumstances.

High Court Rules O. 27 r. 5; O58 r.1

Administrative law-Claims against the Government-claims in tort, contract or under statute-whether "legitimate expectation" available to plaintiffs in circumstances where moneys disbursed by the Government over time to other claimants in similar circumstances

These plaintiffs suffered loss of property about Honiara on Guadalcanal at the time of the troubles leading up to and subsequent to the coup. They claim declarations of right arising out of the Townsville Peace Agreement made on the 15 October 2000 when a cessation of hostilities was brokered. Part Three of the Agreement ("the TPA") recited the willingness of the Solomon Islands Government to secure assistance from development partners to assist persons who suffered loss or damage to property on Guadalcanal and went on to

categorize such persons. As a result of various attempts to "compensate" persons, the Government created a Ministry of National Unity, Reconciliation and Peace which accepted monetary claims and was directed in its work by the Cabinet, the Prime Minister and others. These plaintiffs are aggrieved persons whose claims remain unsatisfied.

Held; (1) The TPA is not a treaty or convention as understood in the sense of public international law. Consequently in the absence of domestic legislation providing for benefit to these particular individuals, these plaintiffs cannot use the TPA as affording them a cause of action as it stands.

(2) Even were the TPA to be accepted as a treaty, no cause of action can accrue to individuals by virtue of the terms of the agreement, or by law.

(3) The TPA gives no contractual rights to these individual parties.

(4) In the absence of domestic legislation governing the payment of any moneys made available to "compensate" persons who have suffered loss or damage during the tensions, there is no statutory framework within which the MNUR&P's actions can be viewed and consequently judicial review is not available in the circumstances of these actions.

(5) Judicial review of administrative actions arises out of the right in the court to review the actions of officials and public servants of the Government or other government agencies to ensure such actions are *vires* the powers of the official and in the circumstances of this case, no powers under legislation have been shown. In fact, the Cabinet has retained the right to deal with such moneys by Executive fiat.

(6) Notwithstanding the absence of a cause of action as commonly understood, this court may entertain claims for declarations stating rights of parties where a party has a particular interest in the outcome, for O27 r. 5 follows United Kingdom Rule OXXV r. 4 which gave rise to the underlying law in the Solomon Islands.

(7) Such power to make declarations of right are discretionary and in the circumstances of this case, material matters for consideration are;

a) The political imperative which guided Cabinet in each matter of payment cannot be the subject of judicial enquiry, but that is not to say persons who received payment cannot be brought to account where amounts claimed were overstated or fallacious.

b) Payments are by their nature, gratuitous and entirely in the grant of the giver, the Government

c) This Court should not interfere in nor does it have the power, to review acts of the Executive in absence of any legislative or regulatory framework. (Where Treasury or donor agency moneys are the source of such payments it is unreasonable to expect no financial control or limit to the extent or benefit.)

d) The power to grant or not in the circumstances remains with the Executive.

e) The government is consequently answerable for the manner and the extent of such grant of gratuities to Parliament.

f) The exclusive nature of the power in the Executive in these cases does not admit any right in these claimants to any such payment beyond consideration afforded them in the absolute discretion of the Executive.

Cases cited.
The following cases were cited in the judgment.
(Maclaine Watson & Co. v- Department of Trade and Industry (1989) 3 All. E.R. 523
Minister for Immigration and Ethnic Affairs v- Teoh (1995) ALR 353
Laugwaro v-Auga unreported decision of Muria, CJ no. cc. 102/2003
Russian Commercial and Industrial Bank v- British Bank for Foreign Trade, Limited (1921) 2 AC 438
Guaranty Trust Company of New York v- Hannay & Co(1915) 2 KB 536
Ku-ring-gai M.C. v- Suburban Centres (1971) 2 NSWLR 335.
Tevita –v- Minister of Immigration (1994) 2 NZLR 257

Originating Summons seeking declarations of right.

N. Moshinski QC, the Solicitor-General with J. Gordon for the applicant/defendants.
P. Watts for the respondent/plaintiffs.

At Honiara.
Hearing 27 February, 30 March, 2004
Judgment 19 August 2004

Brown J. In all these matters the Attorney (Representing the Accountant-General and the Permanent Secretary of the Ministry of National Unity Reconciliation and Peace) seeks to strike out the various originating summons on the grounds that they disclose no reasonable cause of action or that the claim is frivolous and vexatious.

The first three above mentioned applicants seek declarations that the Ministry of National Unity, Reconciliation and Peace (MNURP) acted unlawfully in that it contravened Part 3 (2) of the Townsville Peace Agreement (TPA) made on the 15 October 2000, in that the applicants had not been paid monies representing "the approved value of damage as initially determined and approved by Cabinet". The Applicants further sought declarations that the MNURP's act in distorting approved payments was *ultra vires* the MNURP power for such distortion was in conflict with Cabinet's initial approval for payment. The third order that the applicant sought was that they be paid the amounts claimed.

The fourth applicant claimed by way of statement of claim, $2,683,5721.00. This amount related to the plaintiff's claimed entitlement under Payment Voucher No. MNURP/198/2002 dated 16th May 2002 and is in the nature of a claim for debt. I shall deal with this claim later, but the principles which lead me to deal with the declaration claims also apply in this case.

The various claims relate to loss and damage suffered during the ethnic tension in years 2000, 2001 and 2002. The second applicant for instance, one Billy Gizo Saenumua claims as owner of BJ Motel in Honiara which was burnt down by a group of Militants after the worst of the tension late in 2002. The applicant has placed a value of $5,160,500.00 on the building.

The first applicant Michael Tohina was a farmer who owned properties including three residential buildings about Kakabona which were also burnt during the crisis on Guadalcanal. This applicant claimed, of the sum of $855,853, a balance owing of $810,679 which had apparently been certified by MNURP.

