IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case Number 258 of 2011

BETWEEN:	**SMM SOLOMON LIMITED**	-	First Claimant
AND:	**ALFRED JOLO** (Representing the trustees and members Of the Anika Thai clan)	-	Second Claimant
AND:	**WILLIE DENIMANA AND HUGO BUGHORO** (Representing the trustees and members of the Thavia clan)	-	Third Claimant
AND:	**HENRY VASULA RAOGA** (Representing the trustees and members of the Vihuvunagi Tribe)	-	Fourth Claimant
AND:	**BEN SALUSU** (Representing the trustees and members of the Vihuvunagi tribe in respect of the Chogea and Beajong land areas within Takata)	-	Fifth Claimant
AND:	**MAFA PAGU**	-	Sixth

(Representing the trustees and members of the Thogokama clan) - Claimant

AND: **PAUL FOTAMANA** (Representing the trustees and members of the Veronica Lona clan) - Seventh Claimant

AND: **THE ATTORNEY-GENERAL** (Representing the Minerals Board) - First Defendant

AND: **THE ATTORNEY-GENERAL** (Representing the Minister for Mines, Energy and Rural Electrification) - Second Defendant

AND: **THE COMMISSIONER OF LANDS** - Third Defendant

AND: **THE REGISTRAR OF TITLES** - Fourth Defendant

AND: **PACIFIC INVESTMENT AND DEVELOPMENT LIMITED** - Fifth Defendant

AND: **AXIOM KB LIMITED** - Sixth Defendant

AND:	ROBERT MALO, FRANCIS SELO, LEONARD BAVA, REV. WISON MAPURU AND ELLIOT CORTEZ	-	Seventh Defendant
AND:	THE ATTORNEY-GENERAL	-	Eight Defendant
AND:	KOLOSORI HOLDINGS COMMUNITY COMPANY LIMITED	-	Ninth Defendant

AND BY WAY OF FURTHER AMENDED CROSS CLAIM

BETWEEN:	BUGOTU MINERALS LIMITED	-	Cross Claimant
AND:	THE ATTORNEY-GENERAL (Representing the Director of Mines)	-	First Cross Defendant
AND:	THE ATTORNEY-GENERAL (Representing the Minerals Board)	-	Second Cross Defendant
AND:	THE ATTORNEY-GENERAL	-	Third Cross Defendant

AND: **SMM SOLOMON LIMITED** - Fourth Cross Defendant

AND: **ALFRED JOLO** - Fifth Cross Defendant
(Representing the trustees and members of the Anika Thai clan)

AND: **WILLIE DENIMANA AND HUGO** - Sixth Cross Defendant
(representing the trustees and members of the Thavia clan)

AND: **HENRY VASULA RAOGA** - Seventh Cross Defendant
(Representing the trustees and members of the Vihuvunagi Tribe)

AND: **BEN SALUSU** - Eight Cross Defendant
(Representing the trustees and members of the Vihuvunagi tribe in respect of the Chogea and Beajong land areas within Takata)

AND: **MAFA PAGU** - Ninth Cross Defendant
(Representing the trustees and members of the Thogokama clan)

AND: **PAUL FOTAMANA** - Tenth Cross

(Representing the trustees and members of the Veronica Lona clan) - Defendant

AND: **THE ATTORNEY-GENERAL** (Representing the Minerals Board) - Eleventh Cross Defendant

AND: **THE ATTORNEY-GENERAL** (Representing the Minister for Mines, Energy and Rural Electrification) - Twelfth Cross Defendant

AND: **THE COMMISSIONER OF LANDS** - Thirteenth Cross Defendant

AND: **THE REGISTRAR OF TITLES** - Fourteenth Cross Defendant

AND: **PACIFIC INVESTMENT AND DEVELOPMENT LIMITED** - Fifteenth Cross Defendant

AND: **AXIOM KB LIMITED** - Sixteenth Cross Defendant

AND: **ROBERT MALO, FRANCIS SELO, LEONARD BAVA, REV. WISON MAPURU AND ELLIOT CORTEZ** - Seventeenth Cross Defendant

Date of Hearing: 14 October 2013-1 July 2014.

Date of Judgment: 24 September 2014

1st – 7th Claimant	-	Mr J Sullivan QC
		Mr. N. Moshinski QC [sometimes]
	-	Mr R Kingmele
1st - 4th & 8th Defendant	-	Mr S Banuve – (The Solicitor General)
5th Defendant	-	No appearance
6th Defendant	-	Mr R Lilley QC
	-	Mr J Carter
	-	Mr D Keane
	-	Mr M Pitakaka
7th Defendant	-	Mr F Waleilia [sometimes]
	-	Mr D Nimepo

For the Cross Claimants, Bugotu Minerals Ltd – Mr T Mathews QC [sometimes] & Mr W Togamae

Rulings on Claims for Judicial Review.

Brown J sitting as Commissioner.

Synopsis.

These proceedings have been instituted by Sumitomo Metal Mining Solomons Ltd [SMMS] and others claiming the courts assistance to set aside various decisions of the Minister of Mines, the Minerals Board, the Commissioner and Registrar of Lands and to declare that SMMS has a valid prospecting licence over Kolosori land on Santa Isabel Island. As well these other claimants seek orders correcting what they say are mistakes leading to their land at Kolosori becoming land registered in the names of those described as the 7th defendants, for these other claimants are, they say, the customary owners of the land and registration was wrong.

If what these claimants say is correct, the land will be seen as always having been customary land [or on rectification of title, will again become customary land] so that the prospecting licence to Axiom KB [Axiom] affecting their customary land will be seen to have been awarded without proper authority and will be void and of no effect.

This case is about the wish to mine for nickel on Santa Isabel. It had its genesis in 1992 when the Commissioner for Lands, Mr. Riogano appointed Mr.Penrose Palmer, acquisition officer with a view to having Kolosori land acquired, in accordance with the Land and Titles Act, to enable a company, Bughotu Nickel to mine principally nickel.

Mr. Palmer [Palmer] went to Santa Isabel and conducted his meetings, met with landowners and took away an agreement with the landowner representatives in the form of a lease of the land to the Commissioner so that, in terms of the Act, the land may become registered land. A subsequent lease to that mining company then interested would, it was envisaged, enable the mining venture to proceed.

But for various reasons the acquisition proceedings stalled and the mining did not eventuate. Sumitomo Metal Mining [Solomons] [SMMS] and others claiming as landowners supporting that company, say the acquisition proceedings had lapsed or been abandoned because of the passage of time and the lack of action.

But there were arguments about those appointed by the acquisition officer in 1992 to represent, arguments not finally resolved until a decision of the High Court in 2000. In all that time, there was no progress on the mining side for the land issues needed to be settled. The Land Act allowed for any persons aggrieved by the Acquisition Officers determinations to appeal. During this period the original mining company seemed to have faded away. Then of course, the country was embroiled in civil disturbance.

In about 2004, Mr. Riogano with the support of others, [for he had retired as the Commissioner] formed the Bughotu Land Owners Association [BLA] with a view to resurrecting the mining venture by seeking agreement for those elected officers of the Association to represent landowners about Kolosori, San Jorge and Jejevo for that purpose. The BLA took steps along those lines. In April 2008 a group broke away from the BLA and formed their association, the Kolosori group, intending to progress the mining venture in relation to that particular Kolosori land. Mr. Francis Selo seems to have been the principal actor since he was the Secretary of the association although I shall call it the Cortez group for Mr. Elliott Cortez subsequently often named when the group became active in seeking registration of the Kolosori land. The group formed a business arm, the Kolosori Holdings Ltd which subsequently became an association for particular purposes.

Before that time in 2008, SMMS had been seeking a prospecting licence for that area but had failed in court proceedings to oblige the Mines Minister to extend the period of a letter of intent to grant a prospecting licence over Kolosori land. The landowners had objected to the extension.

The Kolosori group, following the failure of SMMS to obtain a prospecting licence over Kolosori land [for the support of the landowners was then absent] at a meeting attended and supported by many, at the Iron Bottom Sound Hotel in April 2008, [the IBS meeting] determined to

stand in place of those found by the Acquisition Officer [AO] as "owners" of Kolosori land for the purposes of the acquisition and to seek foreign assistance for an introduction to a mining company willing to treat with the group in consideration of a share of mining profits. For the original agreement in 1992 with the interested miner envisaged a sharing of profits.

In the lead-up to the International Tender process affecting this land, the Government conducted awareness meetings at Santa Isabel early in 2010 when the various landowner groups were identified with their representatives, or spokesmen. They corresponded with those persons named at the IBS meeting to stand in place of the "owners" [so named by the acquisition officer in 1992] persons who subsequently became the registered proprietors of the perpetual estate in Kolosori land and, on the institution of these proceedings in 2011, were named as the 7th defendants.

The claimants in these proceedings say the 7th defendants could never have become the proprietors since they did not represent the wishes of the customary landowners in that regard and in any event there were many mistakes by the Lands Commissioner and the Registrar of Titles in carrying out the vesting process leading to registration of the land in contravention of the terms of the Land and Titles Act.

The 7th defendants say they have in accordance with adopted law, by assignment and ratification by the original "lessors and owners" so named in the lease agreement in 1992 and in full knowledge since 2008 and consent of the relevant landowners, become the registered owners of the perpetual estate in Kolosori land.

As a consequence of the indefeasibility principle underlying the LT Act as it affects registered owners, they had every right as the proprietors of the registered land, to deal with the land by way of lease and did so when granting a lease for mining purposes to Axiom KB. The "rent" under the lease, if you like, is to be paid to a community association, KHL created for this purpose. As "statutory representatives" the 7th

defendants had acknowledged the underlying trust obligations to the landowning groups found by the AO.

Before registration of the land in February 2011, during the early part of 2010, the Government had accepted a proposal to put the Kolosori land to International Tender in an endeavour to progress the original intention to mine. The BLA had, following the failure of Sumitomo to progress its own application as a consequence of the court's refusal, sought on a number of occasions to apply for a prospecting licence but had been refused by the Director. That refusal has become part of the argument in this case. The Tender was promulgated and a number of companies accepted the invitation, including the mining arm of the BLA and Sumitomo. The Board recommended to the Minister [following the Board's finding that Sumitomo was the successful tenderer], the grant of a letter of intent [to issue a prospecting licence] on terms including the need to obtain surface access agreements from the landowners. Although the recommendation was made to the Minister at the end of September, for various reasons, the Ministers communication of the award and letter of intent was not made until the 4 December 2010. Sumitomo commenced, with the assistance of the Department of Mines, to seek to obtain landowners consent to its access to their land to prospect.

In October 2010, the Cortez group reached agreement with a foreign company, Axiom Mining for Axiom to form a local company as a joint venture vehicle to proceed to seek a prospecting licence.

After the Cortez group had become registered as owners of the land and had given a lease to Axiom KB to mine the land, Axiom KB [Axiom] the joint venture company sought and obtained a prospecting licence from the Minister on the 15 April 2011.

On the 17 January 2011, the Minister for Mines, the Hon. Mark Kemakeza had cancelled the Award earlier given SMMS and his letter of intent, in reliance on a Cabinet decision. Sumitomo pleaded it was unaware of the cancellation for some time after this date and had by virtue of its various surface access agreements, obtained a prospecting licence from the Acting Minister, the Hon. Bradley Tovosia. It would seem the Acting Minister, when granting the prospecting licence, was aware of the Cabinet decision cancelling Sumitomo's Award and the earlier Minister's letter of cancellation.

The Acting Minister had been approached by Mr. Yorishito Ochi [Ochi] who was the Managing Director of SMMS, the local company formed to carry on prospecting and possibly mining for the Sumitomo group. Ochi was aware of the cancellation and I am asked to infer he brought pressure to bear on the acting Minister to issue the PL, notwithstanding the knowledge in both of the cancellation. I also am asked to infer the approach by Ochi stemmed from his subjective view about the unlawfulness of the former Ministers actions in purporting to cancel the LOI.

Axiom KB commenced to move equipment to a site at Kolosori to prospect for Axiom sought to proceed to prospect in accordance with its prospecting licence. Those acts obviously conflicted with SMMS's prospecting licence given by the Acting Minister, Tovosia.

Sumitomo, with the support of these other claimants, commenced these proceedings seeking orders to set aside the Ministers cancellation of the Award. Sumitomo also seeks to support the other claimants with their claim to have the vesting order by the Commissioner of Lands by which the 7th defendants had become registered proprietors set aside, for that order they say was without basis in fact or law. A consequential order would remove the fact of registration from the Register of Landowners while the lease to Axiom would also fail and be removed from the Lease Register. In other words, the land would revert to customary land [or be

recognised as such, unaffected by the acts of the 7th defendants] and Sumitomo would be able to proceed in accordance with its prospecting licence once the court directed the cancellation of that licence given Axiom KB.

The 7th defendants and Axiom are defending these claims, alleging SMMS has been dishonest in its dealings with the people and the Government. SMMS, coming to the court seeking justice, must do justice. They say SMMS should be denied its claims for it has done things which the court would find debars it from the various discretionary remedies which it seeks. It does not have "clean hands". They say Sumitomo has failed to show it is entitled to the benefit of the Tender Award. The company was not entitled to the Award for a number of reasons. They say the Award and letter of intent of the Minister do not give the company any recourse to the court for no agreement had been reached through the failure of Sumitomo to follow the process of the Tender. In any event it had elected not to terminate any agreement with the SIG for breach of contract. In fact, on the evidence, they say there was no contract reached with the Government. Consequently the company, SMMS's prospecting licence was void and the Ministers letter of cancellation effective in any event.

They say those other claimants have no standing to come to court for they have failed to show sufficient proof of their right to represent landowners. Their claim to representation was brought about by the interference of SMMS and any such change to representation was consequently not in accordance with custom for until the intervention of SMMS the named 7th defendants had been recognised as the trustees and spokespersons for the various parcels making up Kolosori land.

They also say the process envisaged and initiated by Mr. Riogano when he was the Commissioner in 1992 [and followed by Mr. Palmer] has been completed by the registration of the two parties, the 7th defendants and Axiom KB. Because their titles are indefeasible and no mistake or

fraud has been shown, the claim by Sumitomo for rectification of the Land and Lease Registers should be dismissed. These two defendants also seek a permanent injunction against SMMS for they say there is a real risk that SMMS will interfere with their right to prospect.

The claimant's proceedings were commenced by a statement of case in their claim filed on the 18 July 2011. The case came before the court for trial in September 2013. There have been some 95 sitting days. There have been various pleading amendments and defence counsel has been at pains to argue that the claimant's changes reflect on the strength of the case. The fact of amendment is countenanced by the Rules while the purpose or reason has fallen into that realm where debate calls for adjudication.

There have been a number of interlocutory applications. Again the effect of the orders, including injunction and undertakings in those earlier proceedings in this case gave rise to argument and must be dealt with in due course. From the 6th and 7th defendant's perspective, unexpected consequences flowed from Axiom's inability to treat with persons on the Takarta land, the subject of this case or progress prospecting. Those consequences may give rise to a claim for damages.

The claim seeks relief in a number of ways, principally by way of judicial review seeking discretionary orders directed to those various Government officers and instrumentalities to recognise the right in SMMS to prospect accorded by its prospecting licence following its successful tender while the other claimants also seek discretionary orders to effect the correction of the Land Registers and expunge the registrations of the 7th defendants as proprietors of the perpetual estate and Axiom as a lessee so named in the Lease Register.

Consequential upon such orders the claimant's say the lease given Axiom is void and of no effect. There are various other arguments and

the cross-claim by the BLA for priority to prospect, if the Sumitomo claims fail.

HISTORY

I will give a brief history of the happenings which led to this case, happenings starting to all intents and purposes in 1992 when the Commissioner of Lands, by request, commenced action in terms of the Land and Titles Act Chap 133 [the LT Act] for customary land acquisition for mining purposes.

Mr.Josiah Riogano [Riogano] was then the Commissioner of Lands. He appointed Mr. Laury Penrose Palmer [Palmer] then a Regional Lands officer in the Department, Acquisition Officer [AO] in terms of s. 61[1] of the LT Act, for the purpose of acquiring land in the Isabel Province for mining. Mr. Palmer carried out his duties diligently and prepared two reports [Part 1 & 2; Exhibits 9A, B] recording the facts of his meetings with interested persons at Vulavu and later at Huali. Palmer in his first report named the areas of land corresponding with group interest; identified them by number, G1, G2 etc to G6; listed the names of each group who claimed the land areas; and naming the tribes and that of the group representatives who were put forward by such landowning groups.

Palmer had called upon the groups to appoint one representative for each of the six groups who identified with the land areas and to give the names to him. He then called upon the representatives to tell him how the groups claimed to own the particular land. As a consequence he was satisfied and named particular persons put forward as able and acceptable to represent the groups. He was constrained by the LT Act to name only 5 persons as trustees and "joint owners" to execute the agreement for lease. At the first meeting, there was no agreement although the trustees had signed the document, after the second meeting where the fact of the acquisition officers' intention to complete the lease was further debated and rulings made, the officer subsequently signed the lease for the Commissioner.

For at Vulavu, Palmer had a written agreement as the agent of the Commissioner for the lease of the land required for mining. He marked on a map the area of land called Kolosori, intended to be the subject of the lease. He carried into effect the directives in s. 62 of the LT Act.

The agreement consequently named Joel Malo [describing the land parcel as G1 as having named two representatives, Echel Kopemana of the Posomogho and the said Joel Malo of the Vihuvunaghi tribes with Joel Malo by concession to represent both tribes]; Hugho Bugoro [on behalf of Vihuvunaghi and Posamogho] and Martin Tango [on behalf of Thogokama] to sign for G2 land [Martin Tango declined to sign]; G3 land representative Levi Likoho [of the Vihuvunaghi]; no representatives present for G 4 & 5 land parcels; and Joseph Bengere for G6 [of the Vivhuvunaghi]

On the 4 October 1992, the AO had the Agreement for Lease of Kolosori land [Exhibit 10] with those named persons whom he had initially determined represented the customary landowners of that land signed and in accordance with s. 64 of the LT Act, had public notices put about stating that an agreement had been signed with these particular persons and that there would be a further public hearing concerning Kolosori land on the 30 October at Huali Village when interested persons could be heard or object to his earlier determinations .

The agreement was expressed to be for 35 years commencing 1 March 1993; named Bughotu Nickel Limited as *transferee from the Commissioner*; stated the purpose to be mining and provided for *" 30% of share or dividend be given to landowners in substitution for rent"* . The subject Kolosori land was marked on a plan by a boundary line which wholly enclosed an area. The various land parcels were described and sketched. There were no survey plans of either the Kolosori land or the groups land claimed within Kolosori.

Following enquiry on the 30 October 1992 the Acquisition Officer [Part 2] after hearing other persons and Martin Tango again, determined those previously named persons to be trustees of Kolosori land, together with Lonsdale Manase [although disputing the boundary with G 3, the AO found Lonsdale Manase to be the representative for G 4] and those entitled to grant a lease to the Commissioner and he executed the agreement on the 12 November 1992. [Exhibit 11 A]

Mr. Palmer sent his Reports to the Commissioner with the agreement. There was argument about whether a declaration required in terms of the Act was completed or sent although the AO dealt with the fact of it in his report.

Then a number of objections to the determination and findings were made so that in effect, nothing transpired in so far as the acquisition was concerned for very many years until the 7th defendants, relying on these acquisition proceedings, sought and obtained registration of Kolosori land in February 2011.

The named representatives so found by Mr. Palmer [those persons parties to the agreement] were not those registered on the land register although why will be examined in detail later. That is an issue in dispute.

In the meantime, as was said in the hearing before me, Bughotu Nickel Ltd faded away.

The AO heard objections and argument in support of the basis for the trustees' right to represent at both the 1st and 2nd hearings. He made determinations. As a consequence of the final determinations, there were appeals as provided for under the Act against the AO's acts in making particular findings.

The claim by Martin Tango to the whole of G3 went eventually to the High Court for Hugo Bugoro and Willi Denimana denied the basis of Martin Tango's claim that the land was bought by Silas Tango, his father in his own right and consequently Martin, as the son, was entitled to the whole on his father's passing. There was much evidence led in the acquisition proceedings; the Magistrate reviewed the A O's findings and His Lordship Justice Palmer after argument on hearing, dealt in detail with the appeals from the Land Appeals Court [the Magistrate] and delivered judgment.

His Lordship upheld the Magistrates findings by decision dated 10 January 1997, with particular variations. He accepted Hugho Bugoro's claim that the ownership of the Piegha-Kolosori land was vested in the clans of Silas Tango, Denniss Hatatano and Paul Fota yet confirmed the appointment of Martin Tango to sign on their behalf. The effect of the variation was that the claim by the families of the two brothers, Hatatano and Fota to joint ownership with that of the third brother, the late Silas Tango was accepted rather than the pleaded assertion by Martin Tango that his father bought the land for himself and thus the other two brothers claim to a share should fail.

The Magistrates finding [supporting the AO] that the land belonged to the tribe of the three brothers [through matrilineal descent] was overturned. [Exhibit 12] Justice Palmer [as he then was] had no criticism of the AO's reports or procedure; preferring to vary the earlier decision on the basis of a factual misapprehension about the effect of a purchase in the circumstances.

Even later an appeal from an order of the Local Land Court, constituted by His Worship Mr. Eddie Muna to the High Court was dismissed for want of prosecution [Exhibit 14] and leave was refused by that court on the 7 November 2002 [Exhibit 15] to hear an application by Mr. Likoho to seek to have the earlier dismissal order refusing his claim to represent,

set aside and to be allowed to proceed to argue that Lonsdale Manase was not a proper representative named by the AO.

The land area in dispute was to the east of the Beahutu River within Kolosori land. The Magistrate ruled that the AO was in error in naming Levi Likoho as one of the trustees of that particular parcel of land to the east of the Beahutu River. Lonsdale Manase had claim of right to speak for that parcel.

Levi Likoho's appeals to the High Court came to nought. [Above]

I find that the apparent effect of the Magistrates order was that Levi Likoho remained trustee representative for the remaining land described by the AO at G3, while Lonsdale Manase was representative of G4 which then included the parcel determined by the Magistrate to be also part of Lonsdale Manase's tribal land. While this Magistrates order may well have been the subject of futile appeals to the High Court [Likoho had his application for leave to prosecute his appeal refused in 2000], both Manase and Likoho acted in concert subsequently as evidenced by the IBS meeting. By acting in concert, it may be presumed that their earlier disagreement had been resolved.

Part V of the Land and Titles Act Chap 133 [the LT Act] deals with Purchase or Lease of Customary Land by Private Treaty and Compulsory Acquisition of Land. I should say here that the Claimants argue for the proposition that Part V be treated as a Code since to treat it otherwise would not sit easily with the fact that the later part had been accepted as a Code. [Williams JA, Acting President, Sir Gordon Ward JA, and Sir John Hansen JA at 44:- *Lever Solomon Ltd v Attorney-General* SIOCA CAC 24 of 2013 dated 8 November 2013, when dealing with Part V11 of the LT Act].

He says there is then no change to the status of the subject land as customary land with the concomitant obligation on the trustees in custom to their tribes or groups. That obligation in custom he says has not been followed. The acts of the 7th defendants are contrary to custom and

contrary to the provisions of that Part of the Act. The land was always customary land.

The underlying premise in Sullivan QC's argument is that the acquisition proceedings had lapsed and consequently been abandoned and notwithstanding the reliance by those registered, on the indefeasability protections of the LT Act the facts leading to registration preclude them from its protection. As a result, no registrations could take place in terms of Part V.

By s. 66 of the LT Act, persons aggrieved by any act or determination of the AO may within three months from the date of the record or determination, appeal as provided. Those persons sufficiently aggrieved did appeal and the process was not complete until the last decision of the High Court on 7 November 2002.

Since 1992 there had been a civil war euphemistically called "troubles" in the late 1990's and early 2000's until the Townsville Agreement brought a semblance of peace to the capital. This period may well have been cause enough to delay the acquisition; by nature people are reluctant to take risks when "troubles" abound.

By the LT Act s. 67 "*the Commissioner may, when the time limited for appeal under s. 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.*"

There is no explicit section, beyond s. 67, dealing with time limitations as they may affect the agreement. There is nothing said in the agreement or the Act about intervening events before registration, such as the event of death, insanity or other act which may affect the parties to the agreement. Is it unusual, to envisage such a delay to registration of some 19 years? For that time passed before the 7th defendants became registered proprietors of the perpetual estate. Mr. Bengere had died in 2003. Of course delay is not the only issue in dispute.

There is the issue about the fact of the vesting order made by the Commissioner in February 2011 naming persons other than those found by the AO to represent the tribes and clans and who were parties to the lease agreement.

The expressed purpose for the acquisition was mining. There is no record by the AO of persons seeking to oppose the purpose. There is recorded dispute involving inter tribal boundaries shown on sketch plans displayed at the acquisition hearings and named by the AO. The AO appears to have sought to mediate to an extent by suggesting subsequent demarcation before registration as a means to avoid delay and thus gain representative support to proceed. The plans to which the AO referred were his sketch plans drawn on a map of the region. It could not be seen to be a proper delineation of boundaries and the AO clearly expected proper delineation before registration on a reading of his reports.

The LT Act deals with survey in the circumstances. Those persons who did appeal his determination in particular aspects going to representative capacity, had their appeals dealt with. Martin Tango's appeal was the only explicit appeal on the grounds of a particular families' ownership. That was dealt with by the finding and order of the High Court.

The Bugotu Landowners Association. [BLA]

After he retired as Commissioner of Lands, Mr. Riogano [Riogano] sought to reinvigorate the mining venture proposed for Kolosori and other areas about Santa Isobel and San Jorge for the areas were presumed to be rich in minerals, especially nickel. He was instrumental in forming the Bugotu Landowners Association [BLA] [under the Charitable Trusts Act Chap 55] registered on the 3 February 2004. The preamble to the memorandum of association or Constitution recited that the BLA consists of 30 tribes *"who are the traditional custodians of the*

Nickel and cobalt deposits at San Jorge and Takata, on Isabel Province". The business arm incorporated was the Bugotu Resources Development Ltd [BRDL] which shareholding was held by the BLA Board of Trustees.

Bugotu Minerals Ltd. [BML][The Cross-claimant]

A further company, Bugotu Minerals Ltd [BML] was incorporated on the 8 December 2005. That company, it was envisaged, would hold the prospecting licences and mining leases with respect to the land covered by the Association interests. [Including Kolosori/Takata] As it transpired no licences or leases were obtained by BML although that was not for want of trying. That is an issue which the cross-claimant through Riogano has argued.

Riogano gave evidence before me. He was, I find a most impressive person and reliable witness. I will deal with his evidence where necessary.

But I continue to follow this historical trail for it may help to explain the cross-claimant's place in these proceedings. Accepting his evidence, I find 40,000 BML shares were originally held by the BLA while the remaining 10,000 were held by BRDL. The BLA shareholding was transferred to Silanda [SI] Ltd about 2008 while the remaining shares are with BRDL. For it was Silanda which was expected to facilitate mining on BML's behalf.

BML firstly applied for a prospecting licence on the 17 August 2007 over land on San Jorge and Santa Isabel [Takata] [which has been loosely used to also describe the Kolosori land] but the application was refused by the Director of Mines, Mr. Peter Auga. Again a second attempt was made to lodge the application on the 29 November 2007 but this was

again refused although the application was left in Mr. Auga's office. He relied on the supposed forthcoming tender and moratorium in relation to prospecting applications for his refusals.

Leaving the BLA for the moment, I should say something about the 7th defendant's interest in the Association. Before the Iron Bottom Sound meeting on the 23 April 2008, they were part of the Association but left to pursue their separate interests with respect to Takata land. On that day, at the meeting chaired by Elliott Cortez and attended by some 23 interested persons who signed the minutes, it was resolved to replace the trustees named and signatories to the agreement with the AO as follows; Joel Malo by his son, Robert Malo, Hugo Bugoro by his nephew, Leonard Bava, Levi Likoho by his nephew, Elliott Cortez, Lonsdale Manase by his brother, Francis Selo and the late Joseph Bengere by his cousin brother, Father Wilson Mapuru. Another meeting that day resolved to appoint Cortez chairman of the Takata Landowners and appointed one named Webb to source funds to further their purpose to mine. This purported substitution is denied by the claimants as contrary to custom.

The Tender.

In response to the Government's advertised request for international tenders [closing on the 15 September, 2010] for a licence to prospect about the tender areas including San Jorge, and areas referred to as Jejevo and Takata deposits on Santa Isabel, BML lodged its tender . On the same day, 15 September 2010, BML also lodged three applications with the tender, for prospecting licences covering the tender areas. The land was not particularly delineated in the advertisement but generally described to include the Kolosori lands. It was then customary land for the acquisition proceedings had not been finalised.

There was yet another attempt to obtain a prospecting licence made on the 7 December 2011. Neither the applications nor the tender by BML were successful.

Other Parties had become involved in the wish to mine Kolosori land. Riogano's vision had become a shared vision.

SMM Solomon Ltd [SMMS] had also tendered and in October, 2010 after the Minerals Board had considered the various tender proposals, the company was successful. The Award and the Letter of Intent [to grant a Prospecting Licence] by the Minister for Mines was given the company on the 4 December 2010, quite some time after the Board's decision and recommendation to the Minister.

The 7th defendants.

For their own reasons these members of the BLA left the organisation. In accordance with the wish of the meeting at Iron Bottom Sound Hotel on the 23 April 2008, those persons, the Kolosori Group [now the 7th defendants], were named to replace those representatives originally found by the AO to be proper persons to execute the agreement for lease dated back in 1992. The argument of course is whether the 7th defendants could effectively be substituted in this fashion by this meeting. They did not lodge a tender. They had no support of a miner at that time.

The 1st claimant

Before then however, Sumitomo Metal Mining Co. Ltd [Japan]70% and JOGMEC [a Japanese Government Instrumentality for all intents and purposes]30% through Sumiko Solomon Exploration Co. Ltd [Japan] had a subsidiary incorporated in the Solomon Islands, SMM Solomon Ltd

][SMMS] on the 26 August 2005. SMMS had at the time of the tender in October 2010, 3 existing tenement areas on Santa Isabel known as tenements B, D, and E. Areas D and E are contiguous to the Takata area. Areas H [Takata] and I [on San Jorge Island] were the subject of an earlier court decision refusing SMMS a right to renew Letters of Intent over such areas. Tenement B [PL 59/07-Isabel] was up for renewal with PL 06/05 Choiseul in December 2010. [Ex. 124] The existence of these Prospecting Licences at the time of the Tender process became known as the "3 PL issue" in the course of this hearing.

While the drafted letter of notification of award dated 4 October 2010 by the Minister for Mines in favour of SMMS is in evidence, SMMS says it only received the award and Letter of Intent [LOI] on the 4 December 2010 and it notified the Minister of the company's acceptance on the 6 December. The Minister purported to cancel the Award and the LOI on the 17 January, 2011. The letter of cancellation is in evidence. There is much argument about the circumstances surrounding and the effect, if any of this cancellation. The Minister has not given evidence.

Axiom KB Ltd. [Axiom] [the 6th defendant]

Following negotiations at the King Solomon Hotel, on the 15 October 2010 an Option Deed was executed between Axiom Mining Ltd, Axiom Nickel Pty Ltd, the 7th defendants and Bungusule landowner trustees. There is no need to detail its terms here.

But it was by now plain four groups were concerned with the Kolosori mineral resource.

They were the BLA [for they claim by virtue of their earlier application for a PL and the applications at the time of their tender and afterwards], SMMS [through their existing PLs on Santa Isabel and their participation in the tender], the 7th defendants [who claim as assignees of those

persons who executed the lease agreement with the Commissioner in 1992] and Axiom [as a party to the Option Deed].

On the 17 December 2010, Axiom KB Ltd [the 6th defendant-"Axiom"] was incorporated in the Solomon Islands together with other Axiom entities. The earlier Option Deed by the 7th defendants and Axiom Mining Ltd and others was the subject of argument and the effect if any of the later agreement between different parties executed in February 2011 was also the subject of argument.

A Vesting Order in favour of the company, Kolosori Holdings Ltd, to vest the perpetual estate in the named 7th defendants as owners of Kolosori land for that company, came into existence on the 11 December 2010 but appears to have lapsed through want of attention or was subsumed by the later vesting order.[Ex. 30]given on the 11 February 2011.

<u>The other Claimants. [trustees and representatives of landowners or landholding groups]</u>

As a consequence of the Tender Award [Award] and Letter of Intent[LOI] in favour of SMMS, the company commenced meetings with landowners about Kolosori in conjunction with officers from the Department of Mines and Energy [DME] to arrange, if possible, execution by landowners of the Surface Access Agreements necessary in accordance with the Letter of Intent and Mining Act. [s. 21{8} - a prerequisite before the issue of the PL].

Unbeknown to SMMS [again in issue] the Minister for Mines on the 17 January 2011 by letter to the company cancelled the Award and LOI.

Whilst SMMS continued to canvass support for its SAAs, a further Vesting Order by the Commissioner for Lands vested the perpetual estate in Kolosori land in the names of the 7th defendants on the 11 February 2011 and on the Monday, 15 February the 7th defendants were registered as owners of the land. [Exhibit 35] Some days later, on the 22 February the 7th defendants leased the perpetual estate to Axiom for 50 years for mining purposes and that lease was registered on the 23 February. [Exhibit 40]

On the 11 February 2011 SMMS lodged Takata SAA's with the DME. [Surface Access Agreements signed by the some landowning groups now supporting SMMS] Some representatives of these groups subsequently became the other claimants when these proceedings were commenced. They claim as representatives of the community, tribe, line or group. [Civil Procedure Rules 2007, r. 3.42] The right to represent is in issue and denied by the 7th and 6th defendants.

On the Axiom side, the company lodged an application for a prospecting licence [PL] on the 29 March 2011 and following process, a PL by the Minister for Mines was given the company for Takata [loosely covering that land called Kolosori as well] [Exhibit 47] on the 15 April 2011. Again, that process is an issue.

The Imbroglio.