The third applicant was a local business man who also own residential properties about Kakabona lost during the conflict. Cabinet apparently approved an amount of $1,131,514.00 and the applicant received an amount of $52,440.00. The applicant comes to court seeking payment of the remaining balance.

The Attorney's summary of argument is succinct.

Each of the abovementioned proceedings concerns a claim by an Applicant for compensation for losses sustained prior to the Townsville Peace Agreement (the TPA) made 15 October 2000.

The agreement was made between the Malaita Eagle Force, the Isatabu Freedom Movement, the Malaita Provincial Government, the Guadalcanal Provincial Government and the Solomon Island Government (SIG).

The agreement has not been implemented by domestic legislation and therefore does not create rights or obligations in the law of the Solomon Islands.

Further, a breach of an international obligation (if there be such should this court find the TPA to be a "treaty") is not justiciable at the suit of an individual. (*Maclaine Watson & Co. v- Department of Trade and Industry* (1989) 3 All. E.R. 523, 526)

Further, clause (2) of Part Three of the TPA does not cast an obligation upon the SIG to pay compensation but only requires it to make efforts to secure assistance from its development partners to assist those who suffered loss.

Further, an assurance of compensation by a public official does not provide a right of compensation in the absence of a pre-existing contract.

The statement of claim of the 4th plaintiff is in effect, a money count for the plaintiff claims $2,683,571.00 pursuant to payment voucher no. MNURP/198/2002 dated 16 May 2002 made payable to the plaintiff for loss and damage to property. The voucher has not been met by the Government. It is not based on a negotiable instrument, for instance when perhaps different considerations would apply. I propose to deal with these claims together since they have been argued that way.

Proceedings pursuant to HC Rules.

Each claim is initiated by Originating Summons under Order 58 of the High Court (Civil Procedure) Rules, 1964. This procedure is followed for the applicants' seek interpretation, they claim, of a "deed, will, or other written instrument" under Order 58, r. 1, (for it is not a written law within the meaning of r. 2).

The respondent/plaintiffs answer to the applicants claim to have the proceedings dismissed.

Mr. Presley Watts appeared for these various plaintiffs and answered the argument by the Attorney-General. He acknowledge that the provisions of an international treaty to which Solomon Islands is a party may not form part of Solomon Islands law unless provisions have been validly incorporated into municipal law by statute. (He was unable to point to any specific authority which clothed the TPA with the indicia of a Treaty or Convention). He says this is in conformity with our Constitution, s.75, where ratification of treaties falls within the executives' power; making an alteration to domestic law falls within the function of Parliament. There is no evidence that the TPA has been "ratified" in the sense understood by public international law. The TPA has not been incorporated into our municipal law and cannot operate as a direct source of individual rights and obligations.

Nevertheless Mr. Watts says that an individual may have a legitimate expectation arising out of the terms of a treaty ratified by Solomon Islands. He relied on the case of *Minister for Immigration and Ethnic Affairs v- Teoh* (1995) 128 ALR 353, an immigration case which I must say didn't help in this instance, the facts bearing no relevance nor did the legislation touch on the issues before me. In addition he referred the Court to the New Zealand decision of *Tevita –v- Minister of Immigration* (1994) 2 NZLR 257 again a case dealing with the rights of the child under Conventions and domestic New Zealand law.

Findings on the question of Treaty or Convention.

It is convenient to deal with that question at this point. I find that the TPA is not such to be categorized as a "Treaty", for that it is not a "formally concluded and ratified agreement between Nations". Certainly there is nothing on the face of the TPA to cloth it with the character of a treaty for the purposes of public international law or supra-national law, independent of the law-making province of a Nation State. Consequently it follows that the respondent/plaintiffs argument relying on the rationale in *Minister for Immigration and Ethnic Affairs v- Teoh* (1995) ALR 353, cannot assist them. In that case the High Court of Australia was dealing with the effect of Australia's accession to the United Nations Convention on the Rights of the Child (the Convention), although the Convention had not been implemented in Australia by Statute (domestic legislation). The High Court held, however that the fact of ratification of the Convention and its subsequent coming into force a short time later, was "an adequate foundation for a legitimate expectation in the absence of statutory or executive indications to the contrary, that administrative decision-makers, including the Ministers' delegate, would act in conformity with the Convention and treat the best interests of the child as a primary consideration". The TPA is neither a Treaty nor Convention in the sense understood in *Teoh's* case so as to afford the reference to "legitimate expectation" some relevance in these various proceedings. The case has not been shown to be authority to support the respondent/plaintiffs argument.

In any case, the TPA is not justiciable (were it to be accepted as a treaty) at the suit of individuals. I adopt and follow the *ratio decidendi* in *Maclaine Watson & Co. v- Department of Trade and Industry* (1989)3 All. E.R. 523,
"Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the UK have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest ***of a private individual"*** **(**Lord Templeman at 526**)**

To any extent, then that the former Chief Justice found such a legitimate expectation in terms of the TPA, in the absence of domestic legislation or clear contractual rights in particular individuals, I must respectfully disagree. (Muria CJ in *Laugwaro v-Auga* unreported cc. 102/2003)

Facts

The Townsville Peace Agreement

Michael Tohina filed a second affidavit dated the 25th of February 2004 in which he annexed particular pages from what, he describes, as the Townsville Peace Agreement. It is this document to which I refer and address when I deal with parts but whether it is a valid part of the TPA, I cannot tell. Whilst it appears

particular pages of the document have been photocopied, the whole document is not in evidence. The first copy page preamble is re-produced.

"Whereas since late April 1998, armed groups of Guadalcanal youths, angry about perceived government inaction in addressing their peoples grievances (which date back to 1988 through peaceful demonstration) engaged in activities which resulted in the forceful eviction from Guadalcanal of settlers from other islands, especially Malaita settlers, and the displacement of approximately 20,000 Malaitans;
And whereas in acknowledging the ill-effects the above-referred activities had on the society, well-being of the persons affected and the economy of the country etc"

The second page of the annexure I have, has, at its foot

"Part Three.
Loss of Lives and Property.

(1) Identification of remains of missing persons;

a) Within ninety days from the date of execution of this agreement both the IMF and MEF shall locate, identify and allow remains of any persons known to have been killed during the course of the crisis to be retrieved by their relatives.

b) Custom means of reconciliation and compensation may be agreed to between concerned persons and communities in connection with killing of persons during the course of the crisis.

(2) Claims for lost and damaged property.

The SIG shall make all efforts to secure assistance from its development partners to assist persons who suffered loss or damage to property on Guadalcanal including those who lost-

a) employment as the direct result of the crisis on Guadalcanal;
b) businesses or investments; and
c) personal property.

The next pages I have are attestation signatories by the Malaita Eagle Force, Isatabu Freedom Movement, Malaita Provincial Government and the Solomon Islands Government. Then pages of signatories of those delegates and witnesses of interested parties.

It is this part of the TPA which is material for the purposes of these cases and is the document which I have been obliged to term the **"TPA".**

Claims of the applicants.

Michael Tohina by undated affidavit filed, claimed as owner of three residential buildings and other properties located on Lot 1 LR 920 at Honiara. He annexed a certified photocopy of the Title deed to the land. It showed Albino Damusi, Francis Perogolo, Michael Liliau and Jerry Tada as joint owners. His name is not mentioned on the title. His claim is for $850,853.00 which he says Cabinet scaled down by $45,174.00, approving $810,679.00. He annexed a copy letter under hand of Timothy Bobingi for SRO/MNUPR on Department of National Reconciliation and Peace undated letterhead addressed "To Whom It May Concern" certifying that three named are genuine claims from North West Guadalcanal.

"Their names are in the list for Phase II

Names	Outstanding
1. Bruno Narna	$ 98,000.00
2. Michael Tohina	$168,000.00
3. Michael Liliau	$175,073.00

He also annexed photocopies of various pages of a list headed "9.3 North West Guadalcanal" with a footer "Monday September 09 2002" showing claimants names, outstanding and payment. The payments represented 10% of the outstanding. On none of the page annexed does Michael Tohina's name appear.

Billy Gizo Saenemua claims as owner of the *BJ Motel* which was situated at Tanuli East, Kola'a Ridge Honiara. He claims the sum of $5,160,500.00 based on a valuation dated 11th September 1998 given by Mr Eric Gorapara of the valuation office, Department of Lands and Housing to him.
The Motel building and family residence was burnt down at or around the end of 2001 by a group of heavily armed Ex-Militants (sic). The property was originally built with the assistance of a loan from DBSI. By letter dated 13 August 2003 addressed to "To Whom It May Concern" the Bank confirmed assistance by loan of September 1994 to assist building a Motel complex. The Bank's loan was secured by charge over the property and shows an initial loan of $268,000.00 varied by fresh charge dated the 1st September 1996 when the loan was increased to $440,000.00.
On the 23 April 2003 the Prime Minister wrote to the Honourable Minister of Ministry of National Unity and Reconciliation and Peace enclosing Voucher No. 1648 for the amount of $350,000.00 which the Prime Minister recommended for payment. (While approved, it seems no payment has been made).

How did Mr Gorepava value this property in 1998? He says he adopted two methods – direct comparison and investment methods of approach. He says the sales of residential property within the vicinity of the subject property in and around Honiara provided reasonable comparisons. If there had been exhibited "comparative sales" such exhibit is not with the document file.

I must say I find it difficult to accept that comparative sales about Honiara at the time of the troubles would justify a value of 5m plus on this Motel.

The valuation then refers to the residual method. He says *"the residual method involves ascertaining the maximum development which can be achieved on the land, what development would give the optimum value and what that value will be; the investment approach considers the rental income return of the motel accommodation are capitalized at normal rates of return reflecting the risk involved in this part of investment."*

I have difficulty in understanding this statement. It might be thought that land for instance would be accounted for as a separate item and shown at its cost value with the valuers' justification for any current market value which he attributes to the fixed asset and a component for the income return on the asset. Buildings, machinery and equipment may be recorded at costs and perhaps some method of depreciation applied. None of this seems to have been considered; although a reference to "residual value" (the predicted sales value of a long lived asset at the end of its useful life) does tend to cloud the idea of valuing the motel as such for use of "residual value" must relate to buildings and equipments which go to make up the motel, and may not have much relevance in this case where the motel was a going concern.

By looking at his consideration of *"rental return income (for that is the business of the motel) capitalized at normal rate of return reflecting a risk involved in this type of investment"* at that time, then we may adopt what are described as **discounted cash flow models** (which look to a projects cash inflows and outflows and incorporate the time value of money). DCF Models are the best measure of financial effects of an investment and reflect the old saying "a bird in the hand is worth two in the bush". In other words, what is this motel worth to a purchaser shortly before the time of the fire in 2001 when expected cash flow from the asset will extend over many years but the use of this money (to buy the business) will have a cost. A purchaser then will need to seek a better rate of return on his money (the cost) then he can expect from a bank (a risk free rate). As has been shown, the motel in Honiara was not without risk. It was destroyed.