I propose to deal simply with the imbroglio. Axiom and the 7th defendants claim that SMMS was in breach of the Mines and Minerals Act Chap 42, s. 20[5][c] at the time of the Tender for that it held three or more PLs and had not applied for a mining lease or commenced mining in at least one tenement area. [The fact of the three holdings is not in dispute]. Disputed is the effect of s. 20 of the MM Act in the light of the factual circumstances at the time SMMS's Tender lodged on the 15 September 2010 and the effect of the fact of the Award and issue of the LOI to SMMS.

SMMS claims the Minister's act in purporting to cancel the Tender and LOI was wrong and consequently the company is entitled to its PL over Takata for it has the requisite SAAs. It denies a right of standing claimed by Axiom since Axiom's lease from the 7th defendants had no basis in fact. SMMS says that the 7th defendants did not represent the customary landowners and should never have been accepted as persons entitled to either a vesting order or registration as proprietors of a perpetual estate in land. They could not stand in place of those named by the AO in 1992 or those as varied by the High Court order. In any event, the acquisition process had long since lapsed.

The 7th defendants rely on the fact of registration under the Land Titles Register [the indefeasibility provision] for their status as owners of the perpetual estate in Kolosori [which covers most of the land claimed by SMMS under the Tender as Takata] able to deal with the land.

Axiom claims rights under the lease from the 7th defendants and indefeasible rights as a registered leaseholder for consideration as well as relying on the fact of its existing PL over the land.

Both the Axiom and the 7th defendants deny the rights of representation claimed by the 2nd to 5th claimants. They also deny any right in SMMS to seek a PL on the basis of the SAA's, or that the company had standing to bring this action at all.

The cross-claimant, Bogutu Minerals Ltd says it was first in time and its applications for prospecting licences had priority under the Mines and Minerals Act Chap. 35. In the circumstances, the Director had no good reason to refuse the company's applications.

The Institution of Proceedings.

Following a letter of the 2 June 2011, from the Minerals Board to SMMS confirming the cancellation of the Award and Letter of Intent, the original claim in this court was filed on the 15 July 2011.

This will suffice for the background. The chronology of events and happenings will assist with an understanding as these reasons progress.

SMMS v ATTORNEY GENERAL

HIGH COURT CC 258/2011

CHRONOLOGY

This chronology is the agreed chronology and does not incorporate the later chronology tendered on the last day of the trial by the claimants.

Date	Relevant Event	References
14.08.92	Commissioner appoints Palmer as Acquisition Officer for purpose of acquiring customary land in Isabel for mining purposes.	**Para 10 at p.3 of SS Laury Penrose Palmer (LPP) filed 30.09.13**
04.10.92	Agreement for lease of Takata between Acquisition Officer and Josel Malo, Hugo Bugoro, Levi Likoho, Joseph Bengere and Lonsdale Manase	**Exhibit 10**
05.10.92	Acquisition Officer's report to Commissioner – Part 1	**Exhibit 9A**
30.20.92	Acquisition Officer holds public hearing at Huali	**Para 16 at p. 3. Of SS LPP filed 30.09.13**

30.10.92	Acquisition Officer's report to Commissioner – Part 2. Acquisition Officer determines that Joel Malo, Hugo Bugoro, Levi Likoho, Joseph Bengere and Lonsdale Manase are trustees of Kolosori land entitled to grant a lease to the Commissioner	**Exhibit 9B**
31.01.95	Appeal in Magistrates' Court – Manase v Likoho – Likoho removed as trustee entitled to grant lease to Commissioner	**Exhibit 13**
10.01.97	Appeal – Tango v Bugoro – appeal and cross appeal dismissed – High Court determines that ownership of Piregha-Kolosori vested in the family clans of Silas Tango, Denis Hathatano and Paul Fota, with Martin Tango to sign (the lease to the Commissioenr) as trustee on their behalf	**Exhibit 12**
25.02.00	Appeal – Likoho v Manase – appeal dismissed for want of prosecution	**Exhibit 14**
26.08.05	SMMS incorporated	**Exhibit 1**
08.12.05	Bugotu Minerals Limited (BML) incorporated	**Exhibit 3** **Para. 3. Of SS Josiah Riagano (JR) 04.10.13**
20.02.07	Bugotu Landowners Association (BLA) 2007 Annual General Meeting held at Tanakoru Village	**Para 11. of WS of GCS at p.32-45 file don 30.08.13** **GCS-2 at pp.32-45, 46-47** **Para 11 of SS of Francis Selo (FS) file don 07.10.13**

		"RRM4" at pp. 35-51
16.05.07	Option Deed – Axion Bugotu Nickel Ltd and Bugotu Landowners Association	**Para 22 at p. of WS of GCS file don 30.08.13**
02.07.07	PL 48/07 (covering part of Isabel) issued to SMMS	**Para. 20. At p5. Of WS of Yoritoshi Ochi (YO) filed on 10.09.13**
17.08.07	BML attempts to lodge applications for prospecting licence over San Jorge and Takata	**Para 9. at p.4 of SS JR filed on 04.10.13** **Exhibit marked "JR-4"**
17.08.07	Director refuses to accept BML application	**Para 7. at p.4 of SS JR filed on 04.10.13**
29.11.07	BML re-lodges its application – Director again refused to accept (BML left copies at Mines)	**Para 8. at p.4 of SS JR filed on 04.10.14**
23.04.08	Meeting at Iron Bottom Sound Hotel – decides to replace Joel Malo, Hugo Bugoro, Levi Likoho, Joseph Bengere and Lonsdale Manase with Robert Malo, Leonard Bava, Elliot Cortez, Wilson Mapuru and Frances Selo (7th defendants) as trustees of Kolosori land	**Exhibit 18 and 19**
20.05.08	Kolosori Holdings Limited incorporated	**Exhibit 7C.**
04.03.10	Selo advises PS (Mines) inter alia that Kolosori group has withdrawn from BLA	**Para 46 at p.9 of SS of FS filed on 07.10.13** **"RRM4" at pp. 91-92**
02.07.10	PL 48/07 renewed	**Para. 20. At p5. Of WS of Yoritoshi Ochi (YO) filed on**

		10.09.13 **YO-3 at p.912**
23.07.10	International Tender for Takata, San Jorge and Jejevo called	**Para 70 at p.11 Document 13 of WS YO filed on 10.09.13**
09.09.10	Newyear commences as PS (Mines)	**Para 3. at p3 of WS Benjamin Newyear (BN) filed on 10.09.13**
15.09.10	SMMS Tender lodged	**Para 91 at p.13 Document 29 of WS YO filed 10.09.13** **YO-3 at 164.**
15.09.10	BML tender lodged together with Form 1 applications (3)	**Para 13. at p.6 of SS JR filed on 04.10.13** **Exhibit marked "JR-11"**
15.09.10	International Tender closes	**Para 70 at p.11 Document 13 of WS of YO filed on 10.09.13** **YO-3 at p 105** **Notice published in Solomon Star on 23.07.110**
04.10.10	Date of letter of Notification of Award from Minister notifying SMMS of award of tender	**Para 118 at p.12 of WS of GCS filed on 30.08.13**

		GCS-2 at pp.383-389.
15.10.10	Option Deed between Axiom Mining Ltd, Axiom Nickel Pty Ltd, 7th defendants and Bungusule landowner trustees.	**Para. 73 at p.13 of WS of GCS filed on 30.08.13** **GCS-2 at pp.390-407.**
16.11.10	Application by Axiom Nickel Pty Ltd for prospecting license (Takata and San Jorge)	**Exhibit 42(a) and 42(b).**
23.11.10	Date of letter of intent to SMMS covering Takata, San Jorge and Jejevo for a 12 month period	**Para. 118 at p.16 document 46 of WS of YO filed on 10.09.13** **YO-3 at p.345.**
02.12.10	Vesting order in favour of 7th Defendants – 'vesting' perpetual estate in Kolosori in Kolosori Holdings Limited (for and on behalf of all the land Holding groups)	**Exhibit 30.**
04.12.10	Date SMMS says it received the notice of the Award and the SMMS letter of intent	**Para. 118 at p.16. of WS of YO filed on 10.09.13**
06.12.10	SMMS notifies Minister of acceptance of the Award	**Para 121 at p.16 document 47 of WS of YO** **Yo-3 at p.347.**
17.12.10	Axiom KB Ltd, Axiom Nickel Pty Ltd (now Axiom Nickel (SI) Ltd and KB Minerals Ltd incorporated	**Exhibit 4.**

17.01.11	Date of letter from Minister advising cancellation of the Award and the SMMS letter of intent	**Exhibit 31.**
17.01.11	Date of letter of intent to Pacific Investment and Development Limited (on behalf of W.Y. International) covering Takata, San Jorge and Jejevo for a 12 month period	**Exhibit 45.**
19.01.11	SMMS re-registered under Companies Act 2009	**Exhibit 1A**
09.02.11	Letter from Cortez (on behalf of 7th Defendants) to Commissioner of Lands clarifying matters in relation to registration of Kolosori land and the vesting of perpetual estate – encloses minutes of 2008 Iron Bottom Sound meeting	**Exhibit 33(b)**
11.02.11	Vesting order in favour of 7th Defendants – 'vesting' perpetual estate in Kolosori in 7th defendants	**Exhibit 34.**
11.02.11	Date SMMS says it lodged a complying Takata SAA	**Paras. 139-141.at p.19 Documents 64, 65, 66, 67 of WS of YO filed on 10.09.13** **YO-3 at pp.560-567**
15.02.11	'Registration' of 7th defendants as owners of the perpetual estate in Kolosori – PN130-004-1	**Exhibit 35.**
17.02.11 or 18.02.11	Probable date of signing by 7th defendants of 'Deed of Agreement' between 7th defendants, Axiom Nickel Pty Ltd and Axiom Mining Ltd	**Para. 75 at p.14. SS FS filed on 7.10.13** **RRM 4 at pp.374-388.**

22.02.11	Axiom Lease – 7th defendants 'lease' Kolosori to Axiom KB for 50 years	**Exhibit 39.**
23.02.11	'Registration' of Axiom Lease	**Exhibit 40.**
14.03.11	Date SMMS says it unofficially received Minister's cancellation letter of 17.01.11 from Director	**Para 187. at p.24 Document 87 of WS of YO filed on 10.09.13** **YO-3 at p. 822.**
28.03.11	Date SMMS says it lodged a complying East San Jorge SAA	**Para 144-147 at p. 19 Documents 69-72 of WS of YO** **YO-3 at pp.660-706.**
29.03.11	Axiom KB lodges application for prospecting licence over part of Takata with similar application for South San Jorge	**Exhibits 42(a) and 42(b)**
12.04.11	Mineral Board meeting purportedly recommends issue of a letter of intent to Axiom KB for Takata and South San Jorge.	**Exhibit 43**
12.04.11	Minister issues 'letter of intent' to Axiom KB covering Takata and South San Jorge for 12 months	**Exhibit 44.**
15.04.11	Axiom KB and 7th defendants sign 'surface access agreement' for Takata/Kolosori	**Exhibit 46**
15.04.11	Minister issues 'prospecting licence' for Takata No. PL74/11 to Axiom KB	**Exhibit 47**
28.04.11	SMMS lodges Jejevo SAA together with a Form 1 application for a prospecting licence	**Para. 148. at p.20. Document 73 of WS of Yoritoshi Ochi (YO) filed on**

		10.09.13 **YO-3 at p.716**
02.06.11	Letter from Minerals Board to SMMS advising that Award and SMMS LOI were cancelled by the Board on 12.04.11	**Exhibit 49**
15.07.11	Claim filed	**Claim filed on 18.07.11**
EVENTS AFTER CLAIM		
16.09.11	Injunction granted	**Exhibit 53.**
08.12.11	BML lodges Form 1 application over Takata and San Jorge	**Para 15. at p.6 of SS of JR filed on 04.10.13** **"JR-13-14"**
15.02.12	Kolosori Holdings Ltd converted to community company and changed its name – Kolosori Holdings Community Company Limited	**Exhibit 7A and 7B**
23.02.12	BML informed by Director that application unsuccessful referring to Board decision of 01.02.12	**Para 16. At p.6 of SS of JR filed on 04.10.13** **"JR-16"**
24.03.12	Appeal against injunction dismissed	**Axiom KB Limited v SMM Solomon Limited [2012] SBCA 22.**
12.07.12	PL 48/07 further renewed	**Para. 239 of p.29 Documents 119 of WS of YO filed on 10.09.13**

		YO-3 at p.924
30.11.12	SMMS lodges application for mining lease over area covered by PL 48/07	**Para. 244 at p.29 Document 122 of WS of YO filed on 10.09.13**
01.07.13	Tango and Ugura given leave to withdraw and Denimana, Bugoro and Raoga joined	**Order 26.07.13**

In due course, since the statement of case [which I intend to call "pleadings" for ease of reference and to differentiate the statement from the Claim] is convoluted I shall indicate findings with respect to the various parts as the reasons unfold.

The Claim and pleadings as well as all other pleadings by way of defences, cross claims, requests for particulars and particulars furnished are in the updated trial book as 01 Court Book Pleadings. A reference, then in the course of this judgment to for instance, the Claim is a reference to the claimant's Claim in the 01 Court Book Pleadings.

The 6th and 7th defendants have been principally concerned with defending this litigation and since the 7th defendants have adopted the arguments of the 6th defendants, where I address those arguments it can be presumed the 7th defendants case follows that of the 6th defendant. I also describe from time to time "these defendants"in the context to mean the 6th and 7th defendants. I have interchanged the named 7th defendants with the Cortez group, the IBS group and later the "Young Turks" as and where I saw it appropriate; describing the Cortez group to time of registration for instance.

I have for convenience, dropped persons proper designations once persons are introduced and I intend no disrespect. I also have followed to some extent, the 6th defendant's [Axiom] approach by addressing the main areas of dispute since they correspond with the Claim.

Axioms Five Main Areas of Dispute.

As Mr. Ochi, the managing director of SMMS said, there was much done by SMMS in the time leading to the tender. As a consequence of those acts Axioms says, this court would exercise its discretion to refuse judicial review to SMMS, not least because it has not come to the court with "*clean hands*". Axiom says quiet simply that this court should question whether it can do what the claimants asked it to do[1] [since the style of pleadings is oppressive and as a matter of practice where the Claim is for judicial review of executive acts, the pleadings in the manner brought should be struck as an abuse of process] and if so whether the Claimants are allowed to ask to do so [for they do not come to court with clean hands].

Axiom says there are five main areas of dispute. They are;

[1] The jurisdiction of this court and the standing of the Claimant;

[2] the claim for judicial review of the cancellation of the award and the SMMS LOI;

[3]: the claim for rectification of the land register as to Axiom KB title;

[4]: the claim for rectification of the land register as to IBS groups title;

[5]: the claim for judicial review of the grant of Axiom KB's mining rights.

I propose to deal with the first of the 5 main areas of dispute.

1. The jurisdiction of this court and the standing of the claimants.

[1] *Mio Art v Macequest* [2013] 95 ACSR 583

Axiom says the claimants have prosecuted their claims by pleading all causes of action against all parties and having failed to themselves logically connect the causes of action that gave rise to the relief sought, leave the parties and the court to conduct a 'treasure hunt' as to what the claimants case is.

While the particular parts of the judgment are illuminative of the convoluted pleadings in that case of *Mio Art*[2], I accept Axiom's argument as reflective of the problems with which we are faced here. That case may be said to be incapsulated in the matrix of the inter-relating companies arrangements. The proceedings were stayed. This case before me has a myriad of factors, matters which while inter-related to various extent really involve statutory and regulatory concerns which have sought to have been separated by pleadings of a fashion, such that the Defendant parties have been obliged to address them.

There is a logical temporal relationship to the pleadings. The problem is the conflation of causes of action, those under Chap.15.3 [judicial review] pleaded in terms of Chap 5 of the Civil Procedure Rules. The statement of case under Chap. 5 may have been struck very early on, it has not, but the convoluted pleadings may be considered on a question of costs.

The Claimants claim for relief starts:

1. "Judicial review pursuant to Rule 15.3 of the *Solomon Islands Courts [Civil Procedure] Rules 2007,* for the following orders in respect of decisions, determinations or actions of the Minerals Board["the Board"],the Minister of Mines Energy and Rural Electrification ["the Minister:],the Third and Fourth Defendants hereinafter referred to."

Then follows, particular quashing orders sought, directed to the various authorities.

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[2] *Mio Art Pty Ltd v Mocequest Pty Ltd* [2013] 95 ACSR 583 at 58, 61-62, 65 per Jackson J

By 2 of the claimant's AFAFA Claim[3] and following the claimant's seek quashing orders against the Minerals Board'decision to cancel the LOI and Award given SMMS and the Minister of Mines decision cancelling by letter the LOI and Award in favour of SMMS.

Declarations sought in 4 and 5, relate to the fact of the SMMS Award, its Surface Access Agreements affecting Kolosori Land [the land of the other claimants] and the entitlement to the prospecting licences as well as in 5A a declaration that the Vesting Order given the Cortez group [the 7th defendants] is void.

By 6, a quashing order is sought against the Commissioner in relation to his Vesting Order.

By 7 and 7A, declarations are sought that the various registrations of the 7th and 6th defendants on the Land Registers are void [and that leaves of the Registers should form no part] or that the registrations are contrary to rights in the Constitution affording persons protection from deprivation of property or compulsory acquisition.

By 8, a quashing order directed to the Registrar of Titles quashing the 1st registration of the 7th defendants and the Axiom lease and a consequential mandatory order, by 8A to the Registrar to remove the leaves from the Register.

By 9, orders for rectification directed to the Registrar of Titles to facilitate the earlier declarations by cancelling the registrations and removing the registered land Parcel 130-004-1 from the Land Register.

By 10, a declaration that the land in Parcel 130-044-1 Kolosori always was customary land.

By 11 mandatory orders directed to the Minister and the Minerals Board reinstating the LOI and PL of SMMS and by 11A an order for specisic performance of an agreement pleaded at 97 A of the claimant's pleadings.

By 12 and 13, prohibiting orders directed to the Board and Minister of Mines prohibiting them from considering other applications over the Tender area.

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[3] 01- Court Book Pleadings

By 14, 15 and 16, permanent injunctions restraining the 5th defendant, Pacific and the 6th and 7th defendants from applying for a PL over the Tender area.

By 17 a penal notice and by 18 and 19 an order for account and an order to pay to the non-SMMS claimants moneys found due under the account.

Then by 20, 21 and 22 a claim for costs on an indemnity basis from the defendants with interest and other orders as the court thinks fit.

The Claimants' statement of case ('pleadings') follow the Claim. As can be seen from the numerous amended claims, the AFAFAClaim has gone through 6 iterations.

On the reasoning of Jackson J in the *Mio Art* case, the court should find the pleadings amount to an abuse of process and should have been struck but that after hearing the court should refuse relief in the face of what they describe as fictitious proceedings amounting to an abuse of process. In any event, the 6th and 7th defendants say SMMS has not come to court with 'clean hands', a necessary incident where it seeks judicial review and the other claimants rights are statutory rights in terms of s. 229 which preclude them from pleading in this fashion for their rights have not been exhausted.

The matter has come for trial as if it were by a claim in terms of a statement of case provided for by Chapter 5 of the Court (Civil Procedure) Rules 2007 although judicial review and consequent orders are sought. The defendants have through circumstances been obliged to plead as though the case were one brought under Chapter Five. The circumstances included the earlier interlocutory proceedings before Chetwynd J when injunctive orders were made, orders which were appealed, findings and orders made on appeal and by various directions hearings before this trial proper.

The claim has been through many iterations and its last iteration on the 15th of May 2014 is the amended further amended, further amended

Claim. Consequential amendments to the various defences cross claims, replies and answers followed. The fact is, the matter has come for trial in the form ordinarily contested by way of pleadings. It has within its statement of case, the conflation complained of by Axiom and the Crown.[4] For the claim is principally for judicial review. The Court of Appeal[5] at paras 13, 14, and 15 said:

> 13:- The statutory basis for the Solomon Islands High Court's exercise of its jurisdiction to grant interim relief in judicial review is, we understand, Rule 15.3.5 of the *Solomon Islands [Civil Procedure} Rules 2005* ["the 2005 Rules"]. That provision is of a piece with Rule 7.38 of English and Welsh *Civil Procedure Rules...,* in providing that the Court may grant an interim injunction in proceedings for judicial review in cases where it is just and convenient having regard to:
>
> [i]the nature and matters for which judicial review is sought;
>
> [ii]the nature of the persons against whom such relief may be granted;and
>
> [iii]all the circumstances of the case."

> As to *locus standi* in judicial review, the adopted law by section 31 of the English and Welsh *Supreme Court Act 1981,* sub-section [3] provided that no application may be made without leave of the High Court, and the leave must not be granted unless the Court "considers that the applicant has a sufficient interest in the matter to which the application relates". "Sufficiency of interest" has not been statutorily defined, but its purpose is clear, namely to eliminate at an early stage hopeless, frivolous or vexatious claims and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration and to ensure representation of relevant

[4] Axiom's Written Submissions para 150.
[5] Axiom KB v SMMS (2012) SBCA 22 - CA-CAC 28 of 2011 (24 of March 2012)

interests at a substantive hearing. In *R v IRC, ex p National Federation of Self–employed & Small Businesses Ltd*[6] the House of Lords, by a majority, introduced a informal and relaxed *locus standi* test for all judicial review claims, so as to include anyone affected by a public decision or action in question. The issue as to standing is to be judged in the legal and factual context of the individual case, not only by directness or indirectness of the effect on the claimant personally of the matter of which complaint is made. Also relevant are matters such as the apparent strength of the claim and whether it raises important issues—all in all, a pretty low and elastic threshold, which also allows for a form of representative standing in the public interest in suitable cases; see e.g.the *Pergau Dam*[7] case.

14. In the Courts view it is plain from the foregoing provisions and jurisprudence in the common law world that an intrest capable of protection in judicial review is not necessarily confined to "legal or equitable rights", but may also apply to other personal interests deserving protection by the courts in their exercise of public law jurisdiction. These may, depending on the circumstances, include statutory rights or legitimate expertations or matters of customary law, especially where, as in the Solomon Islands, they are given constitutional recognition, and, of course, other interests such those of a private injury flowing from a public wrong.

15. In the Court's view, it is at the very least arguable the Sumitomo's claim surmounts that threshold on at least two accounts and possibly a third. First, there is its close involvement and strong commercial interest in seeking to exploit the proprcting licence that the Govterment at one stage went a long way to granting with its letter of intent. Secondly,

[6] (1982) AC 617
[7] (1995) 1 WLR 386.

there is the interest in promoting the integrity of public administration in the Solomon Islands, in particular in the context of dealings in public land, and especially where subject to claimed customy land rights. Thirdly, Sumitomo, having participated and succeeded in securing the award of a major international tender to prospect for minerals and the issue of a letter of intent to grant it a right to prospect for them, is arguably entitled, by way of injunctive and/or other relief to enforce a legitimate expectation of securing the promised grant, pursuant to section 21 of the *Mines and Minerals Act.* In short in such circumstances there is no sensible basis for confining relief in this context to a "legal or equitable interest", as if this was purely private law matter. In the Court's view, there is clearly a serious issue to be tried on the issue of Sumitomo's entitlement to seek injunctive relief case in response to Axiom"s challange that it has no *locus standi* to pursue its claim.

At paras 30 and 31, the Court of Appeal said:

30. In the Court's view, the submissions of Mr Sullivan, which are of a piece with Chetwynd J's reasoning, are to be perfered to Mr. King. There is an overwhelming case for the grant and maintenance of the interim relief granted by the Judge. As indicated in the pleadings, filed evidence and submissions summarised in this judgment, Simitomo's claim clearly raises serious mining and land triable issues. The balance of convenience, regardless of the input from the presence of those issues, is at best neutral to Axiom's case for setting aside the interim relief and at worst against it.

31. Accordingly, the Court dismisses Axiom's appeal. In doing so we deprecate the manner in which the whole issue was put before the Court, with voluminous documentation, prolix and highly repetive submissions, each decending into a maze of legal and factual minutiae more appropriate, if at all to conduct

> of the case at trial. The costs to the parties and the public are a sad reflection on the legal process. If this litigation is to continue, the Court repeats its suggestion made on the oral hearing of the appeal that the parties should attempt to agree a short list of preliminary and determinative issues for consideration and disposal of the matter at trial.

Apart from the criticism of the manner in which the issues were brought before the court, [the Court did comment on the apparent conflation in the statement of case in terms of para 15 above], the court rightly pointed out there is a discretion in the trial judge in these circumstances on the injunctive relief question for relief is discretionary as are orders in the nature of prerogative writs now described differently by the new Rules of court.

The Case is one for judicial review [apart from the claim in 11A] and I must consider the law as it affects claims of that nature. The injunctive interim relief was confirmed by the Court of Appeal since it was satisfied a serious issue to be tried arose on the facts but this claim is couched as one for judicial review.

That conflation may be illustrated by paragraph 11 and 11(A) of the claimant's relief sought. On the one hand, the claimant seeks judicial review, whilst on the other, claims a private law right in terms of a breach of agreement, yet purports to plead the whole claim for judicial review as if it were a claim arising for instance, in common law.

Axiom has, throughout, been critical of the manner by which the claimant has pleaded its case.

The claim does not appear to have had a "sworn statement verifying the facts in which the claim is founded," as required by Chap. 15.3. Nevertheless the trial has been conducted on this hybrid claim. The hearing before Chetwynd J which gave rise to the earlier appeal may in the circumstances be seen to be the "conference" required by the Rules[8] for there does not appear to be any other record of a "conference" as envisaged.

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[8] R15.3.16, 20

Whilst the Court of Appeal upheld the findings of Chetwynd J, opining "an overwhelming" case for the grant and maintenance of the interim relief granted by the judge, it accepted the likelihood of a trial of the issues and they were as the Appeal Court said, at the very commencement of its judgment, issues by nature of judicial review. I must have regard to the directory nature of the *obiter* in paragraph 13 of the reasons for decision of the Court of Appeal and those findings of Chetwynd J, but having exhaustedly heard this matter, I may still make findings on issues which conflict with those earlier findings of Chetwynd J, the judge at first instance, where the evidence before me supports such departure.

Put differently, Lilley QC's [for the 6th and 7th defendants] argument that judicial review should be refused in my discretion is still extant. Sullivan QC (for SMMS) says: "what the Court of Appeal said is conclusive on the law but not on the facts". I accept that proposition. All the facts have been brought before me, they were not before Chetwynd J.

It consequently follows that implicit in the Court of Appeal ruling is acceptance of this Court's right to hear the claim in the light of the Appeal Court's reference to the Supreme Court Act 1981 (UK) s.31(3) where leave for judicial review must not be granted unless the court *"considers that the applicant has a sufficient interest in the matter to which the application relates"*. It was that phrase *"sufficient interest"* which is echoed in the more recent judgment of Faukona J in *Sikua's* case. But the rules of the Supreme Court underwent considerable revision following the Woolf Report.

The parties did not seek to argue the effect, if any of the revised Rules (UK) on that part of [UK] Order 53, rather Lilley QC points to Faukona J's comments as support for his argument in relation to standing. [Order 53, of course, no longer has force in the Solomon Islands on the coming into effect of the Court Rules]. Our R.15.3.18 categorises the matters which go to "sufficient interest" and which need be canvassed if the Court is to be satisfied it may determine the claim.

Axiom argues most strongly in some respects in relation to R.15.3.18, that other remedies are open to the claimants which would resolve the matters. (R.15.3.18(d)).

For instance, in relation to the tender, Axiom says the tender process itself and any arrangements that resulted were regulated by private law considerations. He referred the Court to *In R –v- Lord Chancellor, ex parte Hibbit and Saunders*[9], where the divisional court held, refusing the appeal for judicial review (at page 327 328) there was no creation of a public law element by the fact of the tender by a Government department.[Consequently the aggrieved need rely on any claim in contract]

> "[2] *Decision not amenable to judicial review.* Although the applicants had been treated unfairly, the decision challenged lacked a sufficient public law element and accordingly was not amenable to judicial review. It was not sufficient in in order to creat a public law oblication simply to say that the Lord Chancellor's Department was a governmental body carrying out governmental functions and appointing persons to public office. If a governmental body carrying out its governmental functions enters into a contract with a third party, **the obligation that it owes will be under that contract** unless there also some other element that gives rise in addition to a public law oblication. There was no justification for distinguishing between pre-contractual negotiations and the contracts themselves. A governmental body was free to negotiate contracts, and it would need something additional to the simple fact that the governmental body was negotiating the contract to impose on that authority any public law obligation in addition to any private law obligations or duties there might be."

[9] (1996) 3 All England Report 1 @11

In other words, the arrangements that resulted from the tender process were regulated entirely by the private law of contract[10]. Lilley QC says; "notwithstanding that the call for tenders by the Board may have been pursuant to the power conferred under s20(4)of the MM Act for the circumstance that the power involved the entry into commercial contracts demonstrates that the process lacks the requisite public law element which will in and of itself render the controversy non-justiciable."

The fact of the tender underpins SMMS claim for judicial review, Axiom says the company should rely on its right, if any, under the commercial contract with the SIG flowing from the tender and the remedy would resolve the matter.

Axiom points to the authorities since *Hibbit's case,* to show that the Board's power to contract with the successful "Tenderer" was derived from its status as a legal person having capacity to contract by dint of that status alone. Events happening since the time of the contract do not alter the nature of the relationship between SMMS and the Board so that it remains a contractual relationship absent any public law connotation.[11]

Axiom says the right to revisit falls to be considered with the general law of contract but on this authority, this claim cannot be seen as involving any statutory underpinnings.

In *Derbeshires* case, Woolf LJJ after dealing with the facts (which need not concern me here) addressed authorities dealing with the doctrine of judiciary review, insofar as it relates to the need for "statutory underpinnings" and recorded the judge at first instance reliance on earlier authorities with approval.

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[10] JJ Richards & Sons Pty Ltd –v- Bowen Counsel (2008) 2Qd R342 @ (22 PER KANE and Frazer JJ A and Fryberg J)

[11] R v Derbyshire County Council; Ex p. Noble [1990] ICR 808

> At [11] Lord Woolf says: "The situation is this, that by applying for judicial review you are imposing upon yourself restrictions for making an application which do not apply to ordinary civil proceedings in private *821 law actions. In particular it requires the applicant to seek leave, and Dr. Noble was granted leave. It is not therefore the same situation which was considered by the House of Lords in *O'Reilly v. Mackman*[12]. There what was being complained of was the fact that the applicant was bypassing the procedure of judicial review and the requirement to obtain leave and it was regarded as being inappropriate that he should be able to do so. The procedure of judicial review has built into it safeguards which avoids the procedure being abused.

In the case before this Court, Lord Woolf's *obiter* concerning the approximate divide, having regard to the cases, is good logic. By proceeding in terms of a stated case, the claimants may be seen to be bypassing the procedure for judicial review.

Here I need be satisfied the first claimants, and the others, have shown sufficient connection with a statutory basis, for complaint. Or it must consequently fall to be decided in accordance with private rights under the tender agreement. Lord Woolf acknowledged Lord Diplock's widening of the right to judiciary review[13]. From a reading of Lord Diplock's judgment at 35-36, our R 15.3.18(b) owes its genesis to Lord Diplock's reasoning.

The first Claimant is directly affected by the Minister's act in cancelling the Award and the LOI. On the authorities, this court may expect the 1st claimant to rely on its rights, if any, to seek remedy for breach of contract. I accept that the authorities reflect the law in the Solomon Islands since right to seek judicial review has its historical underpinnings

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[12] (1983)2 AC 237

[13] Counsel of Civil Service Unions –v- Mount; Minister for the Civil Service (1985) ICR 14@35-36)

in the UK law and procedure. "Standing" to seek judicial review in the Solomon Islands has undergone change by reason of R.15.3.18 although the Court of Appeal was apparently satisfied on that question, here, although I am not precluded from further consideration having heard all the evidence and argument.

The claimant, SMMS in its written submissions, and by its pleadings has not directly addressed the Axiom argument separating the fact of the Award of the Tender [and any supposed right to judicial review of the cancellation by letter of the 17 January 2011[14]] from a right under contract, perhaps as a consequence of the withdrawal of the LOI.

SMMS relies rather on the argument that any Ministerial power to cancel the LOI was not exercisable in isolation from the Minerals Board. So the Ministers act miscarried for that it required a Board recommendation before the Minister could withdraw his letter of intent to grant a prospecting licence.

That argument is addressed elsewhere but it does not face the defence of Axiom that SMMS's rights to judicial review did not arise for the Tender had no sufficient public law element, [for the Tender was a commercial tender] and any rights could only arise from contractual relations, if any which followed the Tender. Those contractual relations may well be just cause for a claim in law or equity but not for judicial review. I accept that judicial review of the Ministers act by his letter does not give rise to a claim for judicial review for in the commercial tender situation there was in this case no sufficient public law element. It rather falls to be considered in terms of a claim in common law for breach of contract for instance.

The non-SMMS claimants do not have a sufficient interest to challenge the agreement for lease to Axiom [so as to intermeddle in a private contract] or challenge the acts of the Commissioner or Registrar giving effect to that lease, the 6th and 7th defendants say. Their claim to ownership in the earlier part of the pleadings is challenged by these defendants. Their argument relies on the registration of the perpetual

[14] Ex. 31

estate in the names of the owners, the 7th defendants and the subsequent Axiom lease was the consequence of the 7th defendants appointment as agents [by assignment and ratification] of the original representatives, by performance of the agreement to lease struck with the Commissioner of Lands in 1992. The claimants seek to challenge the performance of the agreement to lease notwithstanding they are not parties to that agreement and none of the claimants have standing to do so. These defendants point to the fact that neither of the parties to the agreement [including the originally appointed representatives] nor Axiom nor the Commissioner challenges it. [The Attorney-General in place of the Commissioner does not challenge it].

These defendants rely on the authority of *Venos* [15] case and that of *Leua* [16]. I accept that if ownership in custom is to be relied upon as a basis for standing to mount a challenge in the High Court such customary ownership must be evidenced by a decision to that effect by the proper arbiter of that question. I will have more to say about this issue in the course of these reasons.

The High Court has no jurisdiction in matters of a civil nature arising out of a claim to customary land.[17]

The claimants seek relief by direction to revert the registered land to customary land and by implication accept in that Claim the fact of registration. These defendants say once acquired, the characterisation of the land as registered land prevents further "meddling".