If one looks to Mr Gorepava's letter and his comments written on the 14th February 2002 (after the date of his original valuation where he said the capital value of a motel is ascertain by capitalizing the annual rental value), he still does

not refer to any income or outgoing whether taxable or otherwise, when he reiterates a gross annual return estimated at $100,000.00 plus. So it is something told him but not verified at that time. If we say 50% of that gross income was used to make that rental income (after staff salary and principles salary, repairs, maintenance, electricity and other utility fees, taxes and other charges – but not any borrowing costs) we are left with a net income per annum, of $50,000. The motel was in existence for six years before it burnt down. Applying an interest rate or expected return on money of 10%, using the factor applicable from *net present value tables* the net present value of such annual cash flows is 4.3553 x (50,000) or approximately $220,000.00. If a twenty year period is used (ignoring the fact of the tension, the jump in the cost of capital over this period etc.) the net present value of the annual cash flows is 8.5136 x (50,000) or $430,000.00. Perhaps twenty years is a reasonable period for despite repairs and maintenance, the motel may then be seem to be old and may not attract much residual value.

Accepting (although the valuer does not mentioned the capital costs) that the loan of $440,000.00 represents the building cost to Mr Saenamua, and ignoring any depreciation, perhaps another way of valuing this motel is to adopt the valuers theory and in practice accept a twenty year net present value of these discounted cash flows and add the cost value of the buildings. i.e $430,000 + $440,000 = $870,000. This is nothing near the $5m plus claimed but does illustrate a justifiable valuation model on very little information.

Mr John Sela Chan's claim related to the loss of his two residential buildings at Kakabona caused by Malaita Eagle Force – Joint Operation on the 9th August 2000. The value he places on the property loss was $1,235,514.00. He was only paid $52,440.00 and he claims the balance.

I do not propose to look at the underline basis of these claims for they really rely on assertions that an authority (whether Cabinet or the Ministry of National Unity Reconciliation and Peace) had directed payment of particular sums and authorized, it is alleged, payment by the Department of Finance. In other words they sue not on the basis of their loss (which has not been supported really, by any independent, properly argued justification, nor need it be in these proceedings) but rather on the fact that a claim has been made, in some cases approved, but remains unpaid. In other words, a debt due, rather than a claim for damages.

It is this expectation of payment, which Mr. Watts seeks to cloak with that phrase "*legitimate expectation*" as known to law.

The actual form of claim document in evidence merely provides for the name of the applicant and the amount claimed, without any terms, disclaimer,

explanatory memoranda, or other writing to consider on the issues before this court. Most claims seem to be by way of letter, and in the Motel owners case, sent to the Prime Minister. How these copy documents have been obtained from these Ministries and annexed to these various affidavits is bemusing.

The argument of the Attorney in relation to the nature of the claims.

I accept Mr Moshinsky's argument that the terms of the TPA do not create obligations in the nature of a contract. In reading Part 2 of the TPA it is clear the nature of the assistance envisaged for those who suffered loss is not spelt out. In the aftermath of the troubles, the Government attempted to recompense those who had suffered loss by paying out sums of money. That course is not designated in the Agreement. The Agreement says "The SIG shall make efforts ..., to assist persons etc". The obvious most material assistance afforded the development partners and others, was the advent of RAMSI in July, 2003 when the continuing lawlessness and gun toting culture was addressed in a realistic fashion. The acts of the SIG to pay money to those who claimed was open to it but the wording of the TPA, Part 2 does not necessarily lead to that interpretation, as I have shown. To circumvent further violence by the assistance of RAMSI is clearly within the terms of "assistance" envisaged by the TPA , for without cessation of violence, these plaintiffs very lives were at risk and their claims would have died with them, as had happened to so many innocent people.
It was the fact of the killings and destruction of property and possessions on Guadalcanal which gave rise to the Solomon Island Government seeking and receiving monies from Development Partners and Donors in its endeavour to stop the warlike conflict. The "assistance" received from its "development partners" was assistance given the SIG. There is no suggestion of "compensation" (used in the sense understood in tortuous or contractual claims) in the phraseology of the words used; rather the nature of the assistance was left to the discretion of the development partners. Some assistance was in the form of money which once received, was dispersed in accordance with a decision of the Executive of the Government of the Hon. Manasseh Sogavare. In furtherance of such decision, was the creation of a Ministry of National Unity, Reconciliation and Peace whose functions, it seems, included the work of a committee through which all these types of claims were channeled. It appears from the various communications included in these particular claims, that the Executive and Prime Minister, remained vitally interested in the administration of the process, for various copy letters showing this interest are in evidence.

Parliamentary Sanction

Was this process sanctioned by Parliament? It appears not although Parliamentary Sittings were then few and far between. No legislation had been

passed governing the payment of compensation monies made available by the Government. Although there has been criticism of this process (for ignoring existing forms, institutions and underlying causes of action recognized by law) such criticism to my mind, ignores the root cause of the damage, concomitant as it were, with war-like acts. It could have been regressive and possibly have incited further violence, to have spoken of enquires under the Commission of Inquiry or the Death and Fire Inquiry's Act after the time of the TPA when the Government had seen as an imperative, the need to pay money as soon as possible, to people who had suffered in the civil disturbances which had swept the country especially Guadalcanal and whose likely future conduct may have been predicated by an expectation of compensation in the absence of which further violence was possible. Certainly the episodes of the "special constables" illustrated the risks involved in not acknowledging the propensity to violence in those difficult days before the advent of RAMSI. By acting to compensate, the Government obviously succumbed to public pressure to disperse monies which had been paid to the Government by outsiders for the purpose underlying the TPA, the cessation of hostilities. How best the Executive of the SIG was to carry out that purpose was quite rightly left to the Executive.

In the harsh circumstances of those times before the restoration of the semblance of law and order with the RAMSI intervention at the request of the SIG in July 2003, the manner of the assistance by payment of moneys in the fashion which developed may have been expedient, although whether wise or prudent should not be judged in these more benign times for it is easy to criticize with hindsight, after such extraordinary events.

It is not for this court to undermine the outcome of the Cabinet or the Committee's well-intentioned acts of payments of money for those acts were the manifestation of a political will, distinct from juridical function, brought about by the need to bring an end to the killings and ethnic conflict ranging about Guadalcanal.

The manner of settling conflict historically involves reparation, although as shown by the aftermath of the Treaty of Versailles, such reparations do not necessarily address the need for reconciliation. In the Solomon Islands, brigandage of the various parties continued although the SIG continued to attempt to suppress it, by various means, including payments of "reparation" and "compensation" until the call for outside help was answered in 2003. It would seem the "compensation" course carried with it the seeds of increasing unrest, and increasing demands for that "compensation" did not flow from those directly responsible for the killings, loss and damage but rather a Government in place after the cessation of hostilities. The manner in which settlement of these claims was attempted did not reflect traditional Melanesian *mores* in reconciliation and dispute settlement, for the individuals and groups responsible have not

collectively or individually settled or acknowledged an obligation, rather foreign resource and recourse to a complaisant Government followed.

For as time went by, a perception arose that payments by the Government were prone to cronyism, often excessive, and consequently unfair in the overall scheme. I need not enquire about that perception. These claims may be dealt with on the material before me. It was the effective cessation of payment, especially to these claimants, which has precipitated these actions.

It must be remembered that these claimants seek to be recompensed by the Government, not by the perpetrators of the acts which caused the loss and damage. Clearly the ex-militants described as having burnt down the Motel well after the time of the TPA may well be the cause of police enquiries, and on a strict application of the Felony/Tort rule, civil proceedings should be stayed until any criminal proceedings against the miscreants has been finalized. But that is expecting too much.

So have these claimants a legitimate expectation for that their claims, arbitrarily, have failed, when others have just as arbitrarily, succeeded earlier. Is it for that funds have dried up, or that the Executive has determined compensation in this manner should cease? Whatever the reason in the circumstances argued, have these applicants' legitimate expectations in terms of that phrase applied by this court in country?

Mr Watts relied upon *Laugwaro –v- Auga* (unreported HC Civil Case 102/03) where Chief Justice Muria at 3 said;

"in so far as the first question is concerned the point raised by Mr Ipo that the TPA created the basis on which the Government could lawfully indemnify the plaintiff who lost properties is a strong one. Clause 2 part 3 of the TPA gives you assurance that the Government as a Party to the TPA will do something to assist those who suffered loss or damage their property on Guadalcanal. Clearly as a result of that assurance funds were made available and were paid to persons who lost properties on Guadalcanal. Upon entering into that Agreement, the Government undertakes the obligation to assist in securing payments to those who lost properties. That is an obligation created by the Agreement and against which the indemnity lies in this case. The answer to the first question is Yes".

Talk by the Chief Justice of "legitimate expectation" was coupled with "the basis upon which the Government could lawfully indemnify the plaintiff" in other words the Chief Justice was looking not at a right in a plaintiff to claim but rather the basis upon which the Government was dispersing large sums of money in extraordinary circumstances without Budgetary Appropriation, or legislative backing, Court Order or any due process which one would expect. (The basis relied upon was Part Three of the TPA, the money is that made available by

Foreign Donors and the absolute discretion in the Government (for what better right has a Government to the money in these circumstances) to deal with such money).

I do not understand the Chief Justice to mean, when he uses the word "indemnity" that the government stands as an insurer for there is nothing in the phraseology of Part 3 of the TPA to suggest that. Rather giving a meaning to "indemnity" by the Concise Oxford Dictionary "compensation for loss incurred" or ***"sum paid for this especially sum exacted by victorious belligerent as one condition of peace"***, (repatriation moneys) I am minded to suggest these wider meanings in the Chief Justices' phraseology. I do not accept Mr. Watts's submission that the use of the indemnity in this case quoted has the meaning he seeks to attribute to it, a blanket cover to compensate all claims.

Mr. Watts also relies on Order 58 of the High Court Rules as creating a cause of action in these applicants. He asks the rhetorical question "does the TPA confer any right to the plaintiffs in this case as having an interest in the TPA", he answers the question and says it does.

The language of Part Three of the TPA is not that of a contract. No rights can arise in contract in the application of the Part by virtue of the agreement. Essential matters which give rise to contractual obligations are absent. I do not consider the second document which I referred to, earlier, can in any way cast obligations on the Executive by way of contract. Again it lacks definition and those other essential matters which craft even implied contracts. Read together they fail, for neither is contractual and the combination entirely lacks definition.

It may be that these claims swallowed whole moneys available in the Department of the Treasury, whether grants of Donors or Taxes, without really distinguished between them. The Government can equally claim that person left un-rewarded under this practice have no automatic charge on public funds in the absence of any contractual right, statutory entitlement or tortuous claim.

As I have found no such contractual entitlement or legislative right the remaining arguments of these applicants are two-fold. They claim under the High Court Rules and also from developments in administrative law known as "legitimate expectations".

I seek to address the nature of these claims which relate to declaratory orders under the Rules.

Order 27 r.5 provides;

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

In this cases consequential relief is claimed for that the applicants seek orders compelling the Government to compensate them and claim particular sums of money. The provisions of O58, r.1 affect procedure and need be read with substantive O27, r.5. There is then, a consequential right to declaratory relief created by O27 r.5 irrespective of common law forms and reliance on established causes of action. I accept such right flows from case law adopted on Independence and developed since.

What is the nature and extent of such right to a declaration?