These defendants rely on *Karahu's* case.[18]I accept that reasoning by Kabui J [as he then was] as correctly stating the law.

By adding parties in the manner that comes before me, these defendants claim the provisions of s. 254[5] of the LT Act would prevent adjudication in any event, in the Local Court for Axiom is not a Solomon Islander amenable to that courts jurisdiction[19].

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[15] *Veno v Jino* [2004] SHBC 10 per Palmer CJ
[16] *Leuo v Kolena Timber Co. Ltd* [1999] SHBC 13 per Palmer J.
[17] S. 254[1] of the LT Act; s. 12 Local Courts Act.
[18] *Korahu v Paeva* [1999] SHBC 7 per Kabui J.
[19] Hitukera v Hyundai Timber Co Ltd [1994] SBHC 27 per Muria CJ.

I accept the proposition which relies on the ratio of *Karahu's* case but prefer to consider it in the wider context of the manner in which these proceedings have come to court and the claims of abuse of process.

As a constituent part of that wider argument, these defendants point to the absence of standing in the claimants to seek relief pursuant to s. 241 of the LT Act [which relevantly provides no person other than a Solomon Islander may hold an interest in customary land] for the right to complain rests with the Commissioner of Lands and only the Attorney-General may assert public rights in accordance with s. 241[1] and no right rests with private persons[20].

I address the s.241 argument in detail later although I accept the cases reflect the law in the Solomon Islands.

Obtaining standing and unfounded allegations of bribery and corruption

An absence of *"clean hands"*, Axiom says, is shown by the deceit and dishonesty and improper influence on the part of SMMS by its officers. .

Selected Issues of Deceit, Dishonesty and Improper Influence by SMMS

Axiom lists those issues in the following parts.

The avoidance of the 3PL test
Attempted and actual influence of the screening committee;
The avoidance of any new call of the international tender;
The hollow promise of visits to an operating HPAL plant;
The changing of the landowner trustee / representatives;
Influencing community leaders;
The suborning of Rota;

[20] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477; *Caaney v Ku-ring-gai Municipal Council* [1963] 114 CLR 582 at 604-605 per Menzies J

The pretence of not receiving the cancellation letter;
Various aspects of obtaining signatures to the SMMS and attempts to cancel the registration of the registered land;

The Avoidance of the 3 PL Test

I do not intend to deal with the argument on the law - rather deal with Lilley QC's argument in relation to deceit, dishonesty and improper influence.

The tender coordinator, Tolia, after approaches from SMMS confirmed that the International Tender would involve only one mining tenement hence only one prospecting licence would be involved. There was concern that the MM Act, s.20(4) would adversely imping on SMMS's right to tender for the block since it had 3 existing prospecting licences. An email was sent by Ochi to Mason for Damilea on the 7th of September, 2010 where Ochi had drafted Mason's request for Damilea's response about the 3PL issue.

Ochi has earlier confirmation from the Director of Mines about the single tenement issue, reflected in his report to Japan dated the 14 April 2010[21], long before the close of tenders.

It should be said that Damilea at the Attorney-General's Chambers was a personal friend of Mason. That was not seriously contested. It may reasonably be inferred that Mason was seen by Ochi as having a position of influence over Damilea, for Damilea was instrumental in the Attorney-General's Memorandum of Advice to the Permanent Secretary, Ministry of Mines dated the 10 September 2010 made available to Ochi

[21] Exhibit 113/11

on that day,[22] when confidential for the Permanent Secretary for attention of Tolia, who acknowledged receipt on 14 September. SMMS had no right to the legal advice of the AGC until or unless given by proper authority. In this case, Tolia, [a proper authority] copied the Memo of Advice to Ochi on 14 September 2010 and said;- *"I attach herewith a copy of our legal opinion by the Attorney-General's Chambers on you[r] raised query of 27 August 2010. It is clear and self-explanatory for which I am sure will meet your expectation as initially intended"* (my emphasis).

The words "initially intended" clearly relate to the view held by SMMS (and its legal advisers) that the 3PL issue did not apply in the case of tender.

The Claimant's pleading, at para.19 refers to reliance on this memorandum of advice. At the Management Committee meeting in Japan on the 8th September, the meeting did not have that advice but acted to tender, in any event.

There are untruths in Mason's e-mail of the 7 September 2010; Ochi had known since the 14 of April 2010 that the one tenement meant one prospecting licence. It was not truthful to premise his argument about the 3PL issue on this assertion that 3 prospecting licences will go to the winner of the tender. Ochi did not correct this mistake which must give rise to a misapprehension of the true fact in the recipient of the email, Damilea. The officer's subjective understanding of the facts in the letter from Mason is not entirely to the point but since the letter was factually wrong in part and the legal opinion followed in time, it is an available inference that the legal advice may have been drafted with this false information in mind.

Damilea had previously considered SMMS Prospecting Licences and Mason recounted Damilea's expressed view that SMMS already had

[22] Exhibit 113-120A

enough licences and that SMMS perhaps should concentrate on them. Damilea's statement[23] cannot, however, be seen as Damilea's view on the 3PL issue *per se*. More telling is Axiom's criticism that the pleading implies reliance on the AGC advice when in fact Abe of the Mineral Resource Division in Japan had accepted at the meeting on the 8 of September 2010 that SMMS need not relinquish any of its pre-existing PLs before it had (unofficially on the 10th inst) (and officially on the 15 September) the advice of the AGC[24].[25] The Memorandum of the Management Committee meeting is reproduced in part;-

> "Proceedings' Mr. Abe. [Explaining in line with the materials provided] According to information obtained today {8 September 2010} it has been confirmed that the 3 PL restrictions does not apply. San Jorge and Takata are, so to speak, the sweet bean paste [Translators note: this means the core part] of our planned project but they were taken away from us at the time of our previous applicationas the result of the actions of an Australian company".

The pleading is not supported by this evidence of the Vice-President Abe who was responsible for the SI Project. The decision whether or not to proceed with the Plan A or B (one involved the relinquishment of the PLs so as to ensure SMMS fell within the tender conditions) always remained with Japan and the impediment, seen to be that 3PL issue, had been resolved to SMMS' benefit before it had the written advice of the AGC.

There clearly was a fallacious assertion in pleading 19 and by implication, fallacious to the knowledge of Ochi, the SI Company Managing Director, who is the responsible officer for instructing his counsel[26] in these proceedings. For the pleading asserted that SMMS

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[23] Exhibit 111@35 - 36
[24] Day 19@63, 64 and 68
[25] Exhibit 81 SK-1@47
[26] 108

relied on the AGC legal advice before agreeing to tender. Ochi remained in Court in that capacity for part of the trial including part of Abe's cross-examination.

By pleading 19, SMMS either expressly or impliedly relied upon the AGC advice.

The Company did so at its peril. It had argued that nevertheless, once the Tender was accepted by the Director, the Screening Committee was bound to consider it. That argument has no merit. By the terms of the Act, the Director has a mandatory obligation to refuse a Tender bid which fails the s.20(5)(c) test. I will give my reasons later.

By its defence (10-Pleadings-3rd Defence and cross-claim by 6 Defendant), Axiom admits the fact of the Letter of Advice by Damilea but denies that it was authorised by the Attorney-General or the advisers to the Attorney-General. I find there is nothing in this argument; the Memorandum had come under the Letterhead of the Attorney-General's Chambers and from the proper custody of the recipient, the Director of Mines, to whom it was addressed. The Defence plea that the advice was wrong in the face of s.20(5)(c) is upheld for the reasons later given. The further pleas by Axiom, denying compliance by SMMS with the Tender Notice for that no Form 1 (Application for PL) or payment of the prescribed fee in accordance with Reg.3C(6) of the MM Regs.,is also made out on the evidence. My reasons are given later.

Attempted and Actual Influence of the Screening Committee

Abe was asked various questions in cross-examination by Lilley QC. He was asked if he knew the names of the Screening committee.[27]

[27] Exhibit 81 SK-1 at 47

"Mr Hashinaka. Where the names of the screening committee disclosed? Mr Abe. Yes, but we have not given any bribes or anything like that."

Axiom argued that Abe was disingenuous as to his reasons for wanting to know the identity of the members of the Committee[28] where he said:-"I wanted to know what sort of people, in sort of positions, what sort of title, what sort of background, were selected for the Selection Committee."[29]

I find Abe clearly was defensive at the Japan Management Committee Meeting, mentioning the absence of bribes when the question was not raised. The information was obtained by Mason, through Damilea, a clear breach of Damilea's responsibility of confidentiality as an officer of the SIG Attorney-General's Chambers. Damilea was a member of the Screening Committee and sat on the Board's deliberations when deciding on the Tender proposal. Lilley QC relied on answers given by Ochi under cross-examination to show that Ochi gave an unconvincing answer when questioned about the need for knowledge of the Screening Committee[30]

Axiom sought to infer from the fact that Ochi knew the recommendation of the Screening Committee that it was plain Damilea had breached a confidence, for within a short time of its deliberations; Ochi was able to report to Kudo in Japan.[31]

It may be inferred, as Axiom suggests, that this knowledge of those on a Selection Committee is policy of SMMS. In the circumstances in which it has been obtained, through Damilea, an officer of the AGC, responsible to the Attorney General, the approach by SMMS was improper and having regard to the defensive answer of Abe, in the Japan

[28] Day 19
[29] 114-Transcript Day 19 section 3 page 27.
[30] Ochi cross-examination Transcript Day 64 Session 4 Page 9
[31] Exhibit 122d, RT36 email from Ochi to Kudo 29 September 2010 -11.56am

Management Committee Meeting, known to be so, for it was information elicited by Ochi through Mason, Damilea's friend.

The influence on the Screening Committee is detailed by Axiom. "A member of the Screening Committee had been influenced to disclose that confidential information,[32] since clause 1.8 the Tender Notice required that communications with Tenderers were to be in writing.[33]" Sullivan QC in his oral address on day 89 said, the defence argument was wrong in law [despite the suggestion that communication should be in writing] and that there was no evidence of any such influence. He was careful to distinguish influence in this sense [to influence to ones purpose] from the influence reflected in the disclosures of the working committee. I do not accept his argument; the evidence shows there was communication which is contrary to to the presumed confidential workings of the committee and the influence has been shown in Damelia by his breach of confidence.

On the basis of the evidence, Damilea has clearly been influenced by SMMS to disclose the recommendation. This reflects on the officer's *bona fides* as an employee of the SIG in a position of trust and responsibility to the Attorney General, the First Law Officer. I am satisfied it stems from SMMS' influence on him as a member of the committee and Board.

There is an inference to be drawn from the fact that Auga, the Director, in December on reading his waiver, was also aware of the anticipated advice of the AGC. The written advice was unofficially given SMMS on the 10th September while Abe was sufficiently confident to voice his satisfaction with the tender on the 8th at the meeting in Japan. That confidence I can infer stemmed from Auga's acceptance of SMMS's position that it was not affected by the 3 PL restrictions. For in December, his waiver expressly acknowledged his earlier advice.

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[32] Exhibit 122d, RT36, (SMMS.002.108.0542-RT) (Email from Ochi to Kudo, 29 September 2010 11.56) (page 3)
[33] Exhibit 21 at page 9

When asked about his reason to know of those on the committee, Abe answered *I wanted to know what sort of people in what sort of positions, what sort of title, what sort of background, were selected by the Selection Committee*[34]. Axiom inferred from the fact that Ochi knew of the recommendation of the Screening Committee, that someone on that committee had breached a confidence. For within the short time of its deliberations, Ochi report to Kudo (in Japan)[35].

> *Subject: Good News – "Our Tender Proposal Overwhelmed the Other Bidders' Proposals and it has been recommended to the Mineral's Board to be held tomorrow. The Screening Committee reviewed the proposals this morning".*

That information was confidential. It could only have come from someone in the meeting. I accept Axiom's argument that a member of the Committee had been influenced to disclose confidential information. The Screening Committee was obliged to make its findings to the Board – no one else. That material became the property of the Board.

It was not a breach of protocol but a clear breach of process. I am satisfied that the breach was brought about by SMMS' knowledge (as accepted by Abe) and influence over a member of the committee who wrongly published detail of the finding of the committee to Ochi. That wrong I can infer arose from Ochi's influence since he had reasons, not occasion to know. That person, it is reasonable to infer was Damelia.

<u>The avoidance of any new call of the International Tender</u>

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[34] Transcript Day 19 Section 3 at page 27

[35] Exhibit122d, Rt36, email from Ochi to Kudo 29 September 2010 – 11.56am

Axiom argued a chain of emails Mason Ochi[36], in late October 2010, followed by one from Kudo to Ochi[37] show SMMS to be willing to interfere in any Governmental reconsideration of the tender. This chain predates the notification of the award of the tender on the 4th of December, although Ochi knows that the Board recommended SMMS to the Minister. The inference of a *modus operandi* is reflected in Ochi's email to Mason on the 29 October at 6.10am where he says: *"please explain the situation to Peter [Auga] and your friend in the AG and asked not to accept any bidder to make another evaluation".* This type of approach to use a colloquial expression, is via the back door.

Mason admitted close friendship with Damilea and his long association with other senior public servants has been shown. The earlier influence in having detail of the Screening Committee made known and the wrongful first publication of the result to Ochi are reflected in the expectation of further influence over Damilia in this circumstance. A formal direct approach may be expected by writing directly as the Managering Director SMMS, to Auga, as the Director, Mines. A back-door approach may be result in the underlying purpose, a furtherance of SMMS' interest being masked. It must be remembered that Mason's letter to Damilea, drafted by Ochi, before the tender spoke of Mason's "personal questions" for Damilea. I find on the evidence of the email chains that this practice of Ochi was not restricted to the Attorney-General's chambers.

<u>The hollow promise of visits to an operating HPAL Plant</u>

I have dealt with this at some length in the latter part, the evidence of particular witnesses section, where Ochi's evidence is looked at in some detail. I find that the 'hollow promise' was made manifest.

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[36] Exhibit 113-38@page 1 [Page 74] (bundle) Orchi d Mason Exhibit 113-38 @page1[page74] (bundle)
[37] Exhibit113-42@p38[p121] (bundle)

This proposed visit was not without precedent. Abe referred to an earlier visit in 2008 to CNBC in the Philippines. Axiom's submission relies on conclusions it asks the Court to draw on material, principally found in email exchanges as well as answers in cross-examination, especially of Ochi.

Lilly QC refers to material in the footnotes.

> Transcript Day 66 Session 3, p1711-p22115; Day 66,Session 4,p36,104; Day 67, Session 1,p14,137.
>
> Transcript Day 37, Session 3,p27,131.
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> Exhibit 81[i]at p 154 [Email from Kudo to Ochi dated 19th November at 6:22pm].
>
> Exhibit113, Tab 42 [Email from Ochi to Kudo dated 3 December 2010 at 4:04pm] [part of SMMS. 001.008.0084T].

The references in the footnotes are voluminous. I have set out later, my findings and comments in relation to some of Ochi's evidence on this point. I was satisfied he exhibited a dishonest approach towards the Minister. I am satisfied Ochi used the Minister's expressed wish for a trip to satisfy SMMS's purpose to have the Award and LOI published. I am further satisfied Japan controlled the approval and timings of any such trip. Kudo made that plain to Ochi[38].

So Ochi was aware that he had no full powers to commit SMM [Japan] to such a visit when he arranged with the Minister, on Friday, the 4 December 2010 for the Award of Tender and LOI to issue, and for the Minister to submit a request to visit. I am satisfied that the Minister had a reasonable expectation that a trip would follow without delay since such a trip had been foreshadowed for some time. That reasonable expectation was not met. The expectation was also reasonable in Abe's opinion.

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[38] Exhibit 113-43-A@p1

For all these reasons and in the absence of any evidence, the Court has no grounds for believing that Ochi was trying to behave honourably when he first made that arrangement on the 3rd December with the Minister. I find he did not intend to proceed sincerely but cynically with his one object in mind, to have the Award and LOI published. He had not been "put in a hole" by those in Japan, a hole where there was no honourable escape but rather it was a hole of his own making. This is not a case of breaking an undertaking for the greater good but wholly as he saw it for retribution for the dismal attitude of the Minister towards him. It counts for nothing that the Minister was subsequently penalised for that was post-Ochi's acts in treating the Minister in that cavalier fashioned once he had his way with him, and had the Award and LOI

The Changing of Landowner Trustees/ Representatives

Axiom argued that Ochi actively took steps to replace landowner representatives or trustees who were unsupportive of SMMS. At first glance, this may be seen as a normal commercial imperative. It was certainly an imperative for SMMS interest was the PL which was grounded in the need to obtain signed SAA documents. Awareness meetings and signing meetings were to be conducted under the auspices of the DME. The DME's presence was to ensure, if possible, that landowners and their representatives were informed before, of their own volition, they signed or declined to sign the document after negotiation as to terms of access.

Axiom's argument then was directed to showing improper influence on landowners' representatives or trustees, leading to such signings. It said Ochi was aware of customary landowners' representative arrangements and that he had on the 6 August 2010, a list of representatives prepared by the DME following earlier awareness meetings held by the DME at

Ysabel[39]. The DME list named "Cortez Selo and Bava as representatives".

I am satisfied Ochi knew of the opposition of these particular representatives to SMMS. I am further satisfied that Ochi actively interfered to have particular representatives replaced. I accept Axiom's argument on this point where it relies on Ochi's assertion to Kudo, "this time round we are being cautious, even for tribes that have expressed support, if they ask for more time we are giving it to them because of other Grps [sic]"[40] [41].

Mason, SMMS employee under cross-examination refused to accept that the DME report of landing groups and representives were correct, saying "There's no evidence to show me that they are the rightful person to represent their group."

The particular representatives, Bava, Cortez and Selo had been representatives, historically and known to be such by their tribes.

Lilley QC is correct where he says at 86 of his submissions "Although the Claimants assert that those changes to those positions happened in accordance with custom, the evidence of Riogano was that financial and logistical support from outsiders for meetings was not consistent with custom"[42].

The Claimants purport to play down the significance of that support, but it is irrefutable and patently irreconcilable with custom that SMMS and Ochi (as well as Mason, Devi and Pade) interfered with the relevant groups free will and volition to make their own decisions.

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[39] Exhibit 112a -112b
[40] Transcript Day 59, p 13
[41] Exhibit 113 Tab 56A at p3(page 214 of bundle)
[42] Transcript Day 78 Session 3 p36-37, 121

At Day 89 during his oral address, Sullivan QC was critical of the 7th defendants [then the Cortez Group] asserted replacement of the lessors and owners, parties so named in the agreement of November 1992, as "processes not remotely to do with custom".

The same criticism may be levelled at the Cortez groups supposed replacement as trustees by their tribes or clans at the instigation of SMMS.

Riagano was vitally concerned with the BLA and the interest of the cross-claimants. The BLA interest in this litigation is contrary to that of the 7th defendants. He never denied the representative relationship Cortez, Bava and Selo, purported to have with their clans or tribes. Riagano's association was earlier premised on that representative relationship and included at least these parts of the Takata land for which these three spoke in the Association. Riogano never questioned these three persons right to represent so far as he was aware.

Changes occurred after Ochi's actions in positively interfering with matters which normally would not involve outsiders, especially outsiders where commercial interests dictated the outcome.

By paras. 289-304 of his written submissions, Lilley QC deals exhaustively with the subject of the invalid nature of the SMMS surface access agreements. He bases his argument on three matters. The first is the claimants'challenge to Axioms standing [for the SAAs are by way of private agreement] which Lilley QC says misapprehends the doctrine of privity of contract which operates to only permit privies to enforce a contract[43] and Axiom does not seek to hold the claimants to their contractual obligations. Secondly the claimants have pleaded their case as to join all parties on all issues, such that the claimants themselves have invited Axiom to take a position on the issue.

Insofar as the first two are concerned, I find the criticism goes principally to the manner in which the claimants have couched their pleadings and

[43] *The Pioneer Container* [1994] 2 AC 324 at 334

consequently may be considered in relation to abuse of process argument.

The third criticism relates to the failure of the signed documents to be documents envisaged by s.21 of the MM Act for that they were documents whereby the signatories were compelled to sign an agreement comprising standard form terms [without any real opportunity to negotiate terms] by fear or favour. The arguments are made out on the evidence of the claimants for no evidence had been called by these defendants on point. The paragraphs are dense with references to particular exhibits, especially those statements and emails of Ochi where his *modus operandi* is exhibited by which he contrived to obtain the SAAs contrary to the purpose of the MM Act which presumes a right to negotiate in the landowners and freedom in the landowners [hense the need for DME officers at awareness and signing meetings] from interference or coercion as has been made out by these two defendants on the evidence. I make these findings on the evidence of the material pointed at by Lilley QC, the evidence of the claimants.

This evidence was not only related to the signings but also included evidence which went to illustrate SMMSs' willingness to fund landowner arguments in the Chiefs Court where SMMS interests may be adversely affected. In the 2010 proforma agreement, the funding whilst currently continued, hasthe proviso excluding arguments amongst landowners to determine land ownership.

I am satisfied that Ochi had, in spite of his denials under cross-examination, a proper understanding of the interparty relationship amongst these particular Takata landholding groups especially that Martin Tango interclan group.

[Axiom also points to Ochi's acts in influencing community leaders. I do not intend to address that argument at this point but rather pass to its argument about the suborning of Rota].

The other claimants make no complaint about SMMS. This is not a case where the principles recognised by the High Court of Australia where a bank owed a duty to mortgagors to disclose unusual features relating to the overdrawn bank account. The non-disclosure amounted to a misrepresentation which was sufficient to entitle the mortgagors to have

the deed set aside.[44] But notwithstanding the acceptance by these claimants of their support for SMMS, the evidence surrounding their knowledge of the purpose of these proceedings goes principally to suggest they relied on the 1st claimant's support to recover their land "which has been stolen". This is a simplistic view encouraged by SMMS and its agents for their purposes. It does not bear close scrutiny. The evidence satisfies me these claimant's background supports the suggestion of Axiom [concerning knowledge] that they were, by that absence of knowledge known to Ochi and Rota at least, susceptible to suggestion by superior authority, Ochi and Rota [at awareness and signing meetings] and without the ability to make a judgment as to their best interests, so that the conduct of SMMS may be seen as unconscionable.

Rota Bata'anisia.

Axiom prefaced its argument by pointing to Ochi's view about obligation or reciprocity[45].

On the 31 January 2011, Rota on Ministry Letterhead, as Principal Tenement Officer, addressed to the Managing Director, SMMS, sought and obtained an advance of $500.00 as subsistence allowance to assist his family.[46] This followed his earlier advance of allowances at the time Rota went to Isabel, moneys paid by the company, a practise which had been adopted by the DME.

Axiom says Ochi had the view that if someone owes money to another, then the person *"cannot move freely"*. This is evident from an email from Ochi to Kudo dated 20 January 2011 at 6.07pm[47].

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[44] *Commerciol Bank of Austrolia Ltd v Amadio anor* [1982-83]151 CLR 447.
[45] Exhibit 133-56A
[46] 113-50
[47] Exhibit 113-56A

> "If Elliot Cortis Pade (sic) refuses to sign though I don't know where his land is, it may not be necessary to pursue. He might be indebted to Axiom and can't move freely. If that's the case, it would be good if he resigned as a Trustee".

Axiom's argument was that by advancing monies to Rota, he can't move freely. Axiom says that Rota was indebted to SMMS for most of the time when he was conducting meetings in the Jakata area.[48]

I accept that Rota's involvement was also by nature an agent for SMMS and that his independence as an officer of DME had been compromised by SMMS payments. Rota, by report "period of Letter of Intent (LOI) December 10 – 24 2010 to February 8, 2011" details Jakata signings.[49] On a reading of his report it is clear he is partisan towards SMMS.

Axiom argues that since 6 January, 2011, Rota had a monetary advance from SMMS and the first signing to the SAA, the Martin Tango group, (absent Bava) and Basil Clifton, the trustee Ochi said replaced Bava, occurred on the 10 January.

Moneys were not repaid until about the 12 February. The signing on the 10 February[50] was the last signing before the SAA was lodged and the last day Rota had charged allowances.

Axiom referred to Ochi's cross-examination on Day 67 at page 35-37 of 150. Here, Ochi was asked about an advance of $2,000 [the earlier advance] given Rota. He accepted that it was an advance in allowances, and that SMMS became a creditor of Rota. If he was unable to continue

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[48] Exhibit 113-50 Transcript Day 67 Session 2 page 6, page 9, Exhibits 128e and 128h (notations on Rota's s claims for reimbursement in April)
[49] Exhibit 122b@424
[50] Ex. 122b at 431

to receive allowances (paid by SMMS) he would have been unable to repay it is reasonable to infer, the loan from his salary.

At p.37 Ochi was asked about payments to Rota after Ochi knew officers from the DME were no longer permitted to help SMMS at Isabel. Ochi conceded that SMMS paid Rota's allowances, "if he attended, we have to pay."

At Exhibit 122[b] [Ochi's statement with annexures[51]] are pages of concluding slides which the DME used in meetings with landowners concerned with surface access agreements. The slide headed "Current Situation" says:

- *SMMS LOI is still valid:*
- *submissions for revocation by Bugotu chiefs to Cabinet is unprocedural:*
- *the Minister, Mines and Energy only can act upon the advices of the Minerals Board, and not alone in his capacity as Minister.*

Axiom says that these are the arguments SMMS raise in this trial. The suggestion which Axiom makes is that these three dot points were not conceived by the DME but rather SMMS. Nowhere is there any evidence of an instruction by the Director, Mines Board along those lines but there is evidence that Ochi had adopted that approach through-out this time.

Rota's bias in favour of SMMS has been made apparent during the trial and I accept Axiom's argument that he had been suborned. These three points, relating as they do to legal assertions flowing from the presumed

[51](Rota's second Report dated 23rd Feburary 2011.p476.

revocation by the Minister is outside Rota's brief to assist at SAA information meetings in the absence of other specific evidence of direction on the points. On these facts I infer that Rota had adopted Ochi's expressed view. The dot points in the slide may well have misled those at the meeting. The conduct of the meeting was not that expected of an independent DME officer.

The minutes of the Huali awareness meeting of the 4 January include these statements.[52]

> "Q.-What has to be done for the land acquisition to progress quickly?"
>
> "Rota- The progress of how fast the land acquisition will take place depends very much on the outcome of the Surface Access Agreements. The land acquisition will cost the Government significant funds to undertake and areas where clan or tribes did not agree to sign then the land acquisition process cannot take place on their land. The Government waste money if the people do not agree to sign."

Rota's reference to a land acquisition process in the context of his meeting I am satisfied can only relate to the land the subject of the SAA's which SMMS seek and with which Rota is concerned. The SMMS benefit is apparent from the last line where Rota purports to suggest the waste to the government rather than the benefit to SMMS.

The slide which I have set out in dot point clearly relates to the matters raised by the Bugotu chiefs in the Introduction to Rota's Report. The slide and the specific reference to some Bugotu Chiefs raising the fact of the Minister revoking the Tender process coupled with Rota's response, suggests the Bugotu House of Chiefs knew of the revocation letter by the Minister dated 17 January, some time before the 23 February the

[52] Ex. 122[b] at 459

date of the Report. For in his introduction Rota[53] says "in Bugota some of the Chiefs were confused as there was a letter written by HON. Mark Kemakeza from Minister of Mines and that a Cabinet decision was made on the 17 January 2011 had already revoked the Tender Process."

The letter under hand of Joseph Ishmael, Chief Mines Inspector (acting Director) for the Permanent Secretary dated the 25 February 2011 confirming the validity of SMMS LOI is dated after the Report and consequently after the slides had been created. The Permanent Secretary (Newyear) was unaware of this letter.[54]

Lilley QC for Axiom says this presentation is propaganda. I am satisfied it clearly reflects a partiality in Rota towards SMMS, a partiality which echoes Ochi's view of him (see earlier email).

This assertion as to validity was made on the 6 February, in terms of the earlier slide. [Note Rota in the presence of Ochi at Sepi Bugotu landowners Association joint meeting with SMMS,[55] again Axiom says, [referring to the first Report of Rota in January] that his reference and deductions about the Mining Act were erroneous. A look at the introductory sections of the MM Act and Rota's statement to the landowners satisfies me his statement is misleading. There is nothing in Rota's reports which suggests he has fairly explained the right in landowners to seek to negotiate better access fees from SMMS; rather the approach was that reflected in SMMS's practice to pay only those who actually signed the SAAs and nowere is it apparent the landowners were told they could or had a proper appreciation of the right to negotiate terms. This may amount to unconsciable conduct had the landowners complained. But the absence of slides attempting to explain the right to negotiate is very telling when the company has prepared the

[53] At p464 of Exhibit 122[b]
[54] Exhibit 113-50@228/343
[55] Ex. 122[b] [YO-3 at 487]

surface access agreements. The AGC may have vetted and approved the form of agreement but the AGC is not a party to the agreement.

I accept Axiom's argument that Rota acted, contrary to his obligation and duty as an employee of the DME in this case, to be an independent officer to explain the DME position and to ensure the company, SMMS did not by its actions, coerce or unduely influence landowners. That finding is on the basis of the evidence in those reports especially his slides which misstated the law and facts.

Sullivan QC when dealing with Rota's conduct, [at paras 821, 822 of his submissions] says the Bataánisia issue is a distraction. "There is no evidence that he misled any landowners and acted other than independently at meetings." That is plainly wrong on the 1st claimants own statement, Ex.113[b].

He says there is no requirement in the MM Act or Regulations stipulating that execution of SAA's must happen in the presence of a DME officer.

As I have relied on primarily the slides provided by the claimants given by Rota [above] there is evidence sufficient to give landowners an erroneous view of the law as it affects the Ministers powers to rescind letters of intent. For that view reflects the approach adopted by Ochi and in this case, cannot be taken as correct when challenged until a determination by a properly constituted court has so ruled. Whether particular landowners have been so influenced is immaterial for the presumption arises from the biased information furnished by Rota.

> Reg 8 of the MM Act:- "No applicant for...shall hold meetings with landowners for the purpose of negotiating or acquiring surface access rights for prospecting... unless the Director or his representative is present."

The submission then is wrong and disengenious for the purpose in having officers present is to seek to ensure the information at such meetings is fairly and truthfully given.

The Pretence of not receiving the Cancellation Letter

Ochi"s dishonesty-knowledge of cancellation letter- Newyear- Mason

The Minister's letter cancelling his earlier LOI was dated the 17 January 2011, the day on which Newyear had drafted it on the Minister's instructions. So from that time Newyear was aware of its existence although he had not sent it but rather given it to the Minister presumably for the Minister to deliver it to the SMMS.[56]

The Minister had not been called to give evidence. The inference which Axiom wants the court to draw is that the circumstances surrounding the giving of the letter to the Minister on that day, 17 January, are factually supportive of the Minister's delivery of the letter to Ochi (or at least SMMS).

Axiom further points to absence of any emails from Ochi to Mason (in spite of very many others at that time) to investigate the alleged delivery of letter of cancellation once Ochi was put on notice of the public knowledge of such letter at a landowners meeting at Ysabel sometime after the 17 January but before the 23 of February. Ochi, in his statement[57] says he instructed Mason to investigate the alleged delivery of the letter of cancellation. Mason's suggestion that he would look into the matter of the letter, elicited a response from Ochi[58].

[56] Exhibit 121@47
[57] Exhibit 122(a) @C23[184]
[58] Exhibit 113-71

►Mason to Ochi, cc: Kyoichi Ito – Mitsuhiro Yiano dated Tuesday, 15 March 2011 at 3.44pm:-

" Ochi san, [*after dealing with relinquishment of a SMMS tenement*] At the same time we briefly discuss the Revocation Letter of LOI granted to SMMS by cabinet on 17th January 2011.

-Minister of Mines wrote a letter that is addressed to the General Manager of SMMS on 17 th January 2011.

-This letter is cancellation of LOI and Notice of Award issued to SMMS in respect of Isabel Nickel International Tender.

-The Minister of Mines wrote the cancellation letter, based on the decision made on the cabinets'meeting that also dated 17th January 2011.

-On Tuesday 8th March 2011, the Minister of Mines has made a decree and has instructed Peter Auga not to release any DME officer to accompany SMMS to execute the SAAs. Therefore, Patrick Vatopu/DME is unwilling to accompany SMMS, except Rota, because of different reasons-I/Mason requested Peter Auga on Friday 11th March to approach the PS/DME and requesting him to put it in writing by stating all the legal grounds as to why the Minister of Mines has banned the DME officers not to accompany SMMS.

-On Monday morning, just before mid-day, I/Mason unofficially obtained copy of cancellation letter from Peter at DME office, purposely to see its content.

-I told Peter that we cannot challenge the validity of cancellation letter because it is not formally delivered to SMMS.

-I keep on reminding Peter to refer this matter to AGC office without delay.

-I deny the claim made by the Minister of Mines that he already delivered the cancellation letter to the managing director SMMS.

-I am of the view to investigate the method of delivery of the cancellation letter to SMMS as claimed by the Minister of Mines, that whether by posting, hand delivered or other means, by fax or e-mail or its not necessary at this stage. Mason"

- On the same day, Ochi to Mason at 7.08pm:-

"Mason

Plase don't do anything about this issue any more until my return to Honiara this Sunday. Tell Peter Ochi will be back to Honiara this Sunday and call him. The fact is that we, SMMS have not received this letter yet and we do not know anything about. That's why we are working to obtain signatures from our landowners. Please do not tell anyone that you got this letter unofficially.

Tks

Yori Ochi"

The exchange illustrates Ochi's attitude about the delivery. He is obviously confident Kemakeza would not contradict him had he given him the letter, as alleged, or he believed that in the absence of some proof that he had been given the letter, the absence of communication from the Minister would allow him to continue with his activities as if no cancellation had occurred. The Minister Hon. M. Kemakaza was replaced sometime after 17 January 2011. Ochi had been offered a copy of the letter by Newyear earlier in February but had declined. Newyear gave a copy to Auga who gave a copy to Mason. He had the letter on the 14 March, however, when Mason sent him a copy[59]. This illustrates Ochi's willingness to ignore matters which do not suit him. He is willing to dishonestly deny the fact of the letter.