Firstly I wish to deal with these actions of the Ministry of National Unity, Reconciliation and Peace. These applicants have not succeeded in showing that the Ministry failed to observe any particular requirement of any Act or Regulation specifically relating to the dispersal of moneys in these circumstances. There is no evidence of budgetary appropriation, for instance for these particular claimants. The applicants cannot gain through that expected avenue or plead the legitimacy of their expectation on that basis.

So where moneys freely given by such donor agencies are dispersed in the manner I have described, the conclusions to be drawn is that "determinations to pay" of the ministerial committee cannot be categorized as determinations which fall within established administration of statutory powers and obligations under domestic legislation, for these gratuitous payments flow from pure Executive fiat. The Prime Minister and Cabinet can be seen to have overall control of dispositions when I read the various copy letters under hand of those authorities. They may give or withhold payment. In the circumstances of the time, it is also clear that the Government coffers often were insufficient for the demands placed upon it.

I am unable to find recourse to judicial review through "legitimate expectations" a valid or supportable process in this case. Judicial review depends on *vires* or otherwise, of administrative action within a legal framework. These dispositions were *extra jurial* in an attempt to settle civil disturbances and war-like acts. To clothe them in juridical garb when they spring from the terms of the TPA is rather at odds with the underlying purpose of the TPA to stop hostilities. To understand the purpose of the TPA is important. For that is the reason behind the inclusion of Part 3. It is clearly one of many considerations which brought these parties to accord and to a negotiated settlement. The maximum "*contemporanea expositio est optima et fortissima in lege*" should be borne in mind. (The best

way of getting at the meaning of an instrument is to ascertain when and under what circumstances it was made).

The whole tenor of judicial review is predicated by the concept of *vires.*

"*The House of Lords has laid down the principle that "whatever may fairly be regarded as incidental to, or consequent upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires. This principle has been applicable to the statutory powers of all public bodies, and a high proportion of the reported cases involving the vires of administrative action have been concerned with the question whether a transaction is to be regarded as reasonably incidental to the exercise of statutory powers expressly conferred.*"

de SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION-4th edit., JM EVANS edit., at 95.

de SMITH clearly rests the discretion in an administrative or executive body on the premise of statutory standards. None of this is relevant in my view in the circumstances of this case. The war-like hostilities which gave rise to the crying need for cessation of killings, lootings burnings and dispossessions, were criminal acts amounting to anarchy. Consequently reliance on domestic law principles, particularly administrative review, would lead us away from the underlying reason for the TPA, the need for cessation of hostilities. There is no domestic legislation crafting a methodology for recompense for those who suffered loss during the continuing crisis, which extended over some years until the advent of RAMSI. This *ad hoc* compensatory method does not reflect customary *mores.* The Legislature (Parliament) has not authorized by legislation, compensation for all those who claim after the "troubles".

There is consequently no legislative framework which can attract judicial review.

There remain, however, the acts of the Executive in directing payment of moneys in the fashion described. May this court interfere in that process?

Mr. Watts correctly in my view has come to this court seeking declarations for that recourse encompasses both the legal and equable jurisdiction of the court. To better understand this fusion of legal and equable jurisdiction it is necessary to remember our Rules sprang from the practice rules of the High Court of Justice in England. There the court's work had been carried out by Divisions so that the Court of Chancery's practice and procedure (**principally involving questions of equable relief including the use of declaratory powers**) came to be

governed by the Statute Law Revision and Civil Procedure Act, 1883 and consequent rules by the rules committee which made O. XXV, r.5), (our Order 21, r5).

The earlier arguments in England over utilization of the Rule included the persisting view of separation of court functions. (Parties should choose their forum carefully, for fear of having the particular court decline to exercise jurisdiction, for that the proceedings were better brought in another Division). To come to grips with the over-arching rule, in practice, often caused problems in itself when proceedings were instituted in Divisions seen as inappropriate.

The House of Lords had need to consider the rule in practice in *Russian Commercial and Industrial Bank v- British Bank for Foreign Trade, Limited* (1921) 2 AC 438; where proceedings had been instituted by a borrowing bank claiming a declaration that the bank was entitled to possession of its security bonds upon payment of the loan in roubles (rather than sterling); such proceedings instituted in the Kings Bench Division (common law) where by a narrow majority, the Law Lords accepted the wide effect of the Rule allowed a discretion in the Kings Bench Division, notwithstanding that the relief sought was more appropriately one for the Chancery Division, incidental as it was, to an equitable action for redemption. The court importantly, looked at the courts discretion to make declarations under O. XXV, r.5 (our O27, r5).

Lord Dunedin dealt with separation of business of the Divisions which had clouded the issue; the right in any Division to make a declaration and importantly from this court's perspective (for there are no separate Divisions in this High Court of the Solomon Islands), suggested principles for the court when faced with such declaratory applications.

"Now the Chancery Division as I understand it is not in the strictest sense of the word, a separate court from the King's Bench Division. They are each of them parts of the High Court of Justice. I do not therefore think that it can be successfully urged that this is the case of court granting a declaration in a matter where it was powerless to grant consequential relief. But when it is said that the granting of a mere declaration is a matter of discretion and that that discretion ought to be shown in granting such declaration "sparingly," "with great care and jealously," and "with extreme caution". My Lords I confess that to my mind such expressions give little guidance. It may be that I am swayed by my experience of another system of law but a rule which can be expressed in the form of a principle may well be proper to any legal system. Your Lordships are aware that the action of the declarator has existed for hundreds of years in Scotland. It was praised with envy by Lord Brougham, in your Lordships house, in the case of Earl of Mansfield v- Stewart *long before the genesis of Order XXV, r.5 The rules that have been elucidated by a long course of decisions in the Scottish*

courts may be summarized thus; the question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declarations sought." (Lord Dunedin at 447)

Lord Sumner did not deal with the discretionary principles *per se*, rather the effect of unwinding earlier decisions in the case under appeal, but he did support the practice of the court in the making of declaratory orders which he said, was warranted by the Rules and opined that the Court of Appeal correctly applied the Rule in the previous case of *Guaranty Trust Company of New York v- Hannay*. (Lord Sumner at 452)

Lord Parmoor also in the majority, agreed with the motion proposed by Lord Dunedin but did not venture to lay down principles for the guidance of courts called upon to exercise discretion in matters of declarations. (Lord Parmoor at 458)

Guaranty Trust Company of New York v- Hannay & Co. (1915) 2 KB 536 is clear authority for the proposition that the court has "power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant; and that the Rule (Order XXV, r5) is merely an extension of the practice and procedure of the court and is not *ultra vires*.

"I think therefore that the effect of the rule (O. XXV, r5) is to give a general power to make the declaration whether there be a cause of action or not and at the instance of any party who is interested in the subject matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion to order to help him in other transactions." (Lord Pickford at 562)

These applicants before me are interested in the subject matter of any declaration that I may make about the intent of Part Three of the TPA, that is clear, for while I have found their claims are not actionable under commonly understood causes of action in law, they clearly claim under equitable principles for others have benefited in similar circumstances.
I am also minded to follow that reasoning of Pickford LJ where he deals with the sense of expression "jurisdiction of the court" pursuant to the Rule and allow that practical relief by hearing these applications for declarations, in absence of legislation and procedures established by Cabinet which would have provided an avenue for judicial review of the manner in which such claims were processed. But of course no such legislation or "manner" appears on the material before me, a failing which is fatal to an application for judicial review

but which cannot extinguish these applicants' rights to be heard "as parties interested in the subject matter".

Having accepted then the right of this court to entertain such a declaration pursuant to the Rule, I must ask myself what matters weigh on my discretion.

Guaranty Trust Company of New York v- Hannay & Co(1915) 2 KB 536 involved defendants in England purchasing cotton from dealers in America who drew a bill of exchange on the defendants for the price of the cotton. The plaintiffs in New York (with a branch office in London) purchased the bill of exchange with a bill of lading relating to the cotton and an insurance certificate both attached to the bill of exchange, and sent the documents to the defendants in Liverpool where the bill of exchange was accepted and sent to the plaintiff's London office. The defendants paid the bill at maturity but the bill of lading was a forgery and no cotton had been shipped under it. The defendants brought an action against the plaintiffs in America to recover the amount of the bill of exchange paid by them and it was admitted that the law of England applied to the case. The plaintiffs brought an action in England claiming declarations to the effect that they did not by presenting the bill for acceptance with the bill of lading attached, represent that the bill of lading was genuine and that they were not bound to repay the amount of the bill of exchange. They also claimed an injunction to restrain the defendants from further proceeding with the action in the United States. The defendant came to court by application to strike for that the plaintiff's claim for declarations disclosed no cause of action. (It must be remembered the defendants had paid on bills which had left them at loss for no cotton had been shipped to the value of the bills; in other words, it was the defendants who were asserting in New York a cause of action to recover its loss in the circumstances.)

The matter was argued on the strength of Order XXV., r.5 " *No action or proceeding shall be open to objection on the ground that merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether consequential relief is or could be claimed or not*" (Our Order 27 r.5)

The majority (Pickford and Bankes L.JJ., Buckley LJ dissenting,) held that the court has power to make a declaration at the instance of a plaintiff though he has no cause of action against the defendant; and that the rule so construed is merely an extension of the practice and procedure of the court, and is not ultra vires. This has been followed and applied in a number of decisions, since and I intend to follow it.

Lord Justice Pickford, having described counter arguments in previous cases on point, said at 561

"But Order XXV., r.5, is intended to deal with the very case-that is, one in which no relief can be claimed either by way of damages for the past or an injunction for the future and in fact, in several cases declarations have been made under this Order where there was no cause of action in the proper sense." By "proper sense," the learned judge no doubt means apart from the provisions of the rule, and he refers to Jenkins v. Price *before Swinfen Eady J., where a declaration was made in a case in which it was admitted there was no cause of action."*

And later, at 562;
"I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration. It does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions. " (The Lord Justice went on to discuss an argument about *vires* in particular circumstances which does not concern me here)

I am satisfied there is power under the rule to entertain the claim for the parties are certainly interested in the subject matter which is the disposal of moneys made available by the Government for its purposes. But whether I exercise my discretion depends on those factors of this particular case.

The principle purpose of the Townsville meeting and Agreement was to stop the fighting in country. I believe payments by the Executive were predicated by this principle, guided by the terms of the TPA but the discretion whether to pay lies with the Executive, not this court. It is not available to these claimants to suggest that the Government has somehow breached an obligation owed the donor community as affording them the right to such declarations for if such an obligation arises, its benefit belongs to the donor community, not these claimants. To criticize the MNR&P committee ignores the fact that it was acting under the auspices and direction of the Executive and in the absence of domestic legislation and guidelines shaping its powers, obligations, procedures and methods, no right to complain can arise from the form adopted by the committee when it is but a conduit of the Executive.

It must also be said to be a recognition of realities for that by purporting to pressure the Executive to further payments, were this court to accede to the request and exercise a discretion, the court would be in fact, presuming on the express discretion of the Executive to give or withhold giving, concomitant with the need to actually have moneys available, and I venture to suggest, the largess of aid donors again, when those moneys already disbursed have been principally sourced in aid funds which may have been directed to nation-building. This court cannot so presume, and it can thus be seen to be futile to entertain a discretion which has such a hollow heart.