[59] Exhibit 113/67

Nevertheless, Ochi took it upon himself to have the SIBC report corrected on the evening news on the 21st of March, its earlier Report that the Award and LOI to SMMS had been cancelled, and broadcast that the LOI was still valid for 12 months. The approach to the SIBC, having first heard of the cancellation early in February and seen the letter of cancellation only one week before, does illustrate the effrontery of the man.

Axiom says he is dishonest in relation to his evidence and points to internal inconsistencies. He gave a different version of events to that given by Newyear. In view of the internal inconsistencies, which I have found [by my resume of Ochi's evidence, later] I accept that evidence of Newyear where he says he told **Ochi earlier in February of the cancellation during a phone conversation but later Ochi refused to accept the letter of cancellation offered at his office**. That attitude is reflected in Court where he prevaricated again and again in the course of Lilley QC's cross-examination of him.

By ignoring the offer of the letter, Ochi sought to avoid the consequences of notice. I find that the Permanent Secretary, Newyear, effectively served the letter of cancellation[60], when following a phone conversation about the fact of the cancellation, Newyear said at paragraph 5 of his statement "A couple of days later (February) Mr Ochi came to see me at my office. He asked me if I had a copy of the cancellation letter. I showed him my copy of the letter. I asked him if he wanted a copy of the letter but he was quite angry and refused my offer. He then left." His willingness to prevaricate even with his staff if apparent from a reading of the email exchange , above with Mason.

[60] Exhibit 122I@para 51- Newyears statement

I accept Newyear on this point. Ochi's statement[61], recounts a landowner in Ysabel saying that SMMS LOI had been cancelled. Ochi recall the date, he said, since it occurred before a meeting with the Acting Minister. Rota told him he knew nothing about it [the cancellation]. Ochi telephoned Auga from Buala and was told "your LOI is valid". Ochi said at 160 "I know I tried to contact others possibility including Mr Newyear to seek clarification about the suggested cancellation but I cannot recall any other particular conversations". It is curious that Ochi should mention Newyear yet relied on Auga. For it was Auga who gave Mason a copy letter on the 14 March, well after Newyear showed Ochi a copy and gave a copy to Auga, later for Ochi.

Memory is a useful but sometimes treacherous source. It loses parts, confuses dates and times, conflates recollections of similar events and often includes happenings that followed the event in question. It loses, regathers, confects and re-imagines history as it moves along.

The court should compare and cross-check if possible, conflicting accounts keeping in mind that independent witnesses will seldom remember happenings in exactly the same way and that their statements will reflect the importance at the time, of the event to the witness; their sincerity and the clarity of recall.

Similiar accounts should warn the court of the risk of a witness plagiarising another, and as may happen, suggested here, that statements may be drawn from a common but unknown source. Dissimiliar accounts should also ring alarm bells for such statements may either be of little value or require the court to choose that part or parts to be preferred for reasons given.

Ochi is not an "independent witness" as the phrase is commonly understood. His statements nevertheless must be considered in the

[61] Exhibit 122A@156, 157, 158,159

light of the comments, above where they diverge from other statements. Newyear has been called by the claimants as an independent witness. He has not been undermined in his evidence, rather his cross-examination left me with the impression he was truthful to the best of his recollection. For all these reasons, I accept the evidence of Newyear as to the notice of the Award revocation given Ochi.

I accept that Newyear told him of the cancellation and later showed him the letter.

Ochi's dissembling reflects on his character and goes beyond on this aspect, lack of frankness; rather it amounts to non-disclosure of material facts which also reflects on his honesty. He had notice of the letter of cancellation before the 14 February 2011. He was at an awareness meeting with Rota on the 6 February 2011 when Rota's reported presentation[62] included this dot point.

> "Current situation is that the SMMS Ltd Letter of Intent (LOI) is still valid. Although attempts made by the House of Chiefs for the revocation was unprocedural as the Minister of Mines and Energy cannot act alone in his capacity as the Minister since the Ministry is a technical Ministry by that requires the advice of the Minerals Board."

This refers to the Landowner query about the revocation by the Minister of the LOI. Rota purports to give a definitive opinion on the Minister's powers. He reflects the attitude of SMMS towards the Minister, of circumvention. It is consequently untrue for Ochi when speaking of Rota's knowledge at that meeting, that Rota knew nothing about the cancellation.

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[62] Exhibit 122B [YO-3]@487

Ochi and the "Blind Eye".

All these emails which went to and fro between Ochi and Mason; Ochi and Kudo and Ochi and others relating to the Minister's cancellation of the award and LOI, are reminiscent of the "blind eye" of Lord Nelson, who turned a blind eye to the inconvenient truth of the signal from Parker, his Admiral in Chief at Copenhagen. The inconvenient truth was the fact of the letter of cancellation. The email of Ochi[63] to Mason refers to the fact of the cancellation and his decision to ignore it.

As I have said, confirmation of the letter of cancellation was fixed at the time, earliest at least, of the conversation with the Permanent Secretary, New Year, in his office in February when Ochi was shown a copy. There is evidence which suggests the Minister may have delivered the letter to SMMS but no sufficient evidence to justify a finding on inferences, that Ochi or SMMS had the letter before Newyear's meeting with Ochi. While he may not have accepted the letter from Newyear, he was fixed with its knowledge.

The letter of cancellation had certainly been raised at meetings on Isabel by landowners before Ochi's meeting with Newyear.

There is evidence especially that of Rota's reports showing that Ochi was aware of the determination of the Cabinet to cancel the Award and LOI. I may draw on that evidence and the emails of Ochi where he expressed urgency in obtaining the SAA's and the exchanges with Japan and Mason, in particular, and infer that Ochi was well aware of the cancellation of the 17th of January 2011 if not from that date then shortly thereafter, for he was cognisant of the need for speed in having the SAA's signed before the fact of the cancellation became universally known about Isabel.

[63] We have not been formally served.

The inconvenient truth was the fact of the letter of cancellation. The email of Ochi[64] refers to the fact of the cancellation and his decision to ignore it. As I have said, confirmation of the letter of cancellation was fixed at the time, at least of the conversation in the Permanent Secretary, Newyears office earlier in February. There is evidence which suggests the Minister may have delivered the letter to SMMS, but no sufficient evidence to justify a finding on inferences that Ochi or SMMS had the letter before Newyears meeting with Ochi.

The letter had certainly been raised at meetings on Isabel. While Ochi may not have accepted the letter from Newyear, he was fixed with knowledge of it.

Ochi was effectively saying that he could not see the revocation and thus could ignore it. His cross-examination on point, as Lilley QC has shown, reverted to the "I don't remember" answer. That may well be the case, but that leaves the documentary evidence as best evidence. That evidence satisfies me beyond doubt that Ochi knew of the revocation early in the piece, but in accordance with his expressed belief that the revocation was without basis in law, chose to ignore it. That expressed belief was reiterated time and again in this cross-examination, and is evidence of Ochi which I accept, since it explains his choice in ignoring the revocation. The chronology of the emails when read as I have, leaves me in no doubt that Ochi expected support from the AGC to have the Minister's letter negated, but in the meantime, his SAA's would continue.

Lilley QC at paragraphs 311 and 312 of his submissions, says-

[64] "We have not been formally served".

"311(b) Ochi was prepared to pretend that the cancellation letter had not been received in order to continue to collect signatures for surface access agreements as Ochi stated in his email to Mason to 15th March 2011[65].

(c) on 17th January when the cancellation letter was signed, SMMS had collected only 16 of the anticipated 35 signatures for the Takata SAA. Ten signatures had been obtained from the ANIKA THAI Clan (who were always SMMS supporters) and six from the Thavia Clan. By 11th February 2011, when Ochi lodged the Takata SAA for SMMS's application for a prospecting license over Takata, SMMS had all 35 proposed signatures. It was therefore vital to maintain the deception that the SMMS LOI was and remained valid.

(d) importantly, Ochi instructed his staff to lie about their knowledge of the cancellation letter and to continue to pretend that it had not been received, as Ochi himself did when on 21 March 2011- SIBC broadcast the fact of the cancellation of the SMMS LOI and the following evening, Ochi caused SIBC to broadcast that the award and the SMMS LOI were valid, almost seven days after he had in fact received the cancellation letter.[66]

312. This level of dishonesty apart of Ochi necessarily infects all of the Claimants' evidence. This is because, as the evidence reveals, all the evidence of the landowner witnesses called by the Claimants is taken by Mr Aaron Mane (Mane) who was an employee of SMMS subject to the direction of Ochi, at all material times. That their evidence was stereotyped and pre-prepared as to its content is apparent from the comparison in Exhibit 83. Where necessary, each of the landowner witnesses

[65] Exhibit 113 71.
[66] Exhibit 122b (YO-3) at P624

had been misled to ensure that their evidence met the requirement SMMS in this case. We refer but do not limit this observation to sworn facts which have been scheduled in Exhibit 83".

The argument is made out on the facts.

In so far as the Checke-Holo speaking witnesses were concerned, they principally spoke to their knowledge of custom as it affected their power to appoint and remove representatives of their group. Their evidence left me in no doubt that the imperative to change representatives did not emanate from those particular witnesses but was brought for their ratification. The imperative arose from the need to recover their land which had been "stolen". The Checke-Holo speakers had no grasp of the mining proposed for the land. Yet the proposed mining by SMMS was the cause and rationale for the changes to representatives, since SMMS pleads that its prospecting license has paramountcy.

Here again, these non SMMS witnesses have been misled as Lilley QC says, for with the prospecting license, SMMS, even were the land to revert to customary land, need no longer to treat with the landowners who by their earlier SAA's, have conceded the right in SMMS to proceed to a prospecting licence and obviously that concession had not been explained to those witnesses, who in Court retained and expressed the belief that they might or might not choose to proceed if the land is found to be customary land. Their negotiation of access or other fees has not been made plain on the evidence.

I infer that SMMS has not negotiated with the particular groups at all, rather put an agreement and where possible had them sign it.

All of this illustrates Ochi's willingness to ignore inconvenient truths. It is a matter since the pleadings conflate the issues leading to the institution of proceedings, which I can quite properly take into account when determining whether SMMS has 'clean hands'. For having been put on

notice of the fact of the revocation, and having being aware of it for some time before (for the reasons I have given) since the revocation was known to have emanated from the Cabinet's determination, by blandly ignoring it, (by Ochi's continual actions in refusing to see it), SMMS has exhibited *mala fides*, thus dis-entitling it from the exercise of my discretion for judicial review. [Judicial review may have been available at the time of the Minister's letter once communicated to Ochi].

In this case, however, it would seem SMMS has pointedly avoided acknowledging the status of the Minister and the Cabinet's decision and has chosen an option which in these two Defendant's view, must result in this Court refusing to exercise its discretion, now to grant review.

I have not been concerned with nor addressed on any breach of a Director's duty in any provision of the Companies Act or as it affects Directors in Common Law or in Equity. Nor is there any legislation dealing with an Independent Commission against Corruption for instance, where complaints may be investigated at a cost to the State. Nor are there consumer laws for the protection of persons in a situation of disadvantage. For the landowners may be seen to be such persons, when they are seen against the commercial background and resources of SMMS when concerned with supposed negotiation in relation to access. Here it is plain, the cost has fallen on the parties. That said, however, since Ochi was the Managing Director, it is reasonable to accept Ochi should act in an honest way. For that is the reasoning in Kim Kae Jun's case.

His blind eye, in these circumstances, is dishonest behaviour especially towards those persons whose signatures to the SAA's, SMMS was so anxious to obtain.

Axioms argued the dishonesty of SMMS in its submissions (39):-

(a) Telling the land owners that it was illegal for them to deal with another company in relation to mining or prospecting rights.

(b) Telling the landowners that they had to sign in order to undergo acquisition that, in turn, would assist them their internal ownership disputes.

(c) Telling the landowners that their leaders would not sign with SMMS because SMMS did not take brides or would not give out handouts.

(d) Refusing to make payments to those who did not sign an SMMS' SAA.

These aspects, if sheeted home to SMMS's or Ochi's influence over or direction to the Board or landowners exhibit *mala fides.*

[a] Axiom refers to an email, Ochi to Kudo dated Monday, January the 10th 2011 at 9.10pm [67]– where Ochi says at response;- [1] "*Actions by Axiom, RLG and the landowners active on their behalf violate the mining law (section 2 Sub-Sections 1 – 5), and we are explaining this at each meeting.*"

This email predates the slide which Rota had included in his later presentations and which was in almost identical terms. I may infer that the slide was later included at the behest of Ochi.

> The MM Act, S.(2)(a)(b) "No person shall, except in accordance with the provisions of this Act and any Regulations made thereunder – (a) explore for or develop, mineral resources: (b) carry out reconnaissance, prospecting or mining operations in respect of minerals;" or

[67] Ex. 113 tab 55 at p3

> (5); "any person who contravenes the provisions of sub-section (2)(a)or (b) shall be liable, on conviction before a magistrate, to a fine not exceeding $1,000 dollars and in default of payment, to imprisonment for a term not exceeding twelve months.

This slide by its conclusion, the manner by which it was written, was wrong and calculated to deceive the landowners into believing they were unable to treat with "Axiom or RLG" for fear of court proceedings against them for breach of the Mining law.

Rota adopted this line[68], by his Huali Report of a meeting dated 4th of January 2011, where, he as the DME rep stated; "*formation of a landowner Association with the intention of choosing, making arrangements without proper prior consultations with the government, is illegal. It contravenes s. 2 sub.5 of the MM Act 1990".*

Again, Rota earlier had said, on the 12th of December 2010 at the Cockatoo Camp meeting that *"the government has exclusive right to select or choose who to develop extract and mine, who to prospect, develop and mine minerals."*

> S.2 (1): "all minerals of every description in or under all lands of whatsoever ownership or tenure or in whatsoever possession or employment they may be, are and shall be deemed as always to have been, vested in the people and the government of the Solomon Islands."

Rota's statement at Cockatoo camp again mistakes the law for the whole purpose of SAAs was to obtain those landowners' consent; they

[68] Exhibit 122b (YO-3)at 459

could with- hold it since the resource was vested in them, too or seek to renegotiate terms, a fact which never seems to have been discussed.

This very aspect had arisen earlier in 2007. Riogano, the Chairman of the BLA, had made a statement[69] in earlier proceedings where in SMMS' High Court claim to oblige the Board to reconsider its refusal to extend time for surface access agreements were refused. Riogana said, in parts 11, 12 and 13.

> 11] "The plaintiff's position and responses to our offer clearly indicated to the landowners and BLA that the plaintiff has no intention to enter into any kind of partnership with the landowners. This position was made clear by the plaintiff on July 4th 2007 during a public meeting organised by the plaintiff and the 1st and 2nd Defendants.
>
> 12. As a result of refusal of the plaintiff to discuss the option of joined partnership, BLA as a representative of the landowners, is entitled to look elsewhere to other mining companies who are keen to share the resources with the landowners. What company BLA will eventually accept is not the concern of the plaintiff because at the end of the day it will be the landowners' chose and not the plaintiff.
>
> 13. We admit that there are some people who find favour with the plaintiff and who eventually signed surface access agreement with the plaintiff. However, most of these people only do so because they have disputes of ownership with some members of the landowning groups within BLA. Whilst they are entitled to claim ownership, their claims are at the moment, mere assertions. So much so, they cannot assume to

[69] (note ex 101 page)

> grant a definitive right to the plaintiff because their claims are open to objection from others who might also claim the same areas. The plaintiff cannot, in turn, assume to have obtained an unfetterded right if the right of the grantors are open to objection from other landowners."

In this quotation from Riogano's statement, the reference to the plaintiff is a reference to Sumitomo Metal Mining. The court accepts that while Riogano may have stated that the reason landowners signed surface access agreements with Sumitomo was because they had disputes over ownership with other landowning groups within the BLA (showing a presumption that signing would facilitate any subsequent argument over such landowning rights), the assertion in itself is not evidence of the fact.

I am satisfied Rota's statements were both wrong and likely to deceive the landowners and that they were made with the full knowledge and at the instigation of Ochi. The intention of the MM Act, in relation to SAA is to afford the landowners a properly informed information session before they consent to allow access on their land.

The right to negotiate with landowners was not exclusive to SMMS because of its LOI. The exclusive right to enter lands to prospect is found in s. 2(4) (c) and short of the PL, the Act does not prevent others from treating with landowners.

> [b] By signing the SAAs, it was suggested that ownership rights were protected.[70]

[70] Rota's Awareness Meetings [Ex.122b (YO3) at page 460 – Exhibit 113-56 at page 14: Exhibit 113-56 at page 11)

At Vulavu on the 21st of January 2001,[71] an attendee, Chief John was recorded: "many tribes claimed ownership of San Jorge and for him (Chief John), he must sign any SAA agreement to protect his land from others who also claim".

This is not the only occasion that view of the validating effect of signing the SAAs was expressed. But here, Ben Devi allowed it to hang, as it were without correction.

(c) and (d). These two aspects focus matters which are relevant not only to Axioms particular argument but which go to show Ochi's propensity to accuse and dissemble. He accused landowner leaders and the Mines Minister and two local parliamentary members who were against SMMS' of seeking bribes from the company.

Axiom relied on two instances: P. 41.

.."The Sepi Hall meeting on 6 of February 2011[72]. Ochi explained to the attendees as to why their leaders would not sign a surface access agreement with SMMS in the following terms:

> ..."Why most of the leaders are against SMMS is that the company does not accept brides or free handouts to individuals, The SMMS is a zero-tolerance company and is bride-free."

The second example is an email from Ochi to Kudo[73]. Ochi stated-

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[71] Rota ibid)
[72] Exhibit 122b [YO-3] at 487
[73] Exhibit 122d RT70 [SMMS 002.127.0249] (Email from Ochi to Kudo – 24 March 2011 17.35)

> .."The reason why the Minister of Mines and two local parliamentary members were against Sumitomo was that Sumitomo...does not give brides....this is what we have been stressing at the awareness meetings."

There is no evidence of any approaches beyond the implied assertion and no evidence that "most of the leaders against SMMS" have accepted bribes from anyone else. The reasoning for the attitude evinced by others, to be against SMMS, is strictly Ochi's and was reflected in his cross-examination.

The reluctance to concede that SMMS only paid landowners who signed SAA's goes to Ochi's credibility. This exchange was given by Axiom p42 para 125.

Ultimately, Ochi stated that it was his view that landowners should be paid whether they sign or not, but he did not know that and then, again, he stated: "I didn't know that because I didn't pay myself." Ochi, however later agreed that all expenditure for catering and attendance fees for meetings had to be approved by him.

Ochi's answers in cross-examination were equivocal at best but when his whole cross examination is looked at objectively, (accepting that he may be of an excitable nature) bearing in mind his standing in the company, and his obvious intelligence, I find he cannot be believed on this point; he was the responsible policy maker. Those who did not sign the SAAs were not paid.

Lilley QC, in his cross-examination, criticised his mental state, by asking if he was conversant with paranoia, a criticism both shouted down and disallowed. But it cannot be said that Ochi is entirely rational when by his actions he appears to treat Solomon Islanders who do not bend to

his will, or who openly oppose, as justifying his conclusion that they are in some way the subject of dishonest influence.

He denounced all and sundry, including the Minister and used his position to seek to influence the Japanese Diplomat Corps to his ends by bringing pressure to bear on the Prime Minister, for instance, to set up a Kwaiga Investigation.

He continually, in his email correspondence, railed against corrupt civil servants. He saw Damilea, in whom he had trusted to do his bidding, as an unprincipled person. This became apparent on a reading of the Minutes of the later Board Meetings of 2013.

Ochi had an "in" into cabinet deliberations and took steps to ensure he was made aware of the "goings on" as they affected SMMS. He was continually seeking in his own mind to turn delay into obstruction caused by blame-worthy conduct. Yet, his own conduct wanted honesty.

The conduct of the Litigation

Lilley QC's argument is that such deceit and dishonesty flowed through and affected even the conduct of this litigation[74]. He points to Abe and Kudo (SMMS witnesses) reading each others' proof evidences or sworn statements. Mr. Hichiro Abe, the former Director from the 28th of June 2007 to the 25th of June 2012 and Executive Vice President of SMM Co. Ltd from the 27th of 2011 until the 25th of June 2012, was the responsible officer in Japan for the business of SMMS in the Solomon Islands while Kudo was the Managing Director, immediately preceding Ochi. Abe was responsible for the project in his capacity as General Manager of the Mineral Resource Division. He passed direct responsibility of the project on the 27th of June 2011 but continued his interest as Executive Vice

[74] 19 of the Written Submissions para 61

President and a member of SMMS's Board of Directors. He gave evidence in these proceedings.

At paragraphs 24-28 of his sworn statement[75], Abe gave his clear understanding of the earlier litigation affecting the subject land and SMMS. At paragraphs 28(b) he recounts why SMMS decided to drop further litigation. In the presentation to Prime Minister Sikua, he indicated the company's intention to participate in an international tender, if and when it took place. Ochi, who arrived in the country only days before, was with Abe at that formal presentation in April 2010. I point to this fact of the presentation for it beggars belief that Ochi was not made aware of the difficulties he faced in country, reflected by the policy change recounted by Abe at para 28[b], (which gave rise to the international tender). Yet Ochi in cross-examination, early on, stated he was unaware of the history of the company's difficulties over Takata land until the commencement of these proceedings. Later I deal specifically with his evidence. His cross-examination was internally inconsistent with his statement.

It was the readjustment of the Japanese company's shareholdings and the consequent involvement of the Japanese government through JOGMEC which Abe hoped would lessen the company's "country risk"[76].

The inference which I am asked to draw is that their uncompromised evidence would have been more contradictory. It was obvious that Abe would not be drawn when asked questions about e-mails appended to Kudo's statement. In these circumstances I am not willing to so infer although Ochi's evidence was full of internal inconsistences when I have regard to his cross-examination. It also suffers from external inconsistences once the e-mail chains are read.

The need for a sworn statement in support in judicial review matters should be borne in mind for the proceedings, here, have had many

[75] Exhibit (62[a])
[76] Abe *ibid*

iterations. The absence of such a statement[77] must be a matter for consideration on the question of the conduct of the litigation.

As evidence of the misuse of the statement of case when the proceedings are more correctly concerned with judicial review, the 6th defendants point to the pleading changes over the IBS meetings.

The first claimant by its filed pleadings dated the 14th of May 2014 alleged that the Iron Bottom Sound meeting of 28th of April 2008, chaired by Elliot Cortez at para.59(a) never took place, yet by its pleadings the following day, the denial in para.59a was withdrawn. This is a clear attempt to change the whole nature of the case midway through the trial, a case premised on a right to judicial review. Having made the attempt, I am cognisant of the absence in the claimants case of a real appreciation to adhere to the underlying premise when seeking judicial review, an honest disclosure of relevant matters, not shown here by the willingness to change its case in this fashion.

That is a gregarious example of the claimant's continual amending of its claims and one where a court is entitled to draw the inference, the conduct of the proceedings is at variance with the expectation that a sworn statement would have obviated any claim of right to the various changes to the facts relied upon in the original pleadings for judicial review, pleadings as the evidence of the claimants and witnesses unfolded. This illustrates the dichotomy in the claimants case, on the one hand a claim for judicial review [subject to the underlying law] and on the other, a case to be pleaded in accordance with Chap.5 of the Rules. The uttering of the IBS minutes of the meeting then was pleaded and discontinued on, since I may infer, a claimant's counsel's obligation, when settling the pleadings that required it to be so discontinued.

Another pleading subsequently withdrawn (21a) had plainly asserted bribery by Axiom.

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[77] R 15.3.6[b]

I am satisfied the manner in which the particular pleading and acts relied upon have been amended owe much to counsel's obligation under the Legal Practitioner's Rules 1995 (SI) Rules 16(9) (a) which says he shall not allege fraud unless he-

i) has express instructions to plead fraud.
ii) Has before him credible material which establishes a credible case of fraud.

There is absence of any credible evidence of fraud; in fact the withdrawal of the statement in pleading 21 is illuminative for the claimant's case originally lacked particulars yet by calling Ngelemane, the claimants could only have sought to suggest Axiom had indulged in dishonest conduct and thus fraudulently acted in support of the 7th defendants in some fashion. Ngelemane's evidence (dealt with at some length, later) makes plain SMMS was mistaken to rely on such a source to attempt to make any such case of fraud against Axiom.

Yet para.76 of the pleadings was allowed to stand. Since fraud was alleged in those pleadings, fraud which must be strictly proved, I should say at once that there is no evidence, least of all to the degree of the Briginshaw test, of fraud by the 6th defendant.

Axiom's criticism of the conduct of litigation in these respects is valid. Axiom also pointed to other matters going to the conduct of the litigation which reflects badly on the claimants.

(e) The failure of SMMS to disclose:

(i) The sworn statements filed in the 2007 High Court proceedings, which were used by Sol-Law to prepare the statement of Jimmy Biriki Manedika, and were described on Day 50 as "[containing] two sections, the second section is from the Sol-law handover file which we found – the archive documents which were in there. The first lot, your Lordship, was actually

provided to us by Mr Bradley, then of counsel, now of Queens Counsel who was in the other matter and he still had some documents left." **[105]

** 105 – (transcript Day 50, Session 1, pp17-18,// 48-7

(ii) The documents that show that meetings held in January 2013 to support the apparent installation of the present Third and Forth Claimants as the representatives or trustees of their respective clans or tribes, and pleaded as valid in custom, were organised and paid for by SMMS;

(f) The Claimants' withholding of its argument as to 'possession" under s.229(2) of the LT Act, which was not pleaded until Day 71 of the trial, but was nonetheless asserted by counsel for the Claimants as part of its case;

(g) Annexing critical documents relevant to Abe to the sworn statements of other witnesses on the admitted, but mistaken, understanding that doing so would avoid cross-examination of Abe as to those topics;

(h) The over-disclosure of multiple and numerous copies of identical documents in Japanese, but marked with different Ringtail identification codes, which meant that translation of them by other parties was prohibitively expensive, since doing so would involve the unnecessary translation of multiple copies;

(i) The continuous and extensive "translation errors", sometimes described as "over-translation", which involved the addition of critical and significant words in the English language version of a witness's evidence that did not appear in the deponent's sworn language version, discovered only by accident and due to the assistance of truly independent translators;

(j) The preparation of the sworn statements of the Non-SMMS Claimants by way of a "copy and paste" exercise, whereby entire paragraphs (as demonstrated by Exhibit 83) were duplicated as a witness's evidence, including coping the text of the sworn statement of Tukumana to such an extent

that he, as deponent, swears to attending a meeting with himself (which appears to have been copied from the sworn statement of Denimana); and

(k) The deception of landowners witnesses by:

(i) Telling them that they had lost their rights to garden on, and use, their land, when those rights were at all times protected by statute; and

(ii) Arranging for them to swear that they supported SMMS, without fully and frankly explaining to them what that support entailed.

When I look on the sworn statements of Jimmy Biriki Manedika (Ex 101(j) and Ex 104) it is plain that paragraph 24 of Exhibit 104 has been cut and pasted from Exhibit 101 (j). Biriki is the Anika Thai representative and his evidence coupled with other evidence going to show that the Anika Thai had sought funding in 2011 from SMMS to seek to locate tambu sites about Kolosori and support from other landowners there, leaves me in no doubt Anika Thai [as impliedly found by the acquisition officer and Palmer J [in his consideration of the appeal affecting Martin Tango]] have no existing rights in Kolosori.

Over-disclosure occurred, possibility since only during the trial did Axiom scrutinise the various ring-tail documents annexed to the 1st claimants various statements, scrutiny which at various times brought forth fresh calls for disclosure and a fresh batch of email documents. The most I can say is that the over-disclosure, while it created real difficulties for Axiom, does reflect badly on SMMS since the trial had been unduly prolonged. As the trial progressed, much material which had not been translated from the Japanese [as irrelevant] was translated and found to be relevant. This also goes to the question of material non-disclosure. The possibly most material non-disclosure was the fact of the earlier 2007 proceedings involving Sol-Law as solicitors for Sumitomo in the companies claim to oblige the Minister to extend his LOI, a refused claim upheld on appeal. Axiom was not a party to those proceedings and

while Sullivan QC suggested Axiom knew all about the proceedings, the obligation to disclose all relevant material is an obligation to the court and was not discharged at the commencement of this hearing.

The criticism of the Claimant's "withholding of its argument as to possession" by plea came late and offends the principle that "facts" in support of judicial review must be sworn to and surely may not be changed to suit the vagaries of the evidence at trial.

So far as (j) is concerned, the preparation of the sworn statements of the non-SMMS claimants by way of a copy and paste exercise, whereby entire paragraphs were duplicated as a witness' evidence, may be described as sloppy and oath-helping. So far as (k) is concerned, those assertions that landowners witnesses on Isabel had lost their rights to garden and that SMMS took steps to have them swear support for SMMS without fully and frankly explaining to them what that support entailed, is supported by the evidence.

There were difficulties associated with arranging interpreters but I am unwilling to sheet blame.

Axiom particularly criticises Ochi as untruthful and dishonest. Sullivan QC on Day 1 of the oral submissions[78], prefaced his address by "we will respond to Axiom's various attacks on Sumitomo's Surface Access Agreement and on Sumitomo personnel, including Mr Ochi. We say those attacks are misconceived and for the most part irrelevant, and calculated to distract from the real issues and to conceal the weakness of the position of Axiom and the seventh defendants and to that extent, we say they are scandalous and should as a matter of law, be disregarded".

[78] Day A9 page 29 of 81

I should say at this point, that as a matter of law, proceedings in the nature of judicial review need to comply with rules and any underlying law which govern that type of claim. While I categorize the pleadings as hybrid (for many are by nature and by particulars generic with common law claims for breach of contract or tort perhaps) they seek particular relief founded on judicial review. The conduct of the litigation is a real issue, the criticism of Ochi as dishonest is a real issue on the evidence and not irrelevant and cannot be disregarded.

Jurisdiction and Standing- Abuse of process(1)

Axiom, at paras 145, 146, 147 of its submissions says;-

> "145 Abuse of process- fictitious proceeding: An "artificial" or "fictitious" proceeding will be an abuse of process because the institution and maintenance of such proceedings unjustifiably oppress and vex the defendants to those proceedings.
>
> 146. Ochi's evidence, under cross-examination, was that SMMS sought out and "obtained" the cooperation of the Non-SMMS Claimants for the purpose of securing its standing to challenge matters that SMMS, alone had no standing to challenge. The cross-examination of the landowner witnesses called by the claimants demonstrated that many of them did not have any real opposition to Axiom KB, except that they were displeased with the fact that Axiom KB had not met with them, although they were unaware that this was because Axiom KB had been enjoined by SMMS from doing so".
>
> The Claimants therefore have abused this Court's processes, in so far as that they have brought an artificial or fictitious dispute before it for resolution.
>
> The non-SMMS claimants were misled by SMMS and Ochi as to Axiom's (especially in so far as it was suggested, that their

land was stolen)[79] ..and as to the intention of SMMS to have the relevant land resumed by the SIG,[80]....which would deny the landowners any further input in the process. The non-SMMS claimant's disputes with the Defendants in this case is "artificial" and "fictitious" because, absent the deceptive intervention of SMMS and Ochi, there is no real contest between the non- SMMS claimants and Axiom."

The Australian High Court decision in Walton's case[81], sets out principles whichAxiom considered, were relevant;-

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail (36). Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them (37). Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppels, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of in earlier proceedings (38). The

[79] Exhibit 61© (Tukamana), Exhibit 61 (e) Tukamana), Exhibit 66 (c)Bugoro) Sheet 11 – Exhibit 65 (Solusu), Sheet 19-20, Exhibit 85 (Pado), Sheet 26, Exhibit 87 (Denamana), Sheet 16,17, Exhibit 89 (Raoga), Sheet 29-30: Exhibit 93 (Daoburi), Sheet 11 – Exhibit 94a (Fotomana), Sheet 19 Ex 101 (Jolo), sheet 24, Exh 93(comparative schedule of landowner statements prior to

[80] Transcript Day 65 – Session 2 at page 22

[81] *Waltan v Gardiner* [1993] 177 CLR 378 at 393

> jurisdiction of a superior court in such a case was correctly described by Lord Diplock in Hunter v Chief Constable of the West Midlands Police (39) as "the inherent power which any court of justice must process to prevent misuse of it procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people"".

The fact remains that this case has unfortunately gone to trial in the fashion that it has, after a clear direction from the Court of Appeal, that the Pleadings needed change. As Axiom rightly points out, in so far as the claimant's relief is directed to the MM Board and Minister, the non-SMMS claimants do not have "sufficient interest.

Yet they purport to so plead.

Standing of the non SMMS Claimants to seek Judicial Review

Axiom succinct criticism is that the non-SMMS claimants "do not have "significant interest" to seek relief directed to the Board and the Minister. Their involvement in the proceedings is at the insistence of Ochi and their 'interest' is not concerned with the "mining case". Axiom relied on the approach in *R v Inland Revenue Commission;* ex p. *National Federation of Self Employed and Small Business Limited*[82] (previously adopted and applied in the High Court.)

> (The headnote says "the question whether an applicant had a sufficient interest...was not a matter to be determined as a judicial or preliminary issue in isolation on ex parte application on leave to apply. Instead it was properly to be treated as a possible reason for the exercise of the Court's discretion to refine the application when the application itself had been heard and the evidence of both parties presented, since it was necessary to identify "the matter" to which the application

[82] (1981) 2 AUER 93

related before it was possible to decide whether the Applicant had specific interest).

In this case before me of the Award granted, the matter is the purported cancellation SMMS and the LOI, a cancellation concerning the company, the Minister and the Board.

In those circumstances I see no public duty towards the non-SMMS claimants which could at any stretch of the imagination, to have been breached. The argument advanced relying on their rights as "Customary Landowners" avoids the issue that the matter is one between the company, the Minister and the Board, landowners in these circumstances have not shown any legal or equitable right of their own which has been infringed

The non SMMS claimants fail the "sufficient interest" test.

Foukona J adopted and applied the test *Sikua v Tran*[83] He reiterated the comments of Lord Diplock about the Courts unfettered discretion. I see no reason to depart from the principle here, and find that the non-SMMS Claimants have no standing to seek judicial review of the Minister or Board's acts affecting the company.

Since the joinder of the non-SMMS claimants in this fashion is, I find wrong, those claims are fictitious and must go to the question of costs. Of course, the same may be said in relation to the sufficient interest test as it affects SMMS' claim in relation to the land. SMMS interest in the land claim was to remove Axiom from the register of lease holders over the land on which it sought to prospect. By joining with the non-SMMS claimants, SMMS claimed to relief in respect of the land affords it no more standing than before, the company is not a Solomon Islander and it has no standing.

<u>The need to obtain SAAs by SMMS.</u>

[83] [2013] SBHC 92, paras. 24-34

Lilley QC., in his opening, quoted Cortez, saying on the 21 April 2011

> *"We are happy about this result [the grant of the prospecting licence to Axiom]. For so long we have been held back on the development of our mineral resources because other international companies did not respect our traditional rights. I thank the government and Axiom mining for sharing the vision of my people and all others*[84].

The standing, if you like, of these particular persons, the Cortez Group, only became an issue when they became registered on the title and granted a lease to Axiom. Before then, it has been shown SMMS actively sought to undermine their status. It had been of no consequence to the claimant, SMMS, for its SAA Authority would, if executed by those landholding groups, lead to the grant of the PL to SMMS. That was done at the instigation of Ochi by the acting Minister in the face of the Cabinet decision. But while persuasion and explanation by the company at awareness and signing meetings in the presence of officers of the DME is available, certainly the underlying intent of the MM Act by the provision of DME officers, is to prevent coercion and the dissemination of wrong information. For I am satisfied that Rota, the DME officer by his actions as I have previously shown, was not independent but partisan.

The manner envisaged by the MM Act by which SMMS' SAAs were to be obtained certainly does not entertain interference by the company.

I am satisfied SMMS did interfere with the SAA process, that interference was directed to changing the intertribal status of particular individuals adverse to SMMS, that such interference was contrary to the customary way of dealing with representative change and that the change was directly related to the perceived need in SMMS for "standing" in these proceedings. The interference has been dealt with above.

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[84] Ex 48 (2)

It may be categorised as maintaining proceedings in custom to alter a members' inter-tribal status (standing). SMMS interest was always commercial and could never be seen as having a basis in custom. Maintenance in this context is the interference in custom by SMMS, a company having no rights as a non-Solomon Islander, by providing funds to pursue an action. It should not be countenanced and I find it is not only contrary to custom but in the context of these proceedings, illegal. I am entitled to presume that a costs agreement exists between SMMS [and the non-SMMS claimants] and their lawyers and since their interests are conjuncted [by their claim] then funds advanced or to be advanced by SMMS will avail the other claimants.

The Rule in O'Reilly v Mackman.

Axioms say[85], this case is an abuse of process when considered in the light of the O'Reilley v Mackman principle. Quoting words oft uttered by the Solicitor-General, "the present case is just a judicial review". It says the claimants; in conflating their various private causes of action with proceedings for judicial review have abused the courts process. The House of Lords recognised in *O'Reilley v Mackman*, this principle. In that case, Lord Diplock remarked:

> "it would in my view as a general rule, be contrary to public policy and as such an abuse of a process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law, to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.[86]

Quite clearly in these proceedings the claimants have sought to conflate their causes of action in violation of this principle enunciated by Lord Diplock.

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[85] 148 Written Submissions
[86] (1983) 2AC 237@ 285

Chapter 15.3: Judicial Review of Executive or Legislative Action- of the new High Court Rules does not speak of the need for leave. The new Rules deal with matters previously going to that need for leave and substantive matters, in R.15.3.18, which set out the criteria. Leave was previously necessary and "Leave should be granted if, only on material then available, the Court thinks without going into the matter in depths, that there is an arguable case for granting the relief claimed by the applicant."[87]

Now the new Rules set out in detail the criteria which must be shown by a claimant.

By Rule 15.3.19 at a conference, the court may:

"[a]consider the papers filed in the proceedings and,

[b] hear arguments".

As I have said, either these hearing may be deemed "the conference" (to enable the proceedings to comply with that part of the rules) or the conference has gone before (since the Court of Appeal had directly opined on the "sufficiency of interest" of the claimant's case, and was satisfied a "serious issue to be tried" was apparent[88], in respect of the continued injunction, at least, so that in effect, this court must be seen to have entered upon the trial envisaged by Rule 15.3.21.

Since there has not been shown any Sworn Statement verifying the facts in which the claim for judicial review is founded, I accept that the finding of the Court of Appeal, at para 15 [*ibid]* is directory and the hearing of 95 days before me has been by way of trial. I need not concern myself with the requirements set out in Rule 15.3.18 in these circumstances. The *Inland Revenue* case *ibid* was cited by our Court of Appeal as authority and has been followed here in cases referred to by Axiom. I do not

[87] A v Inland Revenue Commissioners Ex parte National Federation of Self Employed and Small Businesses Ltd (1982) Appeal Cases 617 @ 644

[88] Axiom KB v- SMMS (2012) (SBCA22 @ paras 13, 14 & 15

propose to look at the decision at first instance by Chetwynd J for this trial has had the benefit of voluminous evidence not before that earlier court, or the Court of Appeal when it considered the discrete matters on appeal.

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The court's inherent powers touched on in Rule 15.3.3 relate to abuse of process. While section 31 of the Supreme Court Act 1981 (UK) has trailed through decisions of this court and the Court of Appeal, Order 53, [which came into force in the United Kingdom in 1977] of the Practice Rules has guided [and may continue to guide] this Court until the coming into operation of the new Courts (Civil Procedure Rules) 2008 (which repealed the old 1964 Rules of the High Court).

Faukona J used the language of "standing" to describe the constituent requirements of R15.3.18[89] relying as he did on the UK precedents.

Lord Denning MR made plain the effect of the coming into operation of the Supreme Court Act 1981 (UK) where he said, "rules of court can only effect procedure" whereas the Act of Parliament comes in like a lion. It can affect both procedure and substance alike."[90]

The corollary is that the underlying law in relation to judicial review remains unchanged and procedural changes need be read with that in mind. Procedure certainly has changed on a reading of our new Rules, especially R.15.3.18 which sets out the four discrete criteria to ground "standing".

Axioms says that "unmeritorious as it is, it is difficult to imagine leave been granted". The Court of Appeal appeared satisfied on the "leave" issue.

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[89] Talasasa v Lamupio [2013] SBHC 149 at 9,10
[90] O'Reilley v Mackman ibid @255

Having heard and concluded this trial on the evidence, the question is still moot for it would be wrong to presume leave in the first instance then close ones eyes to evidence at trial which clearly had not been before Chetwynd J when he made his findings. Having regard to the decision of the Court of Appeal at para 15, the jurisdictional standing argument of Axiom in relation to *Waltons Case*, is still moot. The Court of Appeal envisaged a hearing "on the merits" which gives this Court power to look to the *bona fides* of the "leave" issue.

The Court of Appeal had before it and commented upon, the pleadings. It must be presumed to have considered the principles, in *Waltons Case* as they might be, in the Solomon Islands, and saw no ground to stop proceedings then.

But more importantly in the exercise of its discretion, having exhaustively heard the evidence, should this court acting judicially allow review on the claimant's case as it now stands?

I come to that other underlying principle; an applicant must come with "clean hands".

Abuse of process [2] Claims not to be based on ill-will or malice

Where Axiom have sought to show a cause of conduct by the nature of the litigation process on instruction from the first claimant (for the other claimants have joined at the behest – "we support SMMS" – of SMMS on demonstratively false premises) and acts of SMMS, dishonest and deceitful, which if the court is so satisfied amount to lack of "good faith", then leave would ordinarily be refused.

The claimant SMMS has presumed to criticise especially the Minister Kemakeza and other authorities, accusing them alleging malice, ill-will, bias and corrupt practices to such purpose that many investigations, enquiries and police involvement followed, accusations and allegations which on reflection must have coloured these investigations which came to nought. Ochi certainly made threats against such officers and officials (and landowner representatives).

The bribery allegations in the pleadings, at para [21[a]] [except for para. 97] were withdrawn during trial. The Claimant now comes to this court seeking judicial review.

Lord Denning said at 252[91], when speaking of judges

> "He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out".

Ochi's conduct then is a material consideration when considering the litigation process, for Ochi had throughout asserted ill-will in others towards SMMS. Where claim to judicial review stems from this continually expressed assertion, this Court should very carefully look to see that such claim is not motivated by ill-will or malice, [but has proper foundation] for if it is it is an abuse of process.

Abuse of process [2]- Standing of Non-SMMS Claimants

Not exhausted Statutory Remedies- s.229 LT Act.

As I have said previously, the Court of Appeal has accepted the argument in favour of 'Standing' which was made in that case before my brother judge, Chetwynd J. Axiom, however, makes plain that the non-SMMS claimants do not have sufficient interest to seek relief directed to the Board and the Minister. Those claimants' involvement in the

[91] O'Reilley v Mackman ibid

proceedings is at the behest of Ochi and their interests are not the same, the non-SMMS claimants concern is not the mining case, rather their wish to "have their land back". These other claimants' concern is primarily expressed by the assertion that their land "has been stolen". Those claimants want their land back; their evidence in Court was that they would reconsider the mining issue.

As I say I accept Axiom's argument that those other claimants' interests are not concerned with the mining case. They had already assigned any rights in that respect by way of the surface access agreement, if SMMS argument as to the validity of such assignment holds, and in any event, they had long ago, given a lease, through their representatives, to the Commissioner of Lands for mining purposes if Axiom's argument holds.

The non-SMMS claimants rights are provided for in s.229 of the LT Act which provides the court with power to rectify the land registers where satisfied of fraud or mistake. These defendants say that in respect of s. 229 of the LT Act, the non-SMMS claimants have not exhausted their statutory remedies [such that they are not *ex debito justitiae*] [92]

The Earl of Halsbury LC in *Pasmore v Oswaldtwistle Urban Council* [93]stated;

> "the principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute is one which is very familiar and runs through the law."

Earl Halsbury quoted Lord Tenderten with approval [as stating the principle] in Doe v Bridges[94];

> "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner".

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[92] *Bollen v Slade* [1999] SBHC 109; R v Minister of Health ex p Ellis [1967] 2 AllER 65; *R v Paddington Valuation Office ex p Peachey Property Carp* [1995] 2 AllER 836

[93] [1898] AC 387 at 394

[94] [1831] 1 B&Ad 847,859

The joinder in this fashion by all these claimants claiming prerogative orders clearly is not envisioned by the principle. The non-SMMS claimants have a particular remedy available to them.

The manner in which the proceedings have come to court again goes to the question of abuse of process and I am satisfied the question has been made out in the affirmative.

Abuse of Process [2] No "Clean Hands" [of SMMS]

Each criteria listed in R15.3.18 needed to be individually addressed. Each criteria must be found before the Court has jurisdiction to enter upon the consideration of the claim for judicial review. It is curious that the 'conference" envisaged where the Court must be satisfied of the claimant's case, follows a sworn statement verifying the facts and leaves the court with power to (if so satisfied about the matters in Rule 15.3.18) determine the claim "or (it) may give directions and fix a date for trial". One would have thought that the matter was determinative at the conference's conclusion since the court, unless satisfied, was obliged to strike the claim under R15.3.20.

Thus the issue which I touched on earlier, the presumption of regularity in terms of the need for the conference is made plain. I am nevertheless to take comfort from the direction of the Court of Appeal where, while criticising the pleadings, expressed its expectation that the matter proceed to trial. If, in fact this hearing is in the nature of a conference, in which I need to be satisfied of the requirements of R15.3.18 then so be it, for the parties by their final pleadings and on hearing have closed their respective cases.

For the provision for leave in the old Order 53 has been subsumed in its terms by our R15.3.18, a rule which I say applies after service and defence. In other words, the conference envisaged must be in effect a

hearing on the merits, before me, before I can presume to exercise my power to strike out a claim.

The court has discretion whether or not to grant the relief sought. The court must be satisfied that no circumstances appertaining to the claim make it just that the remedy be withheld. That question must be one of fact. Axiom and Cortez Group says that SMMS has not come into the court with "clean hands". As well they say there has been an abuse of process because of the manner of conduct of the proceedings.

The commentary in the White Book (the Supreme Court Practice) (UK) speaks of *uberrima fides* and other grounds necessary to satisfy the grant of leave. Those grounds include for instance, material non-disclosure on the applicant's part or false statements[95].

In the case before me, there is no supporting sworn statement verifying the facts as if the matter were one for trial in the normal course. Yet R.15.3.6 makes the sworn statement a prerequisite for judicial review. The superseded Order 53 provided for such a statement, for *ex parte* orders were available under those provisions (although not here) making such a statement necessary before leave was considered. Under our Rules, the conference after a defence has been filed is called for.

Since these proceedings have a hybrid nature, the absence of such a statement nevertheless (for the trial has concluded) does not lessen the obligation on the claimants to show all the material facts and shall be made *uberrima fides,* for a judicial discretion need reflect just consideration to the contesting parties, not only a claimant who is shown to fall within R.15.3.18. For where is the justice if the claimant is less than truthful with its case? At the commencement of Ochi's cross-examination Lilley QC asked him whether he had stated all the material facts, by nature of his questioning. Ochi said he had. I find that SMMS

[95] R –v- Jocky Club Licensing Committee ex parte Wright (1991) COD 306 QBD

had not disclosed all the material facts at the commencement of the trial before me.

And the hybrid nature of these proceeding certainly has given full rein in the claimant, SMMS to change its pleadings as occasion suited. But the court must address the claim as one for judicial review for the relief sought is principally of that nature and have particular regard to the need in the claimants to show *uberrima fides*.

Axiom (with which the Cortez Group agree) deal in its defence with deceit and dishonesty in SMMS by Ochi and his officers. Axiom's argument in relation to *uberrima fides* is annunciated in paragraphs 57, 58 and 59 of Axiom's written submissions.

> 57. Before dealing with the five main topics stated in [141] below, it is necessary and convenient to make some observations about the above matters since those matters – much like Ochi and his associates – infiltrate every aspects of SMMS's dealings with anyone connected with those five main topics.

> 58. The concept of *nemawashi,* which Abe accepted was defined as "***transplanting a tree and before one transplants a tree one removes the soil and the interfering roots from around the tree that you want to transplant so that when you lift the tree it can be removed without interference***"[96] operates in Japanese business culture and, in particular, at SMMS. The concept looms large in everything that SMMS undertook that has become the focus of this litigation. That is, Ochi and his associates attempted to, and did influence, by deception, promises of reward and/or overbearing, every decision that was to be made by any government body or officer, and any individual landowner or group of landowners, in relation to:

[96] Day Day 35, p105, 143 –pa106, 119. Transceipt Day 35, Session 4, p.28, 140, p29, 12o

(a) SMMS's qualification to bid for the International Tender (that is, influencing the legal advice proffered by the AGC on the application of the 3PL test);

(b) SMMS's oversight of the evaluation by the Screening Committee for the International Tender (that is, ensuring SMMS knew the identify of all the members of the Screening Committee and monitoring each step of its processes;

(c) The period from 30 September 2010 to 4 December 2010, during which SMMS and its officers consciously (or not) engaging in criminal activity was not beyond Ochi and his associates, including:

(i) becoming involved in, and influencing, decisions of the Cabinet;

(ii) becoming involved in, and influencing, decisions of the AGC;

(iii) suggesting the bringing down the SIG to stop the cancellation of the International Tender and SMMS obtaining the Award;

(d) SMMS's obtaining signatures to the SMMS SAAs (that is, the orchestration of the removal and replacement of clan representatives or trustees who would not cooperate with SMMS);

(e) SMMS's attempts to de-register the Registered Land following its registration;

(f) SMMS's attempts to obtain standing to commence these proceedings.

59. With respect to each of these undertakings, Ochi was the puppet master. How his collection of puppets came to be assembled prior to his arrival in Solomon Islands on 5 April 2010 may never be known, but Kudo was his predecessor. Kudo's influence in Solomon Islands, and his knowledge of the inner workings of the SIG from far off Japan, is clearly demonstrated by his communications with Ochi. It is sufficient to refer to one email:

being an email from Kudo to Ochi dated 29 October 2010 at 10:38 AM.[97]

Axiom has sought to show at every step to the time of institution of proceedings and beyond the deceitful and dishonest dealings SMMS had with the SIG and landowners.

Ochi's experience of the company in the Solomon Islands commenced in April 2010. His knowledge of the company's workings at that time and immediately after, no doubt stemmed principally from the presentation given the SIG and Santa Isabel Provincial Government. He also had close communication with his predecessor, Mr. Sumio Kudo (Kudo) who later returned to Japan and who from the Natural Resources Division, SMM(Japan) obviously had a liaison and instructive role to play. Axiom is keen to portray Ochi as the puppet master.

[Part of the email referred to of 29 October 2010 at 10.38 am[98].]

PRESIDENT OCHI

Irrelevant

The worst scenario from the above is as follows:

Again, the Selection Committee and the Minerals Board may be held at the same time and award the tender to the disqualified company (AGL? ArkNickel has some kind of connections), and there are plenty of landowners in Honiara.

We might see such a move next week. We must squash any signs of this at all costs, or risk a huge mess. <u>We can assert wrongdoing and a violation of compliance all we want,</u> but once the announcement is made, rescinding it will require an enormous amount of time and energy. Do whatever you can to stop any kind of suspicious moves.

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[97] Exhibit 62Bm Revised "LA-1", part of the email chain that is SMMS.002.008.0084 at pp. 36-36

[98] Exhibit 62b Revised IA-1" @PP36 -36.

Sumio KUDO SMM

Natural Resources Division.

The last paragraph of the email evinces a clear understanding of the need to go beyond the assertions of "wrong doing" and concedes a violation of compliance. Kudo impliedly is recognizing and acknowledging the need for positive acts to achieve SMMS' purpose to obtain a prospecting licence.

Lilley QC in speaking of *nemawashi*, deals with those acts. The question, of course, is whether acts of Ochi or through his agency are such as to an amount to false statements or non-disclosure of material facts which militate against the exercise of my discretion to grant judicial review. Put shortly does the claimant come with "clean hands"?

I propose in this part of my reasons to follow Axiom's detailed argument in relation to deceit and dishonestly for it must go to the threshold question for my determination; whether I should allow judicial review. When I say threshold question that is not meant in a temporal sense for the deceit and dishonesty are alleged to taint SMMS actions towards the SIG body and landowners through-out.

<u>Other considerations affecting Non- SMMS claimants standing.</u>

These other claimants role is not independently based on their own standing for up until the institution of these proceedings by these other claimants, the preponderance of evidence, supports the fact the 7th defendants' were representatives of those tribes and clans.

During Sullivan QC's oral addresses on Day 89, he spoke of the expectation for members of the line to confide jointly the guardianship of their primary interest, to the head of the line who is expected to consult

all primary interest holders if any major transfer of interest in the land is contemplated.

The replacement representatives before the court claim standing through the various tribal and clan meetings which ratified the change. Those changes I am satisfied were brought about through the acts of SMMS. It was clear that none of the previously accepted trustees had been at the respective meetings which purported to ratify the change. Those previous trustees were the very representatives previously given authority. They were not parties to the purported meetings in custom which resulted in their rejection. In the circumstances, I am not satisfied that those changes were brought about through custom.

It is not within the power of this court to become involved with what must now be seen to be and are called dispute, in custom, in relation to the respective representative capacity of disputing tribal clan members.

The fact that Sol-Law acts for both SMMS and these other claimants in circumstances where there has been shown, on the evidence, the dishonesty of purpose in SMMS in having them join their proceedings, must be commented upon.

As I say, cross examination of these other claimants revealed a wholly unreasonable understanding of their relationship with SMMS.

Since the imposition of the injunctive orders, the intransigence between the land claimants and 7th defendants has obviously worsened for the unexpected consequences include, it seems the inability to communicate or attempt to mediate their respective positions. It is curious that Western *mores* of dispute resolution by Court order have clearly exacerbated an already fraught clan and tribal relationship, brought about by the misleading information disseminated at landowner awareness meetings.

Ochi was aware that his superiors in Japan expected him to overcome that earlier setback, in 2007/2008 when the company had its court challenge to the refusal to extend its LOI for SAAs, defeated. That expectation was manifested in his expressed attitude towards the Minister and indirectly those others whom he had occasion or need to influence, as one showing a higher notion of himself and those supporting him with a marked distinction between him (and his compatriots) and the common Solomon Islanders with whom he came into contact.

The consequences of this dissimilitude of character was the never-ending attempts by Ochi to bend those disparate Solomon Islanders to his will without prudent condescension, for once he identified opposition, he did not forebear to take steps to coerce the opposition (the Bava group, threaten the bureaucrats and politicians, the lawyer Damilea, the Minister and the Prime Minister) and suborn the DME officer Rota, responsible for the proper conduct of the Awareness and Signing Meetings. These acts are acts of malfeasance by this officer. The end result has been fatal for the SMMS through the incautious manner of Ochi.

When I speak of prudent condescension, I do not mean to imply criticism of my brother judge Chetwynd J, who accepted the argument by SMMS when it sought and obtained the earlier injunction. For while the Order clearly has much of the progressive activism for which courts are both praised and sometimes criticised, pointing as it does to the relative helplessness of the Lands Department when faced with the impetuous 7th defendants and their supporter Axiom, the earlier Court had not the exhaustive trial process where, not just the other claimants have had their grievances heard but the 7th defendants' representative capacity put in perspective so that the uncompromising acts of SMMS may be seen from a somewhat different point of view, to give little credit to its claims. For the condescension if it be so called, may be seen as progressive activism where plain customary landowners are concerned

but these plain customary landowners are seen to have been untowardly influenced by SMMS and Ochi.

So the problem facing my brother judge then and this court now, is that of clearly differentiating between the interests of the commercial protagonists and the landowners for it should not be overlooked, when viewing the Cortez Group that until the institution of these proceedings and the subsequent orders of my brother judge, these men were recognised in their tribes and clans as landowners and trustees. They were not plain customary landowners but as Riogano said, to be trusted.

The acceptance in the argument before Chetwynd J of the "standing" of SMMS to, in effect, protect its commercial interests in the light of the contrary acts by the Cortez group and then Axiom, obtaining registration on the land and lease Registers and then, the grant of the PL in Axiom's favour, can thus be clearly seen as "standing" reliant on these other non-SMMS claimants.

But what was not then before Chetwynd J was the evidence of the malfeasance of Ochi leading to the support from these other Claimants on demonstrably false grounds and a claim as a consequence by these two Defendants to oblige the other claimants to prove Standing in terms of R.3.42.

For their joinder is contrary to the earlier trend since 2007 at least [as evidenced by the earlier court decision of opposition towards SMMS] of those unassailed representatives to treat with a company other than SMMS. Be that as it may, the facts which I find will make it difficult to reconcile that earlier reasoning of my brother judge, but he did not as I say, have the exhaustive evidence which has been before me.

It may be said that I have failed to show Ochi with his incongruous qualities, other than with cynicism. I understand that ones nature leads one to judge people in relation to ourselves. I am conscious of that but have attempted by plain facts to show Ochi in his dealings as what they are. I am sure there are many redeeming features in the man but in his dealings here, his actions and words speak loudly.

As I say his cross-examination rather drew adverse findings because of his dissembling, in court, in the face of the clear evidence of his malfeasance towards the landowners at Takata by his e-mail chains.

The other non-SMMS Claimants claim to Standing, then fails. They have been misled as to the purpose of their joinder as it affects them and they have not satisfied me that the original representatives were validly replaced in the light of Ochi's malfeasance.

In any event, I do not accept their assertions of Standing as representatives to bring these proceedings. Proof of Standing to represent, then needed to be confirmed elsewhere, and I might say, in the face of the evidence of SMMS's involvement to-date, an approach elsewhere, for this purpose must be highly suspicious.

Rule 3.42 of the Civil Procedural Rules 20 and the Land Claimants Standing.

R 3.42.

> "Any person entitled in custom to represent a community, tribe line or group within Solomon Islands may sue or be sued on behalf of as representing the community, line or group but the Court the on application of any party or on its own initiative may require that person to provide proof of their entitlement in custom to act as such a representative before any further step in the proceeding may take place".

The Claimants say that the issue arises only in respect of Jolo, Salusu and Fotamana for they were parties on record before an application was made at the trial's commencement, but not of Denimana, Bugoro and Raoga since several months before trial, their joiner had been ordered after a contested inter-parties hearing from which there was no appeal.

In *SMM Solomon Limited v Attorney General (2013) SBHC 102* (1st of July 2013) the Chief Justice said (when granting leave for Tango and Ugura's removal of their names as representatives of the Thavia and Vihuvunagi Clans respectively and for their substitution with Denimana and Bugoro of the Thavia Clan and Visula of the Vihuvunagi Clan) at 17 and 18;- *"as to the ongoing issue of who should be the right representatives in custom of the Thavia Clan, to be more specific, representatives of the three brothers Silas Tango, Denise Haghatano and Paul Fota, are matters which the Clan members can and should try and resolve among themselves whether before their Chiefs or the Local Court."*

> *On the issue of representation of the Vihuvunaghi Clan and issues on rights and interests on the substantiative case, these are similar to those of the Thavia Clan. The material adduced also shows that the Clan not only has an interest in the land dispute but their presence is necessary in the interest of justice and the effective and fair determination issues in this case."*

The Chief Justice's comments relate to the necessary representation as he says, "in the interest of justice and the effective and fair determination of the issues in this case". He is not determining the issue which has been raised before me, whether these two, Denimana and Bugoro, are in fact entitled to act in custom. He is addressing a need for fairness in the hearing should an issue arise as it affects the tribes or clans; he is not determining the right to represent.

That issue is still live. No inference can be drawn as submitted by SMMS. In an exchange of emails[99] it is stated from the record of meeting at VALAVU Village on 21/01/11 "this means landowners must sign the SAA to protect the ownership rights".

[99] Ex. 113 tab 56[a]

As well, further at SMMS 005-006-0814- minutes of a surface Access Agreement meeting at San Jorge Settlement on Sunday the 23rd of January 2011 where Ben Devi the liaison officer SMMS and Patric Vatopu, Mines Officer were present, Ben Devi in answer to a question;- "Joseph: who will be held as parties to the trust account?".

Ben Devi: "SMMS have engaged Sol-law Firm to hold all landowners trust account. Those lands with disputes will have to clear their disputes before they get there payments."

Joseph; "if our tribe sign the SAA today, who will stop others from disputing us"?

Ben (Devi); "no, other people will still claim ownership to land which trustees will sign, this means landowners must sign the SAA to protect their ownership right"

This statement was apparently allowed to pass, uncorrected. It is not correct to suggest that ownership rights depend on the execution of the SAA.

The close relationship between Mason of SMMS and Damilea is reflected in this advice to Ochi from Mason by email dated February 17, 2011 10.21am (SMMS 001.024.0621) quoting from email from Mason to Ochi of Thursday the 17th February 2011.

"OCHI SAN, I met my friend Dami after his official hours, at 17.21 hours on the 16th of February.

Comments from Dami as follows;

- It is not provided in the Mines and Minerals Act the Cabinet has power to revoke the decision made by Minister of Mines.

- SMMS was legally issued LOI on the tendered areas, therefore SMMS can still continue to obtain signatures of landowners on the tendered areas within the period of LOI.
- Dami has discouraged SMMS to seek legal action or explanation at this stage but to work patiently with Reps of DMM obtaining landowner signatures.
- In the event when DMMS has received official revocation letter of its LOI that is when SMMS can seek legal explanation on the validity of the revocation letter.

I also explained to Dani that the representatives of the Director of Mines and SMMS has obtained 99% signatures of the duly appointed trustees from various landowning groups who claim landownership of Takata prospect into the surface Access Agreement (SAA). Therefore, SMMS has submitted the signed SAAs to the Director of Mines in aiming to obtain prospecting licence so that we can commence prospecting work on Takata without delay. When we follow our signed SAA with the director of Mines, we were told that the PO for Takata area has been prepared and submitted to the caretaker Minister of Mines to consider and issue of PL. On Monday the 14th of February the Director of Mines informed SMMS that the caretaker Minister of Mines is reluctant to issue PL at this stage because LOI granted to SMMS has been revoked by cabinet on the meeting on the 17th of January 2011. I told Dani that SMMS would like to resolve issue of revocation as soon as possible.

In response to the above, "Dani suggested that SMMS should request the Director of Mines to refer this matter to the AGC's Office so that they can follow up. I will consult with Peter Auga on this matter as instructed by my friend Dani.

TKS

Mason mason."

Clearly that *ad hoc* reported "advice" from the AGC officer supported Ochi in his perseverance with SAA's. He dissembled in his cross-examination about the notice of revocation, whether he received an official letter or not. I have dealt with that aspect earlier, but I raised it again, here for from about that time in February it was clear Ochi was active in having unsupportive representatives changed.

It consequently has not been shown by evidence that these purported changes to the clan or tribes representatives had been communicated to any of the Cortez Group so that there can be no presumption of withdrawal of customary capacity and mistake on their part in seeking first registration.

I am further satisfied that the non-SMMS claimants statements were all of the kind since originally many witnesses were unable to comprehend the concepts expressed in their sworn documents. I allowed the opportunity to re-draw the statements to better reflect their understanding. That redrawing also reflected on the contrived nature of the statements, contrived not merely because, perhaps of translation difficulties but as Axiom pointed out, the fresh statements contained new material and some were cut and pastes from earlier proceedings.

(Note Denimana-Ex. 87A; 87B; 87C)

> 87A at paragraph 11: He said "At the beginning of this court case, I and the full FOTA family group supported Martin Tango being a claimant to protect the interest of the three family groups and have the registered land converted back to customary land. I together with Martin Tango signed an authority for Sol-law to join the Thavia Clan as a claimant in these proceedings (1). Martin was named as a third claimant to claim. I was happy with that as he had previously been named to sign a list to the government on behalf of all three families and we have a common interest in recovering our land

> as customary land. Bugoro and Denise Hathatano group also supported Martin at that time."

This reference to a "list to the Government" I infer to be the list prepared by the DME early in 2010 before the tender.

The approach for replacement of representatives was clearly after Martin Tango withdrew his support of SMM. Denimana said, at 12 he was not present at the meetings in which he was nominated as replacement but told by Fredrick Pado and Alfred Tukamana.

When Fred Pado [who was living away from the land on posting as a policeman] was cross-examined it was plain to me that he understood little of the background to replace Martin Tango or the underlying reason, to recover the land as customary land. This was the theme running through all other claimants' evidence.

Martin Tango despite his refusal originally to sign the lease agreement back in 1992, had always been the representative of the family clan. He had been confirmed as the spokesperson by the Chief Justice, notwithstanding his earlier claim to own the land.

This meeting which Demimana had not attended, was sponsored by SMMS. (Exhibit 129-boat hiring to search landowners and transport landowners to attend meeting at Buala - received from SMMS $800 dated 23/01/13) On these facts I infer that SMMS was interested in the change of representatives and paid money to facilitate these meetings to which Demimana refers. Riagano confirmed that financial and logistical support from outsiders for meetings was not consistent with custom.

Lilley QC said at p35 of his written submissions, para. 104.

> "Dotho was a landowner and a Trustee of the Fifth Claimant's group (that is, Ben Salusu and Robert Kuare. Dotho stands to

have no interest in mining if SMMS does not succeed in this litigation. Ochi appeared to agree. It maybe that Dotho needed no other interest than his self-interest to side with SMMS, but whatever his motivation, it cannot be doubted he has done so. It appears that Dotho was entrusted with significant amount of SMMS"s cash in order to pay attendees at the January 2013 meetings held by the Third Claimant's clan to change its leadership. Dotho was not a member of the Third Claimant's clan, but he did suggest and organise the meeting. His involvement in another clan's leadership dispute is unexplained. What is clear is that Dotho paid the attendees of that meeting with money from SMMS.

(Ex. 92 at 16[j])

(This meeting preceeded the High Court application to substitute Martin Tango and James Ugura as trustee representatives.)

Raoga; it was put to Ochi in cross-examination that Raoga changed his support from his brother, James Ugura, because Raoga's support of SMMS would gain him the election of his clan as their chief. It transpired (after production of undisclosed documents, which were subject to the duty of disclosure but produced only upon their call) that SMMS had purchased Raoga's elevation for him using his influence with Dotho.

Bogese; Chief Bogese is a Kokolotho Thaba of the Bugotu House of Chiefs. He was a staunch opponent of SMMS mining on Isabel and in the 2007 proceedings, disposed to an affidavit that included statements to the following effect: "Sumitomo seem to be unable to understand the Isabel way of saying no. The fact is that the Bugotu House of Chiefs have by a majority acting in accordance with its own constitution

have concluded that it is not in the interests of our people and resource owners to deal with Sumitomo."

(Ex101[v]at18).

Despite this, Bogese was called as a witness in cooperation with SMMS in this proceeding. Ochi could not suggest why Bogese might have changed sides. As appears from Bogese's cross-examination, however, the seventh defendants would not pay him for assistance, but SMMS would do so."

(Transcript Day 55 Session4, p6,7)

This evidence raises sufficient doubt in my mind that these other claimants, Willi Denimana, Hugo Bugoro and Henry Vasula Raoga [in place of James Ugura] capacity to represent has been bought about by outside influence. That influence stems from SMMS interest in having its SAA's signed by representatives who would replace representatives named by the DME and known to SMMS even at the time of the tender.

The 5th claimant has never appeared. This reflects on the 1st claimants case for the other claimants assert support for SMMS. The 6th claimant is in no better position than the others for the representative appointment is tainted by SMMS influence.

At the commencement of these proceedings, I made orders in relation to R3.42 affecting landowner claimants and any others in that category claiming as customary landowner, since I regarded it as unnecessary to have a trial within a trial on that issue. The fact that land claimants were parties from the outset is no basis for standing if challenged.

For all of the foregoing reasons, the other claimants have not satisfied me of their entitlement to represent their clan or tribe in custom.

So far as Mafa Pagu the 5th claimant is concerned, the absolute absence of any material by that named claimant must be seen in the light of Axiom's criticism. [in terms of the prosecution of this case by counsel].