Clearly the Executive has had difficulties balancing its ambitions to "compensate" everybody, individually according to their wants, with the possible. The acknowledgement in the TPA in the SIG relates to the intention to seek assistance from outsiders. I must again remember these claimants do not seek restitution from the wrongdoers and in fact, outside intervention has further reduced the opportunity for further brigandage. The SIG has then, afforded the opportunity to recover.

In these cases where the applicants are reduced to recourse under O 27., r.5,(for that they lack the indicia of a regular common law claim), it follows that the Attorney-General cannot set up a defense in the normal way. The State however is just as interested in the subject matter of the proceedings for if the court recognizes such claims as of right, in these circumstances, the State will face extraordinary drain on its Treasury and recognition may legitimize all earlier "claims" *simpliciter*. The practical effect must have a place, when I consider my discretion.

It is proper then to characterize the nature of payments already made by the Executive.

New South Wales was slow to adopt changes made in England to the rules in the 1880s. In New South Wales the new rule analogous to our O. 27., r. 5 came up for consideration in *Ku-ring-gai M.C. v- Suburban Centres* (1971) 2 NSWLR 335 where Else-Mitchell J said at 340.

Prior to the Law Reform (Miscellaneous Provisions) Act 1965 there was no court in New South Wales which had general jurisdiction to make declaratory orders except in relation to matters falling within the inherent jurisdiction of the Courts of Chancery and one object of s. 15 the Act was to confer such a jurisdiction. The Provisions of PT.V of that Act were enacted on the recommendation of a report of a sub-committee adopted by the Attorney-General's Law Reform Committee which stated that etc. and later

The legislative amendment conferring necessarily the powers on the equity court and the court generally in commercial courses were designed so as not to impinge on the requirement for jury trial of action of law. (Jury Act 1912 s.9) and in their terms are wider than the powers conferred on courts of comparable jurisdiction in England and other States by provisions such as O. XXV., r.4 of the rules of the High Court of Justice in England. In particular the New South Wales amendment extends expressly to the making of declarations as to the "interests powers rights and liabilities or duties of any persons arising under" a variety of legal relationships including the memorandum or articles of association or other constitution of a corporation etc..., having effect under any Act."

Else-Mitchell J goes on to say;
"These categories are wide indeed and the inclusion of "powers" suggests at once that a declaration can be made about a subject which may not involve a dispute or issue with another person, for example; as to the power of a company or its directors."

So accepting as I do a power in this court to make declaratory orders in wide ranging circumstances, it will be a corollary that in considering the ambit of Executive prerogative in this case, it will be necessary to categorize the nature of the payments made by the Executive. For only then can I clearly see whether there is, implicit in the money claim, an impervious right in these applicants, or not. (I do not see however, the position of any of the applicants as the reciprocal of the State in this case, for contractual issues do not arise).

I therefore propose to list matters which I consider appropriate in deciding the nature of these earlier payments.

The cases cited to me really do not help in the circumstances. This was a State verging on civil war. A reading of the White Book dealing with O.XXV., r. 5 shows a discretionary nature residing in the court hedged about with negatives. The White Book quotes extensively from cases illustrating when the court's discretion has not been exercised. It quotes *Hannay's* case; Banks LJ at 572.
"There is however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction."

The other cases touched on in the White Book where declarations have been made bear little relationship to the extraordinary circumstances before me. They do not reflect past events in this country.
In my view matters relevant for this court's consideration on the question of the nature of payments, in no particular order are; –
no guide lines or particular criteria by Cabinet or the MNURP Committee dealing with payments;– a realization that donor or Treasury moneys cannot be limitless; – the practical effect of a declaration giving rise to fresh expectations of unknown claimants; – the possible effect of legitimizing by such declarations, the actions of persons presumed to have acted illegally in obtaining payments previously; – the absence of statutory or regulatory guidelines for the dissemination of grant moneys; – the clear terms of the TPA recognizing the lawful authority of the Solomon Islands Government as the agency entitled to receive grant moneys from Donor agencies; – the purposes of the TPA in seeking cessation of hostility

Having regard to all these various matters I am of the view that money paid out by, or under the authority of Cabinet and the Committee is consequently in the nature of a gratuity, fixed in amount by the giver and hence, payment by the Committee or at Cabinet's direction must be seen to be individual acts of the Executive unfettered by guidelines, conditions, conventions or having any apparent regard to justiciable claims. As such the government is answerable to the people through the electoral process for its acts; but it cannot be brought to account in these civil proceedings. Such earlier payments made were made exigent in time of civil unrest. With these matters in mind, having regard to the principles enunciated by Banks LJ in Hannay's case above at 572, these additional matters should also bear on the question of discretion since the claims would appear to be unconstitutional for these reasons;

1. The political imperative which guided Cabinet in each matter of payment cannot be the subject of judicial enquiry, but that is not to say persons who received payment cannot be brought to account where amounts claimed were overstated or fallacious.
2. payments are by their natured gratuitous and entirely in the grant of the giver, the government
3. This Court should not interfere in acts of the Executive in absence of any legislative or regulatory framework.
   Where Treasury or donor agency moneys are the source of such payments it is unreasonable to expect no financial control or limit to the extent or benefit.

4. The power to grant or not in the circumstances remains with the Executive.

5. The government is consequently answerable for the manner and the extent of such grant of gratuities to Parliament.

6. The exclusive nature of the power in the Executive in these cases does not admit any right in these claimants to any such payment beyond consideration afforded them in the absolute discretion of the Executive.

I am not prepared to exercise my discretion to make orders and consequently all these proceedings must fail. The Attorney is entitled to orders dismissing these various proceedings as disclosing no reasonable cause of action sufficient to warrant exercising my discretion.

It would be appropriate to call up those various other claims instituted in this court dependant on the same cause to have them dismissed.

Orders: I also order the various plaintiffs pay the defendant costs