Lilly QC. relied on the principle stated in *Veno v Jino*[100], where Palmer CJ made observations in respect of standing to challenge the validity of an agreement for the acquisition of Timber Rights by a corporation, Orion Limited;

> "Insofar as the issue of standing to challenge the validity of the Timber Rights and Licence of Orion is concerned therefore, there is overwhelming evidence that the plaintiffs lack standing to usurp that Timber Agreement and Licence. They were neither parties to the agreement and were never identified as being part of the persons lawfully entitled to grant Timber Rights over Havahava Land. Until their customary claims or rights over Havahava land have been supported or endorsed by the Local Court or Customary Land Appeal Court, their claims at this point of time must remain as mere assertions insufficient to grant injunctory relief sough in this application. They may come back to court if armed with the decision in their favour."

Similarly, in *Leua v Kalena Timber Company Ltd,* Palmer JC observed that, in order for a non-party to an agreement to have standing to challenge its validity, the applicant must demonstrate possession and/or evidence of ownership or interest in the said land." As his Lordship had stated in *Veno*, "mere assertions over ownership are insufficient". So, I may say, are assertions as to representations when put in issue.

To the extent that the Non-SMMS Claimants purport to prove their representative capacity of certain land in custom in these proceedings, this court has no jurisdiction to make such determination. As Palmer CJ

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[100] [2004] SBHC 10

noted in *Veno*, if ownership in custom is to be relied upon as a basis for having standing to mount a challenge in the High Court, such customary ownership must be evidenced by decision to that effect by the proper arbiter of that question. Absent such evidence, the claim of customary ownership is mere assertion and cannot sustain standing.

Lilly QC. at page 57 and 58 of his submission said;-,

> "The mere claim of ownership in custom is a critical, and unavoidable, element of the Non-SMMS Claimants Claims in this court, even though the premise is, on the view advanced by the claimants, not enunciated in terms in the claim. At worst, the fundamental question of ownership of the anterior customary land is dealt with sub silentio so as to avoid the jurisdictional complaint. As Palmer JC remarked in *Vangavoli v Dalsol Limited,* the task of the court is to identify "the real contentious issue." If that issue is "(customary) ownership over the said land," it must be resolved elsewhere. Again, assertions of representation, springing from the tribe or clans customary manner of appointment, are questions for elsewhere, the Chief's Court or the Magistrate.

Sullivan QC argued that Mane had been the interpreter in relation to the Cheke-Holo speakers his use (since it was difficult to find Checke Holo/English Speakers) did not cause or contribute to any similarity in statements, rather the statements reflected similar knowledge. The thread running through support for SMMS reflects that sense of reciprocation prevalent, a sense which Ochi was well aware of and used to good purpose (Rota).

I appreciate that these custom witnesses will recall events in various ways, according to their perspective, their need to focus at the time, their sincerity, and of course their ability to recall sometime after event. Contradictions worry us, accounts that agreed closely also should worry

us, and here (Exhibit 83) in the light of surrounding circumstances where SMMS has been shown to have been part of the process of representative change, the other claimants evidence does not satisfy me that they meet the proper representative hurdle expected by R.3.42. Riogano saw support by non-Solomon Islanders as contrary to custom.

SMMS need to obtain standing-

It was not until SMMS had sought and obtained authorities from these other claimants for reasons known to SMMS but not those reasons made known to the land owners; [claims of "stealing of land" and "putting to right" by correction of land title) to enable it to institute proceedings in the High Court claiming failure in the land registration process, that real conflict and division between those previously seen as the trustees or spokespersons of the tribes and clans of Kolosori land and those nominated at the instigation of SMMS by Ochi to represent their group, line or tribe in these proceedings, had arisen.

There is a dichotomy of interest between SMMS and the other claimants and one which SMMS has sought to use to its advantage. By misleading and interfering with the tribes and clans customary dispute resolution processes, SMMS has confused these other claimants about their purpose in coming to court. The change of representatives or trustees had been instigated by SMMS on a premise that masked SMMS's need for standing in these proceedings. This was made plain from the proceedings before the Chief Justice *in SMMS v AG* [2013] SBHC 102 where the substitution of Martin Tango [who had long been recognised as the spokesperson for his family clan and who had earlier signed the SAA for SMMS headed "Martin Tango land"] and Ugura by Denimana and Bugoro was made after the first two named had sought to withdraw the representation of their clan as a supportive claimant party in these proceedings. The Chief Justice allowed the change for reasons unrelated to the supposed change in representatives but rather since he was of the view continued representation of the clan would assist in the effective and fair determination of the issues in the case.

On Day 15 session 3 Tukumana accepted that at a family meeting in January 2011 Martin Tango had told Bava not to resign as a trustee for the group. Martin Tango and Denimana's authority to Sol-Law [to join the Thavia clan with SMMS in these proceedings] was given on the 13 July 2011. The statutory declaration by Tango withdrawing his authority was dated 3 August 2011. By a decision of the Thavia clan on the 25th and 26th of January 2013, [before the institution of proceedings which came before the Chief Justice] these two were removed as trustees. The evidence is clear that SMMS provided funds for the meeting. Denimana had been employed by SMMS. The manner of funding the meeting is contrary to custom, as Riogano said.

I am left in little doubt, having seen the evidence that Denimana and Bugoro's involvement was at the instigation of SMMS for its purposes. The standing of Denimana and Bugoro to represent in terms of R. 3.42 has not been made out.

The Anika Tai

The AO also recorded feasts to "clear off the primary rights inherited by Anika Tai through matrilineal system"[101]. The Anika Tai had claimed in 2007 and again in these proceedings. In the face of the evidence recorded by the acquisition officer, Palmer in 1992 and in the absence of any chief's decision giving a basis for the Anika Tai's claim to land, I find that the Anika Tai have no standing in these proceedings. Their opportunism relied on their expressed view in the 2007 proceedings that supporting SMMS, then, would afford them a claim to land which had been previously divested. In these proceedings the evidence shows they had sought SMMS's financial assistance to travel to Takota to seek tambu sites in an apparent effort to claw back an interest in land.

I have the evidence of SMMS having being approached to finance a "fishing expedition"; about Easter 2011 by members of the clan to go to Takata with a view to seeking support for their claim to land; the claim, here can only be seen as opportunistic. It was apparent from the 2007

[101] Ex. 131 pp.52-58

proceedings they laid claim under the auspicious of those proceeding but, not by proceedings in the Chiefs tribunal.

Those claiming through Anika Tai have no standing in term of Regulation 3.42 of the Civil Procedural rules. They never challenged the findings of the AO.

Axioms criticism of the mistaken assertions in the claimants final address.

At page 29 of Lilley QC's oral submissions, he points to the Land Titles Act s.230 dealing with Indemnity Provisions. The Claimants have alleged in their argument that there are no such provisions in our Legislation.

Again, the Claimants have asserted that Riogano did not agree with Chief Josiah Pone on certain things but in cross-examination, Riogano can be shown to have not disagreed with anything in the statements of Pone or Likoho, statements that he was asked to look at.

Rota's loan given on the 6th of January 2011, was for an amount of $2,000.00 by SMMS which amount represented some 14 days allowances paid him. He later obtained a further loan at the end of the month before Rota had returned to Honiara with the SAAs in February. Sullivan QC in address, stated that he had obtained the loan after the Takata SAA had been signed. This is wrong and does not recognise the advance or loan whilst SAAs were being obtained.

Environmental Impact Statement

In the meeting of Directors at Japan on the 8th of September 2010, it was clear that Abe spoke of dumping waste water into the sea at Isabel. This fact was not told either the SIG or the Landowners. The details of the EIS were not made available until 2012.

Mapuru

The fact of Mapuru's appointment was by virtue of the surviving jointly appointed representatives who ratified the new appointments. It was not a matter that relied on custom as alleged by SMMS.

Knowledge Case - Axiom

Lilley QC addressed the Claimant's Pleadings 01-AFAFA Claim – at page 31. It had been proposed that an amendment filed on the 14th of May would have included a Pleading in paragraph 59 that the 7th Defendants held a meeting on the 23rd of April, 2008 (the IBS Meeting) chaired by Cortez, attended by some 22 persons. By paragraph 59A and 59B in those proposed Pleadings, the Claimants denied that such a meeting took place, or if held, that meeting had no power to pass the resolutions.

The proposed Pleading filed on the 14th of May was substituted by that filed on the 15th of May, where the denials in paragraphs 59A and B were omitted. The proposed Pleading of the 14 May, [one of the iterations], goes to illustrate the manner in which this case has been prosecuted.

By paragraphs 76 on page 29 of Pleading 01 - (Claim), where dealing with Axiom's actual or constructive knowledge of the fraud or mistake alleged in the 7th Defendants (and its contribution to such), the claimants particularised facts going to the proof of such knowledge and contribution. In sub-para 4. in the superseded Pleading,(filed 14 May 2014), there were 6 dotpoint paragraphs; which included an additional two going to Axiom's knowledge, through Williams and Mount [for that they had prior notice of the 1992 Acquisition Proceedings and the IBS Minutes and thus were put on enquiry] and that Axiom, again by those two persons, was aware of or blind to the fact that such registration process by law affecting the acquisition of customary land, other than by the Commissioner under that process, was or could be unlawful, and thus these parties needed to enquire, failed to make such enquiry or ignored the results.

These additional two dotpoints were not pursued in the Final Pleading, 01- Claim at para.76.

The Claimants had in fact, abandoned those allegations.

Sullivan QC again relied on *Jones v Dunkel* ignoring that the particulars were silent on Williams and Mounts' supposed knowledge yet addressed me as though the amended pleading had remained.

The Translation of Documents forming part of the Evidentary Statements

Abe was called before the completion of the Claimants' land case and before Ochi, the Managing Director or Kudo, his opposite number in Japan, were called. On Day 37 (10 Feb 2014) the translation issue came before the Court for it had became apparent from Abe's cross-examination that he was unwilling to accept questions about documents which formed part of Kudo's statements, but not his own.

As a consequence, it became necessary to have various email chains which have not been translated to that point in time, translated to facilitate a proper understanding of the relevance of such evidence. Up until that time, the Claimants had not translated from the Japanese original emails on the basis of irrelevance, although the e-mails in Japanese sometimes remained in the statements as annexures. Some emails had not been translated on a claim of privilege.

It was, nevertheless, apparent that the material subsequently translated following the Court Order, was relevant and as a consequence, the Pleadings, once again, went through another reiteration.

The Sacking of the Minister of Mines

In his address Sullivan QC denied evidence that Ochi had been concerned to change the Minister for Mines, Kemakeza. Lilly QC pointed to Ochi's e-mail to Kudo dated 15 March 2011 at 12.42pm where the sacking was raised in the context of the cancellation letter[102]. Ochi wrote he would discuss with the aide to the Prime Minister about the investigative report [Kwaiga] and about sacking the Minister of Mines.

[102] Ex. 113-71A [YO-5] at p.101

All of these assertions by counsel leave me with a sense of disquiet for the court should be left in no doubt about the veracity of counsel's claims on the material before the court. This must be considered with that other material concerned with abuse of process.

Do these matters go to show lack of *umberrima fides*[103]?

That phrase is used in the old "White Book" (UK) in relation to Order 53 r.4 (UK)- *leave to apply for judicial review.*

> "Duty on applicant to make full and frank disclosure. - The applicant for leave must show umberrima fides, and if leave is obtained on false statements or a suppression of material facts in the affidavit, the court may refuse an order on this ground alone".
>
> *R -v Kensington Commissioners ex parte Polignac* (1917)1 KB 486 CA; *R –v Barnes ex p Vernon [1910]* 102 L.T. 860.
>
> In R v- Jockey Club Licencing Committee, ex p Wright [1991] C.O.D. 306, QBD]
>
> The grant of leave to move for judicial review was set aside on the grounds of material non-disclosure on the part of the applicant".
>
> The commentary to the White Book @53/1-14/32 says: "*on the other hand and since the Court had the power to determine the application without a hearing, it behoves the applicant to prepare the statement (for judicial review.....) in his notice of application and the supporting affidavit which must verify the facts relied upon fully, clearly and carefully, so that the judge reading those documents will have before him all the relevant material relied upon to support the application. Great care and circumspection will therefore be necessary in the preparation*

[103] Duty of applicant to make full and frank disclosure.

> *of these documents."* (Potts J in *R-v- Jockey Club Licensee Committee ex parte Wright*,[104] cited the passage with approval].

The application for judicial review here should be brought before the court with no less care and circumspection. Material non-disclosure has been and is a reason on which the courts may act when considering whether the test of *umberrima fides* has been satisfied but it is not the only test.

Lord Denning MR in *Central Estates, (Belgravia) LTD –v- Woolgar*[105] said when dealing with the phrase, "good faith";

> "The words "in good faith" are often used in statutes but rarely defined. A good instance is the Larceny Act 1916 which speaks of "a claim of right made in good faith" but does not tell us what "good faith" means....It is left to the courts to work it out from case to case: *see Applegate v. Moss* [1917] 1 QB 406....To my mind under this statute a claim is made "in good faith" when it is made honestly and with no ulterior motive. It must be made by the tenant honestly in the belief that he has a lawful right to acquire the freehold or an extended lease and it must be made without any ulterior motive, such as to avoid the just consequences of his own misdeeds or failures. If the landlord asserts that the tenants claim is not made in good faith, the burden is on the landlord to satisfy the court that the tenant, in making the claim, was acting dishonestly or with an ulterior motive".

I accept that where a claim, as here, is made that a claimant has not come to court in good faith then the burden shifts to the party making the assertion

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[104] (1991) COD306QBD
[105] [1971] 3 WLR 571 at 575

The phrase *umberrima fides* or good faith does not appear in our Legislation or Rules of Court but I accept they should be inferred having regard to the genesis of "judicial review".

In *Mogridge v. Clapp*, Kekewich J[106], opined

> "I think that the best way of defining the expression (good faith) so far as it is necessary or safe to define it, is by saying that it is the absence of bad faith – of *mala fides*".

Somewhat circuitous one would think.

In this case, Ochi has said that he did not want to make the mistakes that had been made before. He embarks then upon a course of conduct to achieve that purpose. Axiom in effect says the purpose exhibited that *mala fides.* His acts were not innocuous.

The process certainly adopted suffers from the criticism levelled by the Court of Appeal, the manner in which the appeal had been brought on the pleadings, for as I have shown, the pleadings went through much iteration and the rules were acknowledged in the breach. The case is that of the claimants "and counsel must be presumed to act on instructions".

Does this course of conduct, coupled with the "ficticious proceedings" highlighted, give this court sufficient disquiet to justify refusing the relief of judicial review, for the first claimant has in terms of the authorities, abused the process or failed the "clean hands" test? ►

[106] Mogridge v. Clapp (1892) 3 Ch 382 at 391

When considering Ochi's evidence, I am inclined to the view of Batty J[107], who when speaking of statements "in good faith" concerning the definition of defamation, said;

> *"good faith requires, not indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must.....in each case be considered with reference to the general circumstances and the capacity and the intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind, may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise* reasoning."

I am shown much by Axiom in support of its assertions of actions by SMMS through its officers and agents which conduct is in question and which exhibits *mala fides*.

The evidence is scattered throughout these reasons.

On any reading of Ochi's cross-examination, it is plain he was reluctant to address the question by his often unintelligible answers. As I say, in my synopsis of his evidence, he was consistently internally contradictory in his cross-examination. The email materials evinced a reliable basis for assessing his motives. Those emails showed him to be a manipulative officer of SMMS determined to avoid the earlier outcome where landowner resistance in 2007, thwarted SMMS expectations as they affected Takata land. SMMS evidence was at the commencement of this case before me, absent material matters.

Ochi did not act candidly by openly treating those with whom he had dealings and used "his agents", to interfere with the usual workings of SIG Departments, the Ministry of Mines and the landowning groups themselves. He did not want the outcome suffered on the last occasion. Inducing the Jakata groups to join SMMS on a false premise (as evidenced by Rota's SAA presentations) was Ochi's greatest reward, for

[107] R v. Wadood (1907) I L R 31 BOM 293 at 298

if successful, SMMS would have achieved its ends by division and not by consensual support, envisaged by the MM Act.

The fact of the SAAs would give this court little reason to examine closely the *casus faederas* of the non-SMMS claimants' support. But the evidence at trial has, in fact, revealed the involvement of SMMS in the SAA process.

I accept Axiom's argument that Ochi's motive was to gain support of the landowners on his terms for the support was necessary for these proceedings. His actions seeking to change landowner representatives continued beyond that time when the Acting Minister, Hon. Bradley Tovosia had granted a prospecting licence.

Until February 2011, SMMS was the only company on the ground and the option for landowners was made clear. Sign the SAAS or else waive any prospect of mining.

The political instability especially, surrounding the Minister, emboldened Ochi; he treated the Minister with distain. He manipulated Damilea, he suborned and manipulated Rota to his purpose.

It is not difficult to see Ochi's logic. By using these agencies, he was able to garner support for his SAAs. The Minister's trip illustrates his prevarication – certainly he was not ashamed of his conduct, thinking perhaps of the greater good as it involved SMMS, nor did he prefer it otherwise. He did not act candidly to seek to fulfil an obligation he had undertaken but personally disliked, in sending the Minister on the proffered trip. I find he acted in bad faith towards those landowners who were entitled to the support of the DME in the SAA meetings, support SMMS had suborned to its own ends.

When considering the Ministers trip, looked at objectively, Ochi's conduct was dishonourable in that he made the offer (couched in terms that required the Minister to make the approach but with the expectation of acceptance nevertheless) of the trip, achieved his purpose in having the LOI and award published and although Ochi was without full power, as it were, to carry out the implied offer of the trip, was casually dismissive of the obligation since Ochi saw the Minister as a criminal not worthy of consideration.[108]

It is not the wish to avoid the mistake of the past which Axiom says illustrates the lack of good faith but the systemic way Ochi went about achieving his aims, a manner for the reasons argued which I have accepted as showing mala fides.

Ochi may be an excitable person driven by his sense of duty to his company "untrained to habits of precise reasoning" but his behaviour was absent honesty and principle to be expected of a Managing Director of this company seeking to benefit from the possibility of mining resources in the Solomon Islands. In the circumstances shown, there were no honest conclusions achieved through principled conduct but rather conclusions brought about by Ochi's manipulation and the suborned officers of the government. He treated the Minister of the State with distain. He believed his purpose was to be bolstered by consular assistance as and when he chose. He made unfound allegations of corruption without grounds.[109]

The claim for judicial review must be made honestly in the belief of the claimant's case. The case since inception has been through, as I say, much iteration, which reflects instructions to take advantage of changing circumstances as the evidence unfolded, evidence of the claimants themselves. That in the circumstances shown here, amounts to the abuse of the judicial process which the court should not countenance.

[108] A tone throughout his cross-examination Day 67 etc
[109] Page 46 Lilley Submissions

The acts of the claimant, SMMS, from the evidence are acts and omissions that leave this court to conclude the claimants case show absence of good faith.

For all these reasons, judicial review is refused. It consequently follows that all the Claims in terms of Chap. 15.3 of the Rules are refused. Claims 18,19,20 and 21 are also refused.

I propose to deal with the claimant's pleadings as they affect the four main areas of dispute set out by Axiom, if I am shown to be wrong in relation to the objection to the Claim.

Judicial Review of Cancellation of Award and LOI

Axiom argues that there is no justiciable controversy as to Award. It says the court does not have jurisdiction to entertain SMMS' claim to the extent that it seeks to review decisions or conduct in relation to the Award, since the international tender was a matter giving rise to contractual rights if any, and such matters relating to tenders, do not constitute a justiciable controversy for the purposes of seeking judicial review. For there is no public law element in the circumstances of this case, it is simply a commercial tender.

Axiom says that the tender process and the issue of the SMMS LOI under the MM Act are separate. I accept the argument that SMMS' entitlement was to have its tender assessed in conjunction with the assessment of all tenders and this was observed. The Minister wrote on the 23 November 2010 congratulating SMMS on the award of the Tender, a letter not delivered until 4 December.

SMMS wrote to the Minister of Mines on 6 December[110] and said

> *"I acknowledge receipt of your letter of notification dated 23 November 2010 and your Letter of Intent dated the 23 November 2010 on Saturday, the 4 December 2010. Please*

[110] Exhibit 27 .

note that as the date of receipt falls on a weekend, we request that the 15 days notification period should commence on the next working day, which is Monday, 6 December 2010. In any event I can confirm that SMMS Solomon Ltd accepts the award for tender of the Nickel deposits on San Jorge, Jakata and Jejevo in Ysabel Province. I also wish to take this opportunity to convey my sincere gratitude to the Solomon Islands Government and the Ministry of Mines, Energy and Rural Electrification, for having the confidence in SMMS Solomon Ltd to carry out the project. SMM Solomon Ltd takes note of the contents in the Letter of Intent and will undertake hereunto to comply with the relevant sections of the Minerals Act as soon as possible".

By Regulation 8(5) of the Mines and Minerals (Amendment) Regulations 2010 (5), the Board shall inform the Minister of the successful tenderer and whether or not the application for prospecting is acceptable for the purposes of Section 21.

By resolutions dated the 30 September 2010, the Board *resolved "the MB finally resolved to endorse the Tender Screening Committee's final report and the selection of SMM as the winning bidder of the Ysabel Nickel international tender and considered that the period of time for a Letter of Intent to be granted be for 12 months to SMM and the Minister be cordially and accordingly advised."*

There was never an application for a Prospecting Licence made by SMMS in relation to the Jakata Land. No application accompanied the tender bid. The Board could not for the purposes of s. 21 of the MM Act advise the Minister that "the application for prospecting is acceptable for the purposes".

Section 21(1) of the MM Act provides;-

> "21(1) .where the Board is of the opinion that an application for a prospecting licence submitted in accordance with Section 20 is acceptable, the Minister shall inform the applicant in writing (which writing is herein after referred to as the "Letter of Intent")) of his intention to issue the prospecting licence subject to the applicant acquiring surface access rights".

The Letter of Acceptance dated 6 December by SMMS is not an application for a prospecting licence. Section 21(1) of the MM Act refers to applications in accordance to Section 20.

In the circumstances, there can be no criticism of the tender process itself. SMMS certainly seeks to support the Award. The claimant's criticism is that the Ministers letter of cancellation went to the LOI and refusal to grant a prospecting licence. It was this issue that Sullivan QC says gives rise to the right to judicial review, for the Ministers act in purporting to exercise the power to cancel, miscarried.

SMMS did not lodge a Form 1 (application for PL) within 30 days after it had been advised of the acceptance of its tender bid on 15 September 2010. The reason is partly found in the wavier given by Auga.[111]

The offer of a prospecting licence was in terms of the LOI. I agree with Axiom that the SMMS LOI was granted pursuant to the statutory power found in Section 21(1) of the MM Act. It consequently follows that SMMS' claim relates to the Minister's act in purporting to revoke the LOI and the subsequent acceptance of the revocation by the Board at its meeting on the 12th April 2011, when Axioms PL was considered. The interim step, the facilitation of SAAs cannot be categorised as falling within the "special province of the State and where in consequence, a sufficient public law element was apparent" to adopt the wording of *Hibbert*[112]. The need to satisfy the requirements, especially those relating to SAAs, in the LOI, has no connection with the State sufficient

[111] Ex. 151 [k]2
[112] Page 328 ibid

to raise a public law element. They are matters between the landowners and the company. In fact while the claimant, SMMS makes no complaint about the procedure, which led to its award as I have shown, its involvement as evidenced by Sol-Law's letter and the waiver by Auga[113], in the tender process [and consequently its conduct of this litigation for the disclosure came late in the trial through Ochi's last statement annexing the letter and waiver, YO-5] reduced the Minister's involvement envisaged by the original tender, to a cypher].

The Tender, *per se* does not give rise to contractual obligations, for it is but an invitation to treat and any obligations which follow need flow from the terms of any relationship entered into by the parties as a consequence of the tender.

It must also be remembered, as both the 1st claimants plead[114] and Axiom concedes, there is an alternate private law remedy for possible breach of contract by the SIG.

This leads me to consideration of Axiom's argument that mandatory orders do not lie. No relief is available because any duty is not a public duty. [There may be a contractual relationship]. In any event, Axiom says, this court cannot grant relief by judicial review to compel the Board or the Minister to exercise their discretion in favour of SMMS.[115]

For that is the effect of the Claim at 11 which seeks reinstatement of the LOI and the grant of a prospecting licence over land the subject of existing LOIs.

This court has earlier clearly applied the principle underlying mandatory orders. In *Kuper v Trade Disputes Panel*[116] Lungole-Arwich J said;-

> "The order of mandamus can issue to compel statutory tribunals that exercise some judicial discretion to discharge its duty, if it neglects ignores or refuses its duty."

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[113] Ibid Ex. 151[k][1]-[2]
[114] Claim 11A
[115] Claim 11 of 01-Claimants Claim in consolidated pleadings
[116] [1998] SHBC 23 at p2

SMMS may have a claim as a consequence of the cancellation of the LOI should there be shown a contractual relationship with the SIG but mandatory orders are not appropriate in that case.

> "Mandamus may issue only when a person or body is required to perform a public duty. It is most commonly used to compel the exercise of discretion required to be made by a person or body performing public duty. An example is order compelling a subordinate court to do its work, not to compel it to make a particular decision – see- *R-v-Graham Campbell Ex Parte Herbert (1963)* 1WLR 279."

The court has no power to compel the Minister or the Board to reinstate the LOI or grant the prospecting licence, for that would be tantamount to acting in place of the Minister or Board.

It follows that on the grant of the award [and in the absence of any application for a Prospecting Licence by SMMS] it does not now lie in the right of the applicant to suggest matters which this court should direct the Minister or Board to adopt.[117] The House of Lords said;-

> (i) There is a danger of Judges wrongly though unconsciously substituting their own views for the views of the decision maker who alone is charged and authorised by Parliament to exercise discretion. The question is not whether the Secretary of State came to a correct solution or to a conclusion which meets with the court's approval but whether the discretion was properly exercised (post, p535B-C).
>
> (ii) The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelming in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision. (pp. 539H-540A)

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[117] R v Secretary for Trade and Industry [1989] 1 WLR 525 as touched on in Kuper, there are other remedies available as envisaged by Ochi

While a quashing order may be considered in relation to the exercise of a Ministers discretion for instance, no mandatory orders can lie in these circumstances. I am satisfied the claim for mandatory orders in Claim 11 has no basis in law. Claim 11A will be addressed later in these reasons. [Claim for specific performance of the agreement in pleading 97A] .

The SMMS Case on its claim to tender [bid] in the face of S.20[5][c] of the MM Act

The international tender was made public on the 3rd of July 2010.[118]

By its statement of case, at para 19. SMMS pleaded;

> After-
>
> [a] requesting clarification from DME as to whether SMMS was precluded by s.20[5][c] of the MM Act from submitting a tender;
>
> [b] receiving clarification [in the form of an advise of the Attorney General] to the effect that SMMS was not so precluded,
>
> SMMS lodged the SMMS Tender on 15th September 2010 in compliance with the international tender, in which SMMS *inter alia* made an application for prospecting licences over each of San Jorge, Takata and Jejevo.

The Crown admitted the fact of the request for clarification in 19 (A), but did not admit the reminder of the pleading, saying that the (legal) advice from the AG was internal advice for the Minerals Board and the Minister for Mines and further that SMMS would have submmited a tender in any event regardless of the advice.

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[118] Exhibit 21.

SMMS reply asserts that the AG's advice was sought by the DME special coordinator for the tender (Mr. Tolia) upon SMMS request for clarification as to whether it was precluded by S. 20 (5) (c) from participating in the tender and the advice was copied to SMMS by the Coordinator on the basis it was official clarification sought by SMMS. The company denied that it would have submitted a tender in any event.

Axiom says because of the fact that SMMS had at the time of its tender, existing three prospecting licenses (a fact not in issue),SMMS was in clear breach of S. 20 (5)(c) of the MM Act. Its tender consequently did not comply with the tender notice. But the defence goes beyond that simple statement and alleges complicity on the part of Daniel Damilea (of the Attorney General's Chamber) bought about by the acts of Ochi and his subordinates, acts motivated by the wrongful purpose to avoid divestment or the relinquishment of any subsisting SMMS prospecting licenses as required by the MM Act.[119]

By its defence it is clear that Axiom says the SMMS bid was a non-complying tender which the Director should have rejected.

Axioms Defence: No Proper Tender-

Non-compliance of international tender with the MM Regulations.

By para. 17 of the consolidated pleadings the claimants state;

> *"on about the 23rd of July 2010 the board pursuant to section 20(4) of the (MMM Act) called for the international tender for applications for prospecting licences for the nickel deposits of San Jorge, Takata and Jejevo and issued the international tender with a forward by the caretaker minister."*

[119] (Defence of Axiom at19. CourtBook Pleadings-10-3rd Defence and Cross Claim by 6th Defendants

Shortly before the international tender, Part IIA of the MM Regulations came into force. Regulation 3 b (1)(2) states;

> *"(1) For the purposes section 20 (4) the Minister may on the recommendation of the Board specify an area as a proposed area for prospecting by notice in the Gazette.*
>
> *(2) the Board shall first under-take consultation with the land owners, land holding groups or other persons or group of persons having an interest in specified area with the view of obtaining their approval in principle on the proposed prospecting before making its recommendation to the Minister".*

As part of the its defence Axiom pleads absence of landowner consultations in accordance with Reg. 3b(2). It is plan from reading Regulation 3b that the consultation process comes first. The Crown by way of its defence to 17 of the Claim admitted the pleading. The seventh defendants did not plead, since 17 "does not contain any other allegation against or directly in relation to any of them."

The Crown then may be presumed to admit that the prerequisite consultation process was carried into effect. In that regard Mr. Peter Auga the Director of Mines at the relevant time has giving evidence.

The claimants denied absences of the landowner consultations. The Claimants cross examination of Mr. Auga. Note: Day 79 Page 38 went to this issue. Auga agreed that a number of DME awareness meetings were held at the Takata in about March 2010. The awareness meetings were in form of Community Awareness/Isabel nickel international tender presentation document by Rota Bata'anisia (of the Mines Department)[120]

[120] Exhibit 151d

There was in addition a plan for community consultation[121] by Tolia to the Provincial Secretary which showed the consultations schedules in terms of Reg. 3(b)(2).

There was no direct evidence however whether the recommendation was made to the Minister for the purposes of Reg. 3 (B)(2). I am satisfied that a consultation process was under taken with the persons at Takata likely to be affected by the tender proposal. But I have regard to the underlying wish as expressed by the BLA and the Cortez group to further the mining prospect for Takata land and the absence of any dissent voiced by Auga so that no recommendation by the Board to the Minister for gazettal may be inferred for the Board had sufficiently specified the area in mind, for Reg. 3 B (1) adopts the specified area as a proposed area for prospecting. The specified area can only be that area designated in the community awareness presentation document. The Isabel proposed international tender areas are plainly designated on the coloured maps. As well in the tender document in the executive summary the areas specified are *" 3 nickel deposits"* referred to as *the Isabel nickel deposit.*

At part 4. 2.1 of the Exhibit 21 the tender states *"All active mineral exploration tenements and the 3 tender areas are shown on tenement maps at Santa Isabel and San Jorge Islands on figure 1.*

Figure 1 correspond with the maps in the power point presentation of Rota Bata'anisia.

The claimant has argued that the absence of a gazettal on a reading of the Act and its regulation cannot for the reasons given affect the validity of the international tender. In the circumstances where the tenderers were under no doubt, the area had been shown by reference and the Board had a specified area, I accept that argument.

[121] Exhibit 151a

The 3PL Test –The Law.

Axiom satisfied me that on the 8th September 2010 in Japan before Ochi had the written advice of the AGC, the Minutes of the Meeting of the overseeing Director of this project, show that the meeting accepted no 3PL Test would apply to the Tender process. The inference to be drawn was that either Abe accepted Sol-Law's advice on the point (that no 3PL Test would apply to a Tender) or that Abe was aware the AGC had accepted SMMS's proposition put by Ochi that no 3PL Test would apply and would so advise the Director of Mines.

Ochi's email to Kudo on the 8th of September 2010 confirming the oral advice of Damilea supporting SMMS position (that no 3PL Test applied) may have influenced Abe in his acceptance of the waiver of the test to favour SMMS on a tender

A particular email is very relevant. Paragraph 19 of the pleadings referred to a requested clarification from the DME as to whether SMMS was precluded by s.20(5)(c) of the MM Act from submitting a Tender.

It is plain from the reading of this email (*Exhibit 113 tab 18C*) that the email details the request for clarification.

The email appears to have been drafted by Ochi for Mason. It is clear that Mason has made amendments, as he says, to the email which is intended for Damilea of the AGC.

I set out the email in full since the court finds that this is the background information and presumably request giving rise to the AGC's advice by Damilea, on the 3PL issue, advice given SMMS on the 10 September, 2010.

"Personal"

Dear Mr Damilea,

I really appreciate your frank comments on my personal question.

This email is continuation of our personal discussion on the above subject. Sometimes this year, the officers of the Department of Mines had confirmed to us that AG himself has verbally confirmed that the process of International Tender will be isolated from the normal process of applying Prospecting Licence, therefore the amendment of the Mines and Minerals Act/Limitation of 3 Prospecting Licences will not be applied at the process of International Tender.

Please also note that the background of this amendment is to eliminate the prospecting companies who has many prospecting licences (PLs) but cannot carry on prospecting work on its licensed areas because they are without financial capability. Please consult with DME officer (Director of Mines) about this issue.

What more important issue that require your consideration is, if the restriction of 3PLs is apply to this International Tender, then no company, who has currently had PL in SI could not participate in this tender because Winner of this Tender will get 3PLs. Therefore only new companies can participate. I think the 3 PL restriction is against the national interest. I heard that only a few company have shown their interest participate in this new International Tender including the company who already has PL in this country. In any case, I think it is important that you consult with your AC, working colleagues, the Director of Mines/Mr Peter Auga and Mr Don Tolia/Coordinator of the International Tender on this matter. THIS IS NATIONAL PROJECT AND SOLOMON ISLANDS GOVERNMENT HAVE TO SELECT THE BEST COMPANY TO BRING BENEFIT INTO THIS COUNTRY. Thank you very much.

Your friend

Best Regards

Mason"

I had previously been satisfied that having regard to the evidence of Abe in Japan, SMMS had not relied on the written Memorandum of Advice given to SMMS on 10 September 2011 for the Japan Meeting was on 8th September. It may be presumed that the information on which Ochi (and Abe) relied was known to SMMS on or before the 8th of September. It may be supposed and there is no conjecture in this supposition, that Damilea had communicated the information in the proposed Memorandum confirming the avoidance of the 3PL test to Mason on or before 8 September.

There is then clear evidence that Ochi and Mason were involved in influencing Damilea's advice in relation to the 3PL test. That information and detail in the email referred to above was clearly drafted by Ochi [and varied by Mason] to accord with his views in relations to the 3PL test. It matters not whether his views were views which followed advice from Sol-Law or not. The important fact is that the email is clear evidence of the involvement of Ochi and Mason in Damilea's final Memorandum of Advice. SMMS may ask a proper officer and in fact Tolia, the Coordinator of the tender process impliedly acknowledged such request when he forwarded the official AGC memo of advice but an approach directly to the AGC notwithstanding it purported to be from a friend on a personal matter in this case is further evidence of improper interference in the office of the Attorney-General.

SMMS' approach to the Director, Auga anticipated the AGC reply and the AGC response followed Mason's approach by this e-mail.

The fact remains that SMMS went with its bid to Tender with full knowledge of the possible effect of Section 20.(5)(c) of the Mines and Minerals Act [Cap.42][the MM Act].

S.20(1)" Except in cases of Tender, each application for a prospecting licence shall be made to the Director in the prescribed form and shall state that- [amended by S.4.2/2008] **[a]-[k].**

(2) Each application shall be accompanied by payment of such application fee as may be prescribed.

(3) The Director may require an applicant to amend an application with respect to the proposed work programme and other matters.

(4)The Board may call for tenders for a prospecting licence over a specified area, in which case, all such tenders shall comply with the prescribed procedures. [Amended by S.4.2/2008].

(5)The Director shall refuse to accept an application for a prospecting licence if at the time of the submission of the application -

(a) there is pending before the Board, an application for a prospecting licence or mining lease in respect of all of the prospecting area or;

(b) all of the proposed prospecting area is subject to an existing prospecting licence or mining lease.

(c) The applicant or an associate company is currently holding three or more prospecting licenses over different prospecting areas and has not applied for a mining lease or commenced mining in at least one prospecting area.[Inserted by s.4.2/2008]

(6)Where an application for a prospecting licence is in respect of an area which includes part of the area which is the subject of -

(a) any previous application, pending before the Board, for a prospecting licence or mining lease – or

(b) any existing prospecting licence or mining lease, the Director shall accept the application and shall excise from it that part of the area which is the subject of such previous application, licence or lease.

(7) The Director shall inform the applicant of any excision made pursuant to subsection (6)b)".

I should say this Court is now not concerned with either or any such advice by the AGC given Ochi or advice with Abe, when considering the meaning and effect of s.20(5)(c) in the circumstances affecting SMMS at that time for it is a question of the application of the law to the facts found. There is no issue with the fact that SMMS had 3 prospecting licences and had not commenced mining.

By para.19 of the Claim, the claimants plead –

"19. After:

(a) requesting clarification from the DME as to whether SMMS was precluded by S.20((5)(c) of the MM Act from submitting a tender,

(b) receiving clarification (in the form of an advice from the Attorney General) to the effect that SMMS was not so precluded,

(c) SMMS lodged the SMMS Tender on 15 September 2010 in compliance with the international tender, in which SMMS *inter alia* made an application for prospecting licences over each of San Jorge, Takata and Jejevo."

Axiom addressed its defence and in its written submissions, said:

"The 3PL Test obliged the Director to refuse to accept an application for a prospecting licence if, at that time of submission, the applicant held three other prospecting licences and had not commenced mining work pursuant to them. The application therefore was the trigger for the 3PL Test. SMMS was, however, bound to lodge such an application with the Director, both under the terms of the Tender Notice itself and the Mines and Minerals Regulations 2009 (SI)(MM Regulations). Any such application by SMMS was liable to be refused by the Director pursuant to the 3PL Test such that it was necessary to ensure that SMMS could avoid the requirement to lodge such an application. The groundwork for further deception was thus laid. "*I have worked on many things to reach a satisfactory result for this tender, and one of them is the automatic issuance of the LOI to the winner (the tender documents specified that the winner must apply for an LOI within 30 days of acceptance)*"[122].

"Instead of merely completing an application or referring to the information contained in its Tender Documents, SMMS caused SOL-LAW to write a lengthy letter to the SIG which included a carefully drawn waiver and release. The signatory of that waiver was approached personally and no one explained to him the effect of that waiver. It is doubtful whether he was aware of its intended deception, but he signed. It is telling that although SMMS seek to rely on the waiver, they claimed legal professional privilege to avoid the divulging the advice given to them at that time."

[122] Exhibit 113-35 (email from Ochi to Kudu 12 October 2010 10.07)

The letter referred to in Axiom's submissions (above) written to the SIG is Exhibit 151(k)(1). It is written to the Permanent Secretary, Ministry of Mines and Energy and Rural Electrification dated the 9th of December, 2010 for Attention Peter Auga Esq. It is written under hand of Silvario Lepe for SOL-LAW Barristers, Solicitors and Notaries. This letter is important and omitting formal parts.

> "We refer to the above matter and in particular Clause to 1.8 Sub-clause 4 under Notification of Award of the Tender Documents which provides that "the Tenderer will be required within 30 days of notification of the acceptance of tender, to lodge an application for a prospecting licence on the prescribed form...."
>
> "We advised that our client had received the notification of Award dated 4 October, 2010 on 6 December, 2010. The notification of Award Letter paragraph 3 also provides that "your fulfilment of Section 20 of the Mines and Minerals Act 1990 is hereby requested in the next 30 days from the date of receipt of your acceptance of the Award."
>
> Our client had instructed us that you have informed them that that requirement has been complied with during the tender process and is no longer necessary. Please indicate by acknowledging at the foot of this letter that our client is not required to lodge an application for a prospecting licence under Section 20 of the Act since our client has already complied with requirements under section 20 during the tender process.
> Yours faithfully."

Exhibit 151(k)(2) is the waiver and release. It has been signed by Peter Auga the Director of Mines and dated 14th of December, 2010. It is in this form.

> "I, Peter Auga, Director of Mines, Energy and Rural Electrification acknowledge and confirm that I have waived the requirement under the Notification of Award dated 4 October 2010 that SMM Solomon Limited, as Tenderer, is required to lodge application for prospecting licence within 30 days from the date of receipt of the notification of Award, since the process under Section 20 of the Mines and Minerals Act has already been complied with under International Tender Process held for the San Jorge, Takata and Jejevo nickel deposits."

I find that the tender process had been interfered with by Ochi. The process clearly envisaged the winning bidder seeking the LOI by written request. By so doing, the successful bidder had an opportunity to reconsider whether or not to carry on (for it may have financial arrangements to finalize with the assurance of the Award) and it leaves the Minister with a final discretionary choice, whether to accept or reject the Board's advice. [I accept that a tender in itself does not create rights in contract, it is a mere invitation to treat] The offer of the PL in terms of the Letter of Intent (LOI) could only be made by the Minister after application by the successful tenderer. Provisions relating to Notification of the Award are set out in the Tender Document at 1.8.

The Tenderer, SMMS, has sought, by the terms of SOL-LAW's letter and Auga's waiver, to acknowledge the variation of the express term in that Tender [requiring the application for the PL] and also to have the process varied to exclude any discretion in the Minister. The effect of the waiver by Auga was to dispense with any need for an application and extinguished the Minister's discretion. For, even without application, the Minister had been advised by the AGC to offer, by way of LOI, a prospecting licence to SMMS. This was not in accordance with either the

terms of the Tender Notice applying to all those who lodged bids in answer to the Notice or the Regulations dealing with Tender[123].
Although there has been no request for the offer by the Minister of the PL by SMMS, the waiver and release [Exhibit 151(k)(2)] by Auga had effectively (for SMMS' purpose) negated the requirement in terms of the Tender by SMMS to furnish an application for the prospecting licence in accordance with the Regulations.

It rather puts the company, SMMS, in the curious position of having negated the Minister's discretion, whether or not to enter into a contract with the successful tenderer by way of his letter of intent. For that is the resultant when the previous mandatory requirement resting on the successful Tenderer to apply for the LOI was waived, SMMS claims, by Auga.

Axiom's argument initially deals with construction of this section 20 of the MM Act.

"there are two construction issues with respect to section 20(5)(c) of the MM Act and whether it applies in the circumstances.

(a) The first is that only sub-paragraphs of Section 20 (1) are excepted "in the case of tender". To except all subsections "in the case of tender" as the claimants contend, because of the regulations (prescribed procedures) for s. 20 (4) is to give those words in s.20 (1) no work to do and also impermissibly [as we noted above], construes the legislation by reference to subordinate legislation.

(b) The second is whether or not the word "shall" in the prefacing words is mandatory or directory. The approach to be taken in the proper construction of the word "shall" is that laid down by the Lord Penzance in *Howard v Bodington*[124] where his lordship stated –

[123] Reg.3C[6] MM Regulations
[124] [1877] 2PD 203

> (c)"I believe as far as any rule is concerned, you cannot safely go further than that in each case, you must look to the subject matter. Consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act. And upon review of that case in that aspect, decide whether the matter is what is called imperative or only directory."

Axiom's first point in relation to (a) is that on a proper reading, other subsections are not excepted, in the case of Tender. I accept that assertion.

I should say that much argument turned on the effect of "tender, tender notice and tenders" as used in the Act and the MM Regulations.

I should also say that since the amending MM Act (No.2/2008) and the Mines and Minerals (Amendment) Regulations 2010 (Gazetted effective 21st July, 2010) were in effect at the time of the Board's tender, the proper approach to construction is as if the Act is "always speaking" so, to adopt Lilley QC's expression, the words must be interpreted as they stand in the current law.[125]

Axiom says the claimant's construction of s.20 (5)(c) of the MM Act must be rejected in so far as it is impermissible to approach statutory construction to interpret a statute by reference to delegated legislation made under it. It is also impermissible to have regard to the amendment history of the Statute, since the Act must be read as if it is always speaking so that the words must be interpreted as they stand in the current law. Further, the search for {parliamentary intention} is not an enquiry as to what the executive sought to achieve in drafting the Bill,

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[125] *Peart v Stuart* [1983] 2AC 109 at 117–118 per Lord Diplock

but is ascertained from the applications of canons of statutory construction to the words of the Act.[126]

This court should look to the words of the statute to see whether the legal meaning corresponds with the grammatical meaning before looking further.[127] That is to a large part, the position I take when constructing this section. Only if I find wider consideration of context necessary, should I go beyond the grammatical meaning when that turns to be problematical.[128]

Having regard to the authorities quoted, I accept that the proper approach to statutory construction is as stated, the Act must be read as if "**it is always speaking**" so that the words must be interpreted as they stand in the current law. It is impermissable to look to extrinsic material as suggested by the claimants in this instance.

The word "tender" is defined in the MM Act, interpretation; s.3 to mean " *inviting, soliciting or placing on an open market, whether domestically or internationally, a land area proposed for reconnaissance_prospecting or mining".*

S.20(1) then, where it refers to the exception, "tender" is speaking of inviting, soliciting or placing on an open market,.. a land area proposed for prospecting.

By s.20(4), the Board is the designated authority to do the inviting in relation to a land area proposed for prospecting.

The reference, there, to "tenders" is the plural of "tender" in the interpretation section which predicates the use of the words in the Act.

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[126] *Inland Revenue Commissioners v Hinchy* [1960] AC 748 at 767 per Lord Reid, *Chen Ho Cheon v Rok* [1998] SBHC 78, *Central Bank of Solomon Islands v Bank of Hawaii Corp Ltd* [2002] SBHC 111

[127] *Project Blue Sky Inc. v Australian Broadcasting Authority* [1998] HCA 28

[128] *Alcan [NT] Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41

> "S. 20(4). the Board may call for "tenders" for a prospecting licence over a specified area, in which case all such tenders **[the invitations by the Board]**shall comply *with the prescribed procedures.* [Amended by s.4(2)/2008]}. [my emphasis]

It must be remembered that the land area previously was 3 discreet areas which envisaged separate "tenders" but in fact the areas were later treated as one for the tender.

The phrase "...in which case, all such tenders shall comply with the prescribed procedures" is a mandatory obligation on the Board, when the Board, at its option has decided to invite prospecting of land areas. [In this case the land areas were amalgamated to one parcel; there was no need for "tenders" in respect of individual parcels]. The phrase, "all such tenders" towards the end of the clause, does not refer to the bid of a tenderer but must be read to mean the "tender" [or invitation] of the Board

The "prescribed procedures" are procedures found in the Regulations, 3C of Part 11A – TENDER PROCEDURES FOR PROSPECTING LICENCE.

The apparent change of characterisation in the use of "tenders" is to be seen in 3C (1). The first part, "*If the Board calls for tender under section 20[4], ..*" concerns the Boards invitation to treat for a prospecting licence over a particular area while later in the subsection, "*inviting interested persons to submit their respective tenders in accordance with the tender specifications approved by the Board*", the use of "*respective tenders*" in that context is loosely used to mean the bid of the tenderer. This interpretation accords with the need for the "*interested persons*", the tenderers, to ensure their bids [*respective tenders* in this context] accord with the *tender specifications* approved by the Board.

The tender specifications are governed by the need to satisfy Reg. 3C which prescribe all the matters the Board must address in the "tender" [or invitation].

The Board by Reg.3C(5) has to approve "tender specifications" which shall contain matters listed in that subregulation.

In accordance with s.20(4) by the Tender document published by the Board dated July 2010[129]; the particular matters in Reg. 3C(5) are addressed by conforming sections in the Tender document.

On their face, these sections pick up all the matters listed, (a)-(f) in sub-reg.3C(5). No argument, certainly has been raised by the first claimant, SMMS, that somehow these sections in the tender do not satisfy the requirements of Reg. 3C(5)) for SMMS seeks to rely on its successful bid.

The tender document was drafted with the assistance of SOPAC.

Reg. 3C(5)(c) – *conditions for prospecting licence*, is picked up by the tender document at Section 2 *–terms and conditions of the PL that will be issued-* and are set out in 22 paragraphs, which as well, includes a form of application for prospecting licence.

Reg. 3C(6) provides:

> "The Tenderer shall submit to the Director the following –
>
> (a) The tender documents in compliance with the approved tender specification, including the prescribed tender fee specified in the tender notice and,
>
> (b) An application for prospecting licence, including the prescribed application fee.

[129] Exhibit 21

The invitation by the Board then in terms of Reg. 3C (5)(c), invites an interested miner to treat with the Board for the issue of "the prospecting licence" envisaged and described by Section 2 of the invitational document, the Tender [Ex 21]. That licence has particular terms and conditions which are concerned with that "tender" by the Board.

By sub-Reg (6), the Tenderer (Miner) shall submit to the Director, the tender document [its bid] and an application for prospecting licence.

SMMS submitted the Tender [Bid] but no application for prospecting licence which was specifically, by Section 2 of the Tender document, required. The absence of an application, it transpires, may be sheeted home to the waiver by Auga where he had [perhaps unknowingly] purportedly unilaterally changed the terms of the Tender document as it affected SMMS.

Axiom says, "it is the Tenderers tender" (Bid) submitted in response to the call that must comply with the prescribed procedures.

I do accept this assertion, for the bidder should follow and attempt to satisfy the requirements in the Tender document prepared by the Board for the SIG which follow the procedures prescribed by the Regulations.

The classification of the phases of the tender process, accords and is consistent with authority which address commercial tenders. The obligation rests with the authority seeking to tender the land to comply with regulatory matters, otherwise the "tender" has no basis in law. The bidders interest is to seek to satisfy the requirements in the document. The bidder [tenderer] is not concerned with the Regulations but with the document which terms it need address.

Axiom relies on *Blackpool and Flyde Aero Club Ltd v Blackpool Borough Council*[130].

In *Blackpool*, Lord Bingham at 30 referred to that old favourite *Carlile v Carbolic Smoke Ball Co* [1893] 1QB 256 at 258 where Bowen LJ asked the question..."how would an ordinary person reading this document construe it?".

I am satisfied that Section 2.2 of the Tender Document plainly expects an application for a prospecting licence earlier described in Section 2.1[131] of the document. I agree with the proposition advanced by Axiom that the classification of the phases of the Tender process may lead to a contract.

Gallen J in *Pratt's* case[132], at 478 when speaking of contractual relations arising out of the tender process, said:

> "A tendering procedure of this kind is, in many respects, heavily weighted in favour of the Invitor. He can invite Tenders from as many or as few parties as he chooses. He need not tell any of them who else or how many others, he has invited. The Invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again, not here, involve time and expense to prepare, but the Invitor does not commit himself to proceed with the project, whatever it is. He need not accept the highest tender, he need accept any tender, he need not give reasons to justify his acceptance or rejection of any tender received.

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[130] [1990] 3 ALL ER 25 at 30, *Pratt Contractors Ltd v Polmerston North City Council* [1995] 1 NZLR 469 at 478-479 per Gallen J.

[131] Exhibit 21

[132] Pratt Contractors Ltd v Palmerston North City Council [1994] 1 NZLR 469

Later at page 479, Gallen J, when dealing with the tender documents said -

> "Secondly, the tender documents were extensive, detailed and substantial. They set out not only the nature of the project contemplated, supported by detailed specifications and drawings, but also set out the conditions of contract which would apply if a constructions contract were entered into. Most significantly, they included an addendum to the conditions of tendering which contains the following clause –
>
> (1) (b) tenders will be evaluated...{setting up particular method)-
>
> That indicates in detail the precise way in which the council will evaluate tenders and indicates in mandatory terms, the basis on which a contract will be entered into. If that is to impose obligations upon the council so that it is required to act in accordance with its indicated intention, then of course, it may become binding in a number of ways."

SMMS claims contractual rights arise out of the tender. For in the nature of the tender process in this commercial setting, obligations may properly be said to arise in and by way of contract. But I do not accept that the fact of a tender *per se* gives rise to contractual rights in a person who should lodge a tender bid. For the phases of a tender vary with the particular and in this case need be understood so that where the contractual obligation arises can be determined.

The Tenderer by Reg.3C(6) shall submit its Tender document in compliance with the approved Tender Specifications .

By Reg. 3C(7), the Director shall, within 10 working days of the expiration of the Tender Notice, inform each Tenderer..

(a)..

(b).. the procedures and estimated time of processing the tender.

(c) whether any other processes will be followed by the Board in finalising the Tender,

(d) the process to be followed by the Minister in issuing the Prospecting Licence,

(e) other information that the Director thinks fit

At 1.4 Section C of the Tender, the document addresses the matters in Reg. C(7)(a)–(c) by Evaluation of Tenders and at 1.8 - Notification of an Award, sets out the matters in Reg.3C(7)(d)[the process to be followed by the Minister].

This detail has been included in the Tender Document to avoid the need to send a separate Notification (within 10 days) and to appraise the Bidders fairly, of the whole of the matters affecting the process of the Tender. These steps then are the phases of the tender.

By 1.8 - the Tender document can be seen to conform to that classification of phases of a Tender as commonly understood, running through the authorities. For this is a commercial Tender. There is no need for the Tender to be accepted. But the successful bidder needs, within 15 days, to communicate his acceptance of the obligation to prospect in accordance with his bid. If he does not, no agreement can be implied since the power to strike an agreement with the SIG following tender, rests with Minister. [Reg.3C[7][d].

The successful tenderer is informed of the fact within 15 days of the official announcement by a communication under 1.8.1. The successful tenderer has 15 days in which to accept [or do nothing] the obligation to prospect in accordance with its offer in its bid, whereupon the agreement is deemed to be made at the time the Minister is informed.[1.8.3] The tender process then culminates in an agreement.

The Directors purported variation to the Tender document [the prescribed procedures for "tender" determined by the Board] falls to be considered in terms of the principle in *Pratts* case.[133] Here no contract by implied or express waiver to comply with s.20[4][the prescribed procedures] in terms of the tender document by the Director is available since the Board determines the procedures and they had been published.

The Tender Document.

1.8 Notification of Award

1. Unless otherwise specified in the Tender document, communications between the Committee and Tenderers or the successful Tenderer, shall be by post, facsimile, email transmission or personal delivery to the appropriate address designated by the parties for this purpose.

2. Not later than 15 days following the official announcement of the award of the Tender by the Minister, the successful Tenderer will be informed of the decision. The offer will be valid for 15 days from the date of receipt of Notification of Success.

3. The successful Tenderer shall inform the Minister in writing, within 15 days from the date of receipt of Notification of Success that he or she agrees to undertake expiration activities as specified in his/her Tender proposal.

4. The Tenderer will be required within 30 days of notification of the acceptance of the Tender, to lodge an application for a Prospecting Licence on the prescribed form. The application must be sent to:

Permanent Secretary, etc."

[133] Pratt Contractors Ltd v Palmerston North City Council [1994] 1 NZLR 469

What has happened here, is that contrary to the normal tender phases as set out in the Tender document, the Minister had been given to understand that he was obliged to grant the LOI immediately upon the resolution of the Board in selecting SMM as the Winning Bidder.

The Board could not have and did not opine on whether "an application for a Prospecting Licence was acceptable": it restricted its comments to an appropriate period for a Letter of Intent.

The Minister wrote on 4 December 2011 of notification of success. He also gave a LOI which was not envisaged under the Regulations until the process in the Tender document was followed. The notification of success was in fact dated 4 October and stated inter-alia;

> "This letter now serve as the formal notification of award of the Isabel nickel tender to your SMM Solomon Ltd which will be valid for 15 days from date of receipt of this notification of success. Your fulfilment of section 20 of the Mines and Minerals Act 1990 [the Act] is hereby requested in the next 30 days from the date of receipt of your acceptance of the award. Section 21 (1) of the Act will automatically be effected once s. 20 of the Act is fully and successfully complied with." [exh. 25]

The LOI dated 23 November 2010 stated inter-alia;

> "The Minerals Board has recommended that a letter of intent be issued to Sumitomo Metal Mining Ltd for being the successful bidder of the international tender of the Isabel nickel project.
>
> Therefore in pursuance of the Mineral Board's recommendation under section 20 of the MM Act 1990 and in accordance with the provisions of section 21(1), I as Minister responsible hereby advise you of my intention to issue to

> Sumitomo Metal Mining Solomon Ltd a prospecting licence over Takata, San Jorge and Jejevo areas as defined in the international tender of the Isabel nickel project subject to the company acquiring a surface access agreement with the landowners." [ex. 26]

I have dealt with the Ministers mistaken view of his obligation to forthwith offer a LOI notwithstanding the absence of compliance with the tender process.

SMMS letter of acceptance dated 6 December 2010 stated [omitting formal and introductory parts];

> "In any event I can confirm that SMM Solomon Ltd accepts the award of tender of the Nickel deposits on San Jorge, Takata and Jejevo in Isabel Province". ..
>
> " SMM Solomon Ltd takes note of the contents in the letter of intent will undertake hereunto to comply with the relevant sections of the Mines and Minerals Act as soon as possible. " [exh. 27]

For the fact remains that no application for a Prospecting Licence was ever made in accordance with the Regulations in terms of the Tender Document, 1.8(4). That is admitted by SMMS.

The Minister had apparently relied on advice of the AGC that he was obliged by virtue of the Award to offer the LOI without anything further. This obligation is directly referrable I find, to the understanding in Auga evinced by his waiver.

These criteria, then, in 1.8 are all indicia of a commercial tender. But "the offer" of the LOI by the Minister was made at the same time as the announcement. The announcement of the Award envisaged in 1.8.2 by

the Minister may also incorporate the Notification of Success [which is to follow the announcement within 15 days]. Whilst communications are dealt with in 1.8.1, the reference there, to the Committee is not that authority which will send the Notification of Success referred to in 1.8.2.

The Notification of Success follows the announcement of the Award of the successful tenderer by the Minister although the Minister may send the Notification of Success at the same time as he publically announces the Award. The Notification of Success may presumed to be issued by the Minister since the Minister is the responsible person charged with the issue of the letter of intent which may be seen to be in the nature of an escrow for that it may be held by the successful tenderer for 15 days whereupon it expires unless the successful tenderer undertakes to proceed with its proposal in its tender bid. On that undertaking, there arises an agreement.

The separation of the announcement of Award and the Notification of Success in 1.8.2 reflects the tender phases where the Minister, in this case, had the option whether or not to seek to proceed to contract by sending or not sending the Notification of Success with his offer of the LOI [as an escrow] in his discretion. If the offer of the LOI is not sent, no contractual arrangements arise for the way envisaged by which such arrangements can arise, are only dealt with in the Tender document, Notification of Award 1.8. By 1.8.3 the successful tenderer need agree to undertake work. For the Tender document contains the terms leading to an agreement.

As I say, the Minister appears to have acted contrary to the Tender document provisions dealing with separate notification of success and offer of an LOI as a consequence of the incorrect advice reflected in the waiver document of the Director, Auga. His discretion in terms of the phases of tender has been taken from him, for he issued the LOI on a false premise [that he was obliged to offer the LOI immediately he had sent the notification of success document, relying on the advice of the AGC but nevertheless the LOI remains an escrow pending fulfilment of the condition calling for the undertaking to proceed with the work. No undertaking was given. The condition in the Tender document in 1.8.3 to agree to undertake the work was not satisfied.

The claimant SMMS contends it has won the tender and subject to satisfactory provision of SAAs, the Minister, in accordance with his LOI, must issue a PL.

SMMS had not followed the terms of the Tender document. It expressly relies on Auga's waiver of the 14th December 2010[134]. No PL has been applied for in terms of the Regulations. There is no explicit reference in the company's Isabel Nickel Tender (Exhibit 22) to the need to apply for a PL "in terms of the published (SIG) Tender published on the 23rd of July 2010" for as Ochi had said in his earlier report, *he had done much, leading to the Tender,* including apparently arranging the issue of an LOI without the need to apply for a prospecting licence.

This arrangement was detailed in SOL-LAW's letter to the Permanent Secretary in December[135] and acknowledged by Auga in his waiver. It is inexplicable in face of Section 2 of the Board's tender document. It may be explicable if one recalls, that SMMS was particularly careful to avoid breaching the 3PL rule, and that the Company's Isabel Nickel Tender had been prepared in Japan before the 8th of September, 2010, when the Management meeting approved the "Tender" (bid).[136]

So the company in its tender bid, did not presume to seek a prospecting licence nor apply for one, once it was notified of its successful tender. It had, by arrangement with the Director, Auga, circumvented the provisions of S.20[4] which was the basis for Reg.3C[6]. The Tender document has the indicia of a commercial tender consistant with the authorities. The Tender Co-ordinator, Tolia had acknowledged receipt of SMMS's tender bid and reiterated those parts of the Tender document, 1.8 which culminated in the need for an application for a prospecting licence in terms of the Tender.[137]

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[134] Ex. 151[k][2]
[135] Ex.151[k][1]
[136] Exhibit 113 (b)
[137] Ex. 122a annexures at p. 205

As Lilley QC says, the tenders [bids] submitted in response to the call must comply with the prescribed procedures determined by the Board and incorporated in the Tender document.

I find on a proper reading of the section, an application for a prospecting licence is envisaged, directly in s.20[1] and impliedly in s.20[4][which relates to "tender"]. The applications need conform to the sub-section under which they are made. In the case of tender, Reg 3C[6] calls for the application and is authorised by s. 20[4].

Consequently the parties have not reached agreement upon any such terms as are legally necessary to constitute a contract. The terms of any prospecting licence envisaged by the Ministers' LOI remain indeterminate since SMMS denies any licence envisaged by s.20[1] and no application for the licence proposed in the Tender document was ever made. A court cannot go outside the words the parties have used in an attempt to make a contract.[138]

Consideration of the Act in the fashion, suggested by Sullivan QC where the use of the word, "tenders" in s.20[4] should be read as meaning the tender document of SMMS, does not accord with a proper construction of the Act. His argument that the "application" at the commencement of s.20[5] can only apply to a direct application under s.20[1] [and not to any application envisaged in terms of a tender] ignores the very procedures prescribed by the Regulations affecting "tender". These Regulations at R.3C[6] mandate an application. SMMS says it was only concerned with the tender.

When dealing with Reg.3C[6] for instance he says the tenderer is required to "submit" its tender document to the Director who in accordance with Reg. 3C[8] shall refer **all tender documents** and the applications for prospecting to the screening committee. He ignores the second part of Reg.3C[6] which calls for an application picked up in the wording of Reg.3C[8]. Later he says the Director had no discretion to refuse to accept the SMMS tender yet by Auga's waiver, SMMS purports to rely on some unexplained Director's {Auga} power to accept the fact

[138] Hillas & Co. V Arcos Ltd [1932] 147 LT 503 at 514 per Lord Wright LJ

that SMMS has complied with s. 20 of the Act. In other words, SMMS accepts the fact that it requires this waiver to avoid some obligation resting on the company by virtue of the MM Act.

I infer from the wording of the waiver and the letter from Sol-Law which preceded it that the obligation related to the need for an application for a prospecting licence.

This argument by SMMS in support of its statutory construction of the section 20 does not find favour. It is wrong by its selective choice of particular parts of the Regulations which suit its purpose; to avoid an application. So far as its argument addresses "application" as that constrained to only mean an "application" envisaged by s.20(1), I find that it ignores the fact of the application required by Reg.3C(6) which must be read *ejusdem generis*, [bearing in mind the separate application provided for in s.20(1)] to give meaning and effect to the provision in s.20[4] and is designed to guard against the omission of the need for a prospecting licence application. Both applications are caught by the provisions of s.20[5].

Section 20(5)(c) states-

> "The Director shall refuse to accept an application for a prospecting licence if at a time of submission of the application –
>
> (a) there is pending..
>
> (b) all of the prospecting area is subject to an existing prospecting licence...
>
> (c)the applicant or an associate company is currently holding three or more prospecting licences over different prospecting areas, and has not applied for a mining lease, or commenced mining in at least one prospecting area (inserted by s.4 (2)/2008)".

I am satisfied the obligation is on the Board under s.20(4) to comply with "the prescribed procedures". It is not and cannot be a statutory obligation

on the Tenderer, the mining company. Any obligations or rights of the Tenderer arise by virtue of contractual principles. For the Board, in compliance with the Reg.3C, draws the tender specifications referred to therein. There are no tender specifications for consideration by willing tenderers until the Board draws them in accordance with that Reg.3C. The Claimant's argument, based as it is on this point, fails. It would be wrong to suppose the Board could publish a Tender document calling for compliance with Reg.3C by tenderers.

The tender or bid is an acceptance of an invitation to treat by the Board. On a proper reading of s.20[4], in the case of "tender", a prospecting licence application is a necessary part of the Bid, for the tenderer need address and comply with the specific provisions in the Tender document. Omission to seek in the document of bid, by the fact of lodging the application in answer to the invitation, a prospecting licence application does not avoid the fact that the Bid need comply with the Tender specifications. The tender process envisaged by s.20(4) culminates, after process governed by the MM Act and Regulations, in "a prospecting licence"; that is what SMMS claims in its pleadings at para.19.

The Director cannot purport to waive requirements in the Tender document [to apply for a prospecting licence] since the MM Act mandates, in s. 20[4] that such "tenders shall comply with the prescribed procedures". The Regulations explicitly call for an application for a prospecting licence. That licence is described in the Tender Document and again, the need to apply, in the specifications which comply with the mandatory obligation in Reg.3C[6].

SMMS had three prospecting licences at the time of submission of its tender bid. The legal advice to the Director (and advice by Damilea to the Board) was incorrect. On a proper construction of s.20 of the MM Act, the Director was obliged to refuse the bid by SMMS as non-complying for the Bid was in terms of tender, by a company already holding 3 prospecting licences, a fact not in issue.

Axiom says "where an offer specifies a particular mode of acceptance, the offer can only be validly accepted by the offeree communicating its acceptance of the offer in that way" *Finance Ltd v Stimson*[139] .

Now Lord Denning MR was concerned with finance to purchase a motor vehicle when and if the agreement had come into effect.

The Australian High Court case more relevantly dealt with the construction of particular documents to determine whether there was a contract capable of being specifically performed. It involved an option to purchase agreement given by a grantor who subsequently died before exercise of the option and the grantees wish for specific performance in its favour. The facts bear no relation to this case either, although the point, that there had been no valid exercise of the option, on which the majority of the court agreed, focused on the failure to effectively carry out the terms of what had become a convoluted case through the death of the grantor and the failure to nominate an agent in the agreement. The crux was that the grantee, Amoco had failed to properly exercise its option in terms of the documents, the option and the contract for sale of land.

> "The case so it seems to us, is one in which there is a stipulation that a deposit shall be paid but there is no identification of the person to whom it is to be paid. In such a case it is to be implied that payment will be made to the other contracting party, his successes and assigns, assuming that the option is personal to the grantor."

Here, no implication can to be drawn that an agreement arises in the face of waiver of the very basis of the contract, the application. The very words of the Tender document have been avoided. The application for a PL has not been made. The payment with the application for a PL

[139][(1962) 1 WLR 1184 at 1187per Lord Denning MR. and Laybutt v Amoco Aust.Pty Ltd (1974) 132CLR 57]

envisaged by Reg.3C(6) has not been paid. No contract between SMMS and the SIG came into existence.

SMMS through its solicitors Sol Law, wrote to the Permanent Sec Ministry of Mines and Energy and Electrification on 9 December 2010[140],

> "We refer to the above matter and in particular to clause 1.8, subclause 4 under notification of the award of the tender documents which provides that the tenderer will be required within 30 days of notification of the acceptance of the tender to lodge an application for a prospecting licence on the prescribed form. We advise that our client has received the notification of the Award dated 4 October 2010 on 6 December 2010. The notification of award letter paragraph 3 also provides "that your fulfilment of section 20 of the Mines and Minerals Act 1990 is hereby requested in the next 30 days from the date of receipt of your acceptance of the award."
>
> Our client has instructed us that you have informed them that that requirement has been complied with during the tender process and is no longer necessary.
>
> Please indicate by acknowledging at the foot of this letter that our client is not required to lodge an application for a prospecting licence under section 20 of the Act since our client has already comply with requirements under section 20 during the tender process."

By exhibit 151K (2) the Director of Mines, Peter Auga, said;-

> "I Peter Auga, Director of Mines and Energy and Rural Electrification, acknowledge and confirm that I have waived the requirement under the notification of the award dated 4

[140] (Exhibit 151k[1])

> October 2010 that SMM Solomon Ltd as tenderer is required to lodge application for prospecting licence within 30 days from the date of receipt of the notification of award, since the process under section 20 of the Mines and Minerals Act has already been complied with under international tender process for the San Jorge Takata and Jejevo nickel deposits".

The reference to the compliance with section 20 of the Act in the waiver by Auga, may be taken as a reference to the waiver granted in terms of the AGC advice. Or it may be taken to mean that Auga has also waived the requirement imposed by regulation 3C(6); "submit..(b) an application for prospecting licence, including the prescribed application fee".

SMMS submits in view of the fee payable for the tender document itself [prescribed in the notice of tender] it was wrong for a fresh application fee to be levied in relation to a prospecting licence for the licence was envisaged by the fact of the tender. It might be hurtful to a company short of funds but there is no evidence that the Act or Regulations should be read with that concession in mind. No prospecting licence was applied for by SMMS either in the tender document or afterwards after notification by the Minister. For it is plain from reading the memorandum of advice by the AGC (Exhibit 25) and Ochi's para. 60 of his first statement (ex. 122a)

> "I am not a lawyer had no experience in how Solomon Islands legislation would be interpreted. I was aware that SMMS had three prospecting licences (one in Choiseul and 4 in Isabel). I therefore thought that SMMS should get advice as to its position. I recall speaking to both Mr Tolia and Mr Auga about the 3 PL restrictions. I am not sure when the first time was, but it was shortly after I became aware of the amendments. Both of them told me seperately, the three PL restrictions did not apply to the international tender. I recall in one conversation one of them suggested we get the Atty- Gen's advice but that may have been later")

Ochi's statement does not accord with Tolia's written advice and acknowledgement of receipt of tender bid on the 15 September where he particularly set out the requirement in the Tender document calling for an application. Ochi also fails to mention the email he concocted with Mason for Damilia.

The concern may well have been with the effect of s. 20[5][c] of the MM Act leading to the time of tender. [the Director's obligation to refuse acceptance of a tender document [bid] where the applicant already held 3 prospecting licences.]

I am consequently satisfied the letter addressed to the Permanent Sec (exhibit 151K (1)) coupled with the waiver by Auga, related to the advice of the AGC dealing with the 3PL issue. There was then, no compliance with the requirements of regulation 3C (6).

In any event, the Board had no retrospective power to vary the terms of the Tender Notice as it affected SMMS whether orally or by letter such as the waiver by Auga. There never was an application for a prospecting licence and consequently the Minister's letter of intent, predicated as it normally would be, on an application approved by the Board, was void and of no effect.

By 11A of its Claim, SMMS seeks specific performance of the agreement pleaded in 97A. The agreement is to be found in the International Tender, the SMMS Tender, the Award, SMMS's acceptance of the Award and the SMMS LOI between the SIG [represented by the Board and Minister] and SMMS to allow SMMS an exclusive period in terms of the LOI to be followed by a prospecting licence. I have dealt with the failure of SMMS to comply with the tender process. It is consequently difficult to find a concluded bargain between SMMS and the SIG for SMMS denies the need for an application for a prospecting licence yet purports to claim a right to one by virtue of the LOI. Since SMMS denies s.20[1] applications apply and no application has been made pursuant to the tender, it is difficult to find terms as are legally necessary to

constitute a contract.[141]There is no prospecting licence to which the LOI can possibly refer on SMMS' argument. The claimant has failed to establish on the pleading the actual material going to the terms of the contract it is sought to imply or any particular terms so that I cannot be satisfied they have reached any agreement in the circumstances of this case. The court should not lend its aid to the enforcement of some incomplete agreement.

If I am wrong and a contract did come into existence (it must be difficult to define its terms in the light of the letter of acceptance by SMMS) Axiom argues that SMMS claim against SIG must fail because, upon the Ministers cancellation of the Award, SMMS was put to an election whether to terminate the contract (and sue for damages) or keep it on foot; in the absence of unequivocal words or conduct that communicated SMMS's election to the SIG, SMMS has waived its right to elect.

Again SMMS has disentitled itself from relief because it is not an innocent party for it has breached a contract in two ways. 1) Contrary to clause 1 .7(b) (2) of the tender notice, either attempted or influenced the screening committee or one or more of its members in the process;[as shown by Auga's waiver document]or;

2) contrary to clause 1.8(4) of the notice; failed to lodge an application for a PL either before or within 30 days of notification of the SIG's acceptance.

I have dealt with the attempted influence of the Screening Committee, elsewhere and accepted that untoward influence. So far as the failure to apply for a PL is concerned for the reasons given, SMMS has not complied with the Regulations under the MM Act and consequently no basis for the Minister's letter of intent has been given.

As I say, Auga's waiver may be seen to relate to the earlier [mistaken] letter of advice from the AGC concerning SMMS's entitlement to lodge a tender bid, in which event the waiver cannot be interpreted to include the assumed later waiver of the need to apply for a prospecting licence [an

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[141] *Australian Broodcasting Corporation v XIV Commonwealth Games Ltd* [1988] 18 NSWLR 540 per Gleeson CJ at 548

entirely separate issue to the first] since the Board should not be fixed [by Auga's waiver] with the obvious failure to conform to the Regulations dealing with need for application for a PL after the notification of Award. The waiver could only relate to the presumed waiver of any requirement to comply with S. 20[5][c] by SMMS before submitting its tender bid.

Insofar as any election is concerned, it was plain that the company sought to firstly ignore the effect of the cancellation once it was on notice and secondly attempted to influence the SIG to sack the Minister and have the cancellation revoked. No election was made within a reasonable time of becoming aware by proper notice, of the cancellation. I do not need to address the question of loss, since SMMS has not sought to quantify any. SMMS's claim for breach fails.

THE 3PL TEST – 2

Axiom seeks support from the principal in *Wentworth v Loyd*[142] considered by Hodgson J in *Standard Chartered Bank v Antico*[143] that I may draw an inference as to the content of legal advice (where privilege is claimed) if there is other evidence on which a court will draw such an inference. This inference to be inferred, on reading SOL-LAW's letter to the PS Department of Mines dated 9th December 2010[144] and the Director, Auga's waiver[145] of 14 December, in response to the letter, is that SOL-LAW had advised SMMS the earlier letter of the AGC to the PS, Ministry of Mines dated 10 September, 2010 for Tolia (Exhibit 122a-YO-3 page 158)[confirming that the 3PL in s.20(5)(c) of the MM Act does not apply to SMMS], may be read to include no further need to comply with s.20 of the MM Act. For by its letter of 9 December, SOL-LAW said: (omitting formal parts);-

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[142] (1864) IOHL Case 589, 11 ER1154

[143] 3636NSWLR 87

[144] Ex. 151[k][1]

[145] Ex. 151[k][2]

"We refer to the above matter and in particular to Clause 1.8 subclause 4 under Notification of award of the tender documents which provides that "the Tenderer will be required within 30 days of Notification of the Acceptance of the Tender, to lodge an application for a prospecting licence on the prescribed form..." We advise that our client has received the notification of Award dated 4 October, 2010 on 6 December, 2010. The notification of Award Letter paragraph 3 also provides that "your fulfilment of s.20 of the Mines and Minerals Act 1990 is hereby requested in the next 30 days from the date of receipt of your acceptance of the Award". Our clients had instructed us that you have informed them that that requirement has been complied with during the tender process and is no longer necessary.

Please acknowledging at the foot of the this letter that our client is not required to lodge an application for a Prospecting Licence under s.20 of the Act, since our client had already complied with requirements under s.20 during the tender process.

Yours faithfully SOL-LAW..."

The earlier advice relied upon on paragraph 19 of the Claimant's Pleading, by Damilea of the AGC, by Memorandum dated 10 September 2010, concluded: - quote..

"thus s.20(5)(c) of the MM Act 2008 can only be exercised and applied by the Director of Mines if at all, an interested company have applied in pursuance of s.20(1) for a prospecting licence for the carrying out of prospecting in an

> area of Solomon Islands and not for an application made through international tender process".[146][sic]

While referring to this advice of the AGC dated 10 September 2010, in his statement filed by the AGC, (Exhibit 150), Auga does not mention his later waiver dated 14 December 2010, where he purported to have earlier impliedly waived the requirement under Reg. 3C[6] for an application for a prospecting licence, "since the process under s.20 of the MM Act had already been complied with under international tender process."

SOL-LAW's letter elicited this waiver. SOL-LAW's letter was no doubt written on instructions which it is reasonable to assume followed legal advice. The letter followed soon after that Letter of Acceptance of the offer of the LOI by the Minister. The Minister's covering letter spoke of the need to fulfil the requirements of s.20. Since the Letter of Acceptance of the offer had been sent on 6 December, it is reasonable to assume SMMS sought advice about its particular obligations under s.20.

Auga's waiver is in the same terms as the Letter. The confirmatory material going to the particular section, is that Memorandum of Advice of the AGC dated 10 September, 2010, advice relating to s.20(5)(c).

There is consequentially the bare assertion of compliance with s.20 in the waiver. By Ochi's statement YO-3 (Exhibit 122a at page 144), SOL-LAW by advice stated 26 August, 2010 said, when dealing with the new regulations: -

> "the Director has the very limited function of providing information to each Tenderer – Reg.3C(7) – and forwarding all the tender documents and applications to the Screening

[146] Ex. 122a YO-3 doc 54

Committee – Reg.3C (18). No other prescribed function. He is not given any other power of recommendation, let alone a power of rejection. Coupled with the expressed words of s.20 (1) and Reg. 3B (3), makes it clear that the tender process is completely separate from the normal application process under s.20 (1). The Director has the very limited function of providing certain information to each Tenderer..."

SOL-LAW's advice is clearly directed to the restrictive nature of the Director's powers in the new regulations.

By Regulation 3C(6);-

the Tenderer shall submit to the Director, the following: –

a. A tender document in compliance with the approved tender specifications;

b. An application for a prospecting licence;

By the approved specifications, the Tender document at 1.8.4 provided for the tenderer within 30 days of notification of acceptance of the Tender, to lodge an application for a prospecting licence on the prescribed form. Tolia acknowledged acceptance on the 15 September 2010.

By 2.1 of the Tender document, the terms and conditions of the proposed PL following application, are set out.

On SOL-LAW's view, reflected in its legal advice to SMMS of the Regulations, the Director has no power to dispense with compliance of this need to make application in Reg.3C[6].

But certainly, on my view of the Regulations, the proper construction is that the Board must comply with the procedures in the Regulations. The bidders need comply with the tender conditions. Auga's waiver in these circumstances lacks any basis either in reliance on the Regulations or by virtue of s.20 of the Act, although it clearly relies on the assertion in the letter of SOL-LAW of the 9th of December. That letter must be seen to have been written on proper instructions and it reflects an attempt to abuse the process of the Act and on SMMS' conduct of this litigation. I should say that no application for a prospecting licence was ever made. It is not clear whether the other bidders had similar waivers given them.

If I am wrong, s.21[1] of the MM Act provides for the Board's opinion to be given the Minister that an application for a prospecting licence submitted in accordance with section 20 is acceptable, whereupon the Minister shall inform the applicant of his intention [by letter of intent] to issue a prospecting licence. No application was ever made in accordance with s.20 since SMMS argued the requirement to make application did not apply in relation to "tender". In the absence of an application the Minister had no power to grant a letter of intent. The Boards advice to the Minister was absent any such opinion, rather it restricted itself to the period of any such LOI.

Minister's Power to cancel LOI

Cancellation of Award to SMMS.

The claimants say the Minister's power to cancel the SMMS LOI is not exercisable in isolation from the Mining and Minerals Board. They rely on s.36 of the Interpretation and General Provisions Act (Cap.85) which says "Where a power is conferred, by any Act such power shall include the power to withdraw approval of any instrument so approved"

They say assuming the LOI to be an instrument for the purpose of s.36, the Minister's original power to issue the "Instrument" (LOI) is not an unfettered discretionary power since the Boards "particular opinion" is

necessary, after which the Minister "shall" issue the LOI. [MM Act s.21(1)]"

Where the Board is of the opinion that an application for a prospecting licence, submitted in accordance with s. 20, is acceptable, the Minister shall inform the applicant in writing (which writing is hereinafter referred to as "letter of intent") of his intention to issue the prospecting licence subject to the applicant acquiring surface access rights".

The claimants say the moving party is thus the Board and the Minister merely the authority through which the Board's opinion is given effect. "Just as the Minister did not have an unfettered power to issue the letter of intent, so to his power to withdraw it was also not *unfettered.* As there was no Board recommendation the cancellation of SMMS LOI was *ultra vires* the Minister. The position is even clearer in the case of the Award. This was made by the Board under section s.20(4)and Reg.3D(4). The Minister merely gives notice of the Award. He has no power to cancel it".

By para 35 the Claimants pleaded at the time of the purported cancellation of the Award and LOI by the Minister, the Board had not advised the cancellation of either, the LOI had not expired and the Ministers grounds upon which he relied were untrue. What the argument lacks is a factual basis for the Board never found an application by SMMS acceptable when it made its recommendation to the Minister.

The Crown admitted the first part of the claim, but added that the Minister relied on a Cabinet decision given the 17th January.

Further the Board did ratify the decision, on the assumption that the Cabinet decision had been properly briefed by the Minister[147]. Since the filing of the "Consent Order" I presume it accepts the claimants on this pleading, without reservation.

[147] Ex.43

Axiom however, disagrees with claimant's argument for it presumes the need for the Board's later involvement in any cancellation, when the cancellation power in s.36(a) of the IGP Act "does not expressly require the Boards involvement, and the provision should not be construed as so conditioned, since to do so would run contrary to the prohibition against administrative decision–makers exercising discretionary powers acting under dictation."

(Axiom argued that s.36(a) of the IGP Act operated to confer on the Minister, as co-extensive with the power under s.21(1) of the MM Act to issue the LOI (instrument), the power to "amend or suspend" and by s.16(1) of the IGPA, "amend" defined to include inter alia "cancel").

Axiom relies on the ratio in *R v Stepney Corp*[148] where the Council of a Metropolitan Borough, having resolved to abolish an office of a Registry Clerk, considered they were bound by Treasury Practice to apply a particular deduction to compensation payable instead of taking account of the facts of the case themselves. The court held, that a mandamus would lie to compel (the council) to take the facts of the case into consideration and to exercise a discretion in the matter.

Here as Axiom suggests, the imposition of a mandatory requirement for the Minister to act on the advice of the Board (in relation to the cancellation) would tend to an absurdity, since the Board is subject to the directions of the Minister as to Policy in the performance of its functions which include advising the Minister on matters such as matters affecting s.20 of the MM Act, a function already discharged, yet s.21(1) does not presume to give the Board a right to advise where the Minister seeks to cancel his earlier approval. The Minister's power to amend or suspend [and cancel] should be that in s.36[a] of the IGP Act.

[148] (1902) KB 317)

I accept this argument since it is not correct to say that the Minister is merely the authority through which the Board's opinion is given effect. The Minister is the Minister responsible for the administration of the MM Act, and may be censurable in Parliament. The Minister cannot plead that the Board is the ultimate authority, and he merely its instrument.

The Ministers power to cancel was available. The argument by the Claimant, SMMS, that the Ministers discretion in acting to cancel, failed to take into account relevant considerations, is an argument when I consider my discretion. The relevant consideration in this case was the Cabinet decision.

The Claimant's' assertion that they were entitled to be heard before the cancellation.

It does not lie in the mouth of the 1st Claimant to point to the absence of an opportunity to be heard when SMMS turned a blind eye to the fact of the cancellation. It must be remembered that the Court of Appeal when dealing with a legitimate expectation (to be heard)[149] had said:- ***"secondly, there is the interest in promoting the integrity of public administration in the Solomon Islands"***,

So that, as here, where the dishonesty of Ochi has been shown to be directed towards undermining that integrity, a Court, as a primary reason, should refuse to recognise any expectation as claimed, as legitimate.

If I am wrong, then s.7 of the MM Act guides the Court. Axiom says while that action relates to "a permit, licence or mining lease" which the Minister may suspend on the advice of the Board, the legislature may have included a "show cause why" procedural fairness claim in that

[149] Axiom's KB Ltd v SMM (2012) SBCA 22/24 March 2012) at 415

section in relation to Letters of Intent, but the section is silent. I accept the argument that the necessary intendment in the Act is to abrogate that right. Axiom suggests that had Parliament intended not to exclude a procedural fairness requirement from the power to cancel Letters of Intent, it could easily have made provision to that effect but did not do so.

For if damage is alleged, the injured party may seek to claim based on the implied breach of agreement implicit in the LOI. The injured party is not left without recourse. The Minister's power under s.36[a] is unfettered.

I do not accept on the facts found, that the 1st Claimant has shown any right to procedural fairness.

The Claim of Lapse and Abandonment.

The acting Commissioner of Lands was summoned to produce documents and was cross-examined by the claimants. By Ms. Maelanga's evidence, it is plain she treated this acquisition as one which was on going but in need of resolution. She recounted that it was ongoing as "the land owners still have to refund the fees we have paid during the course of surveying the area." So a survey had been completed. She further said "9 years have passed now and this piece of job is considered as back log as first registration must be done, so the process of acquisition can be completed". The Land's Department certainly had no intention of treating it as lapsed, it wanted the procedure completed. The Cortez Group wanted it completed. The evidence is contrary to the argument that it had lapsed, notwithstanding the lapse of time.

The vesting process had not lapsed for it was the Department of Lands which accepted the process instituted in 1992 and completed acquisition and registration. But after this length of time, should it have?

The lease agreement dated November 1992[150] was ratified by the acquisition officer after the second meeting on 30 October 1992 for he had determined Joel Marlo, Hugo Bughoro, Levy Likoho, Lonsdale Manase, and Joseph Bengere to be the "trustees for the tribes", accepted as "owners and lessors" for the purposes of s.62 of the LT Act, of the particular parcels G1 – G6 (without naming a particular trustee for G5) as having the right to lease the land to the Commissioner. That particular trustee was Rev Wilson Mapuru who was accepted by the IBS meeting and ratified bythe surviving "statutory representatives"appointed by Palmer.

By clause 3 B the landowners appointed the named representatives (those named above) as lessors (under the agreement) and "as the joint owners of the perpetual estate in the land". The interest to be conferred on registration of the land (for that was the underlying purpose of the proceedings) were those contained in sections 109, 110, while the rights inherent in the perpetual estate were those in s.112 of the LT Act.

I presume there would have been no argument had that vesting taken place without further delay, [following the resolution of the various appeals, and accepting for the moment, the continued interest of Bughotu Nickel Limited – to pay the "rent"] and those persons registered, for that was envisaged and anticipated by the meetings.

The claimant's argue that through passage of time and in the absence of any further steps in the process for so long, it must be concluded that the proceedings had lapsed. Sullivan QC called in aid the reasoning in *Hiva v Mindu*[151] where the Court of Appeal affirmed the earlier decision of Goldsbrough J[152] who had said;- " If it were to be completed, the acquisition process should have been completed or proceedings commenced within one year of the process".

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[150] Ex. 10
[151] [2009] SBCA 22
[152] Unreported HSCI-CC 316/2007

The Court of Appeal *ratio* dealt with the finding that the lease, whilst closely resembling a lease at common law had never been executed and consequently the process failed. On the facts of that case, the process had also been tacitly been abandoned.

Two matters can be taken from the decision of the Appeals Court. The first is that the lease envisaged by s. 62 of the LT Act closely resembled a lease at common law and secondly, it is a question of fact whether the process had been abandoned.

The first point has been adopted by the 6th and 7th defendants in their arguments about agency. The second point is not supported on the evidence. Delay had been occasioned by the failure to fund proper survey of the subject land until only shortly before the vesting and that responsibility rested with the government. Delay had been occasioned by the time taken to finalise the appeals and the LT Act presumes a right in the appellants to have their objections heard.

The reliance on s.69[3] is unfounded. The right to seek specific performance is a discrete right available to the parties to the agreement. No party has sought to exercise that right. The section cannot be read as the claimant's seek; to fix a time limitation on the completion of the acquisition process in the absence of express words. Goldsborough J's comments were *obiter* in the circumstances of that case.

Sullivan QC's assertion by Maelanga's evidence, the vesting order was to give effect to the wishes of the landowners and does not overcome the deficiencies in the process. It does not support the conclusion that the Commissioner still wished in February 2011 to implement the agreement for lease.

That assertion is wrong on the facts. The Commissioner proceeded in purported compliance with the 1992 acquisition process.

The lapse and abandonment argument is not made out on the facts or the law.

The Mistake in the Commissioner by Vesting.

But delay has clouded this outcome, especially when those registered were not those named to be registered. The claimants say that is a mistake, and at worst, because of the non-customary manner in which these named representatives have been substituted purportedly at the IBS meeting, coupled with the inordinate delay, there never was proper process envisaged by the LT Act where it contemplates vesting, so that the purported vesting was a nullity, from the outset and thus registration should never have happened. I have dealt with the lapse argument.

The 6th and 7th defendants say, since "leasehold interests", which sprang from the acquisition process are not part of custom [for custom controls "rights" whether for my convenience termed usufructuary, primary or secondary or howsoever named or understood in the language of the tribe or group] affecting customary land and custom does not recognise leases [a Western concept] and since the lease has the indicia of a lease at common law[153], custom no longer applies to the interpretation of, or the manner in which the agreement is to be considered. It henceforth needed to be considered in terms of the common law of agency and contracts.

It follows that the rights of the parties in the agreement to assign for instance, are to be ascertained in accordance with common law principles. They submit through Lilley QC, this must be so, for by the fact of the appointment to be joint owners of a perpetual state in land;

> 1, that deaths and incapacities occurring to those appointed must have been in the contemplation of the parties making the appointment when it was made. [On death, for instance the interest of the deceased "joint owner" passes to the survivors, a Western concept not recognised in custom]. It consequently stands to reason that, in terms of the lease agreement, where these persons are named as joint owners, on the passing of one or other, the succession will be in terms of adopted law

[153] *Hiva v Mindu* [2009] SBCA 2 at p.3

(the survivors will stand as representatives) for custom no longer has a part to play;

2, that the appointment would not lapse or fail for any reason not provided for by statute.

Nothing in the LT Act addresses the failure of any appointment of owners and lessors named in the agreement, so that we are then, left to determine the appropriate law governing these circumstances touched on by Lilley QC.

It has been called into question for the claimants say they had no authority in custom to do what they did. The claimant's pleadings rely on the failure to adhere to custom.

The issue then is whether custom continues to govern the "owners and lessors" conduct and powers in accordance with the lease agreement or on the 6th and 7th defendants' argument, does the common law of agency as its affects agreements apply.

The claimants say the lessors rights arise from their customary appointment and only by custom can that be altered or varied to permit substitution. The manner of the suggested substitution at the IBS meeting neither reflected custom nor recognised the underlying right in the particular tribes or clans to choose their own representatives when occasion arose for decision. On the evidence, they say there was an absolute failure to follow custom and the purported substitution of the "lessors" in the lease must fail.

The claimant's position relies on the proposition that while the trustees may be called "owners and lessors" in the agreement for lease, they remain subject to the lore and customs as they affect the tribes ; such "lessors" have no independence of action apart from that afforded by the tribe or clan.

The 6th and 7th defendants submit, however that; "since the acquisition officer was implicitly determining customary ownership of the land that was to become the registered land, the acquisition officer was determining which groups required representatives to be appointed for

the purposes of entering into an agreement to lease. Although matters of custom were relevant to the acquisition officer's appointment of those representatives, the source of the representatives' authority was the LT Act since, absent the provisions of the LT Act, the notion of a representative ceases to exist, since it is a creature of ss. 62(b) and 64(b)".

I should say s.62 of the LT Act in sub-clause [b] speaks of a written agreement with "the duly authorised representatives". The representatives need be duly authorised for the purposes of the acquisition process since they become named in the agreement in s.62 as the "lessors and owners", phraseology not associated with custom.

There are tribal spokespersons and chiefs, trustees and family but the representative, Lilley QC called the "statutory representative" to distinguish the customary spokesperson from the representative determined solely for the purpose of the statute. Of course they may be one and the same.

I am satisfied the representative in this sense connotes a proxy for the tribe or group for the purpose of the acquisition and no other. I accept that the use of the phrase, "statutory representative" in this context is appropriate since it does not detract from the customary status accorded others in custom. Chiefs, for instance remain Chiefs and Ochi was well aware of this, I find when reading his e-mails for he sought changes to the trustees or representatives through the auspices of the Chiefs.

I accept that while "trusts" may not necessarily be recorded on registered title, the obligations in custom resting on the acquisition officers appointed "representative owners", are recognised by the acquisition officers determination and deemed to be accepted by the "owners and lessors" who sign the lease agreement, for **they sign it as a proxy for the tribe or clan** which had put them forward for the purpose of the acquisition.

Lilley QC accepts Riogano's evidence in relation to the commonly accepted principle that a person from one tribe is not permitted to represent another tribe, or a group of people to collectively represent a

group of tribes. Yet this happened in this acquisition and was acknowledged by the tribes and the acquisition officer for the reasons stated by the officer. Lilley QC says this is a circumstance supporting his argument for the change of characterisation of the nominated tribal representative to that statutory representative on execution of the lease.

I accept Lilley QC's argument that while custom is relevant to the determination of prior customary ownership, the "right to lease the land and receive the rents", is derived from the determination of the acquisition officer giving such authority and effect under the LT Act itself. Any act of the AO in terms of his determination is subject to appeal. In other words, there need be protection at that time against mistake for the statutory representatives by agreement will become by vesting, the registered owners of the perpetual estate and the land ceases to be customary land.

Custom does not recognise a leasehold interest as understood in common law. The lease in the Palmer Report is an agreement having the indicia of a lease at common law and on execution by the AO became such a lease.

Section 110 of the LT Act sets out the rights of an owner, whether acquired on first registration or subsequently with the proviso "that nothing in this section shall be taken to relieve an owner from any duty or obligation to which he is subject as a trustee".

I find that trustee in this sense encompasses the obligation resting on the "owners and lessors", the statutory representatives, at the time they signed the agreement for lease with the Commissioner and which obligation remains at registration. For they are the proxy for the tribe or clan which they represent.

The obligation passes on death of a joint owner to the surviving joint owners and may be, in the case of dispute, be ascertained by reference to the material of the acquisition officer and the court appeal papers kept by the Registrar in his records[154], material discovering the landowning tribes and clans, whose land has been so acquired. Notwithstanding the

[154] Ex. 131-documents produced by Haelo Pelu, Registrar of Titles.

fact that surviving joint owners may not be of the tribe or clan from which the originally appointed "owners" came, the surviving owners remain subject to the obligation as an implied trustee in accordance with the proviso to s.110. I find that a proper reading of the proviso to s. 110 supports Lilley QC's proposition about the acceptance of adopted law once the lease agreement is executed.

As the defendants say, a person aggrieved may appeal. There were appeals in this case.

The privative clause in S. 66 (4) of the LT Act thereafter denies any further proceedings.

> S. 66- (3) "The High Court may, if satisfied that the award or decision is erroneous in point of law or that the interests of the appellant have been substantially prejudiced by failure to comply with the procedural requirements of this division, may make such order as it considers just.
>
> -[4] The order or decision of the High Court and subject to the provisions of this section, the order or decision of the Magistrate's Court and the act or determination of the acquisition officer shall be final and conclusive and shall not be questioned in any proceedings whatsoever" .

In *Hitukera v Hyundai Timber Co Ltd* [155] Chief Justice Muria said:-

> " In Solomon Islands, there is the tendency that litigation over a customary land very often ends up with a series of other litigations over the same land. Parliament had therefore in its wisdom enacted provisions ... which, while conferring the right of appeal on an aggrieved person, also imposes

[155] [1994] SHBC 27

> limitations on that right, and that the courts must ensure that there must be finality in litigation".

The Chief Justice was principally speaking of litigation concerning rights of ownership but his comments are apposite here. Once the lease has been entered into, and the rights of appeal exhausted, the privation clause in S.66 (4) of the LT Act effectively extinguishes any rights in the customary landowners to further argue custom issues including the right to stand as "owner and lessor" under the lease or other matters arising out of the acquisition officers' process. Any such rights need be found in the common law or equity. Mistaken appreciation in persons, whether landowners affected by the acquisition process or others of s. 66[4] cannot affect the fundamental legal effect of the section as declared by Muria CJ.

The privation clause makes the decision final on the facts and the law. [See *Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 QB 574 at 583 per Denning LJ, *South-east Asia Fire Bricks Stn Bhd v Non-metallic Products Manufacturing Employees Union* (1981) AC 363 at 370 per Lord Fraser.)]

I accept that the terms of sub-sect.[4] of Section 66 fall to be considered as encompassing facts and law.

The claimant's plea for relief, paras 59-62 of the Claim must fail for it expressly relies on claim to custom affecting the substituted representatives as contrary to custom. The privation clause prevents such a plea.

I have regard to the reasoning of Lord Fraser at 370;-

> " It is unnecessary to consider whether the addition of the word conclusive and of the provision that no award " shall be challenged appealed against or reviewed" would have that

> effect, because the final words " quashed or called in question in any court of law" seem to their Lordships clearly directed to certiorari. Quashed is the word ordinarily used to describe a result of an order of certiorari as it is not commonly used in connection with other forms of procedure except in the quite different sense of quashing a sentence after conviction on a criminal charge. If that were for some reason not enough, the expression " called in question in court of law" is in their Lordships opinion wide enough to include certiorari procedure. Accordingly we are of the opinion [a] does oust certiorari at least to some extent"

The final words, in sub-para [4] leave no doubt, after the fact of a right of appeal to the High Court, the legislation has the intention of ousting any right of further appeal including appeals in terms of what might be called prerogative writs. In other words, in so far as the acts of the acquisition officer are concerned, the privation clause [4] of s. 66 of the LT Act prevents further argument in relation to those matters determined subject to findings on appeal. [This argument about representative capacity has arisen more recently and not at the time of the IBS meeting in 2008 which expressly by the Minutes, acknowledged the statutory trusts resting on the statutory representatives.[156]].

But that does not extinguish all argument, for as the 6th and 7th defendants submit, their rights to stand in substitution arise not from custom *per se* but from the law as it affects agency and common law lease agreements. The claimants are silent in that regard, since their case is based on the failure to follow custom especially in relation to the purported representative changes at the IBS meeting notwithstanding the fact of the lease document ratified by the acquisition officer following the 2nd meeting for the lease was signed by the officer for the Commissioner on the 12th November 1992. It was this agreement which created the "statutory representative"and changed the characterisation of the process from one concerned with custom to one concerned with

[156] Ex.18,19

the statutory position of the representatives and common law precepts affecting agreements.

There is no doubt the Cortez group acted, in their view, for the greater good of the community. As Chief Ambrose Bughotu, deputy Paramount Chief of Isabel said[157];

> "logging and lack of government protection for custom land are forcing these changes that are causing us so much pain. Some land group leaders may not see a need for change. Everybody knows I am the leader. They know my line holds this land. I make decisions and they follow. That is the custom of way, that is the way I do it".

The claimants say that, as conceded by Chief Bughotu, greater consensus within the group is necessary where forestry type projects are envisaged affecting land in these changing times.

That may well be, that is the 6th and 7th defendants defence. For this was a determination of " land rights" as such since those present in 1992 accepted amongst themselves the invitation to resolve themselves into such groups according to the land parcels to be affected by mining; and after enquiry by the AC, Palmer, his acts in finding rightful landowners for that land was presumed and accepted except by those who chose to appeal.

By the nominations by the groups of representatives coupled with the right to object in relation to any "act" of the acquisition officer including his "act" in naming the customary landowning groups [by which he had presumed the right in the parcels of customary land], I accept the AO had determined the rightful landowners for the respective parcels of land, G1-G6, [excepting G5] although subject to appeal.

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[157](Claimants works 08-Isabel Land and Sea-part 6-land kastom for tomorrow)

Once those representatives had signed the lease agreement, by their acceptance of the terms of the agreement, they were imbued with the rights and obligations of a party to an agreement under common law or equity subject to the provisions of the LT Act dealing with trusts.

It is this changed character which enables the defendants to plead the privation clause. For all that has gone before relates to custom, [including the wide-ranging rights of appeal] but once the appeals are determined, reliance on custom to impugne the agreement, is no longer available. The privation clause in the LT Act prevents continued litigation. Any arguments concerning the agreement, then need be arguments based on common law and equity as they affect contracts.

There is recognition of the need for consultation, so that the vision is that consensual vision of the group for without consensus the group is vulnerable to outside influences. For the concept of "western lease" was unknown in custom amongst Isabel people[158]. That consultation happened in 1992. The 7th defendants say it happened again in 2008 at the IBS meeting.

When reading Allan in this section it is immediately apparent that custom he was concerned with, had nothing to do with huge mining ventures which would devastate the ground. The massive changes to be envisaged with the huge impact on the land of mining resource by open cut methods let alone, the environmental impact would be difficult to comprehend.

At page 5 Allan says "women had identical rights in the land as men. In discussions about disposal of interest, married women had a power of veto."

I must say, having heard the Cheke-Holo witnesses, I was not left in any doubt that they had little if any comprehension of the mining issue. The women were called to accord with the need to give a voice to them as customary repositories of their genealogy rather as affording them a

[158] (Claimants Works 02 Allan(1998) Land Law and Custom in Isabel at p7.)

voice in how the mining venture is to be furthered. If the need related to the genealogy, it presumes the argument about customary landowning rights with concomitant rights of representation; this court is not the forum.

Lilley QC in his oral address about "knowledge" said that it was a peculiar concept in the Solomon Islands, and was not necessarily shared amongst the group for knowledge was the differentiating factor in the group, knowledge was power.

It is knowledge within that group, clan or tribe and I suppose the more esoteric the more likely it to be retained by a few. For instance, unless you are born or spend your life within the group, you will neither learn the language of the group to perfection nor its customs or know its people with complete intimacy. Riogano who understands Cheke-Holo but does not speak it was careful to deny knowledge of the particular customs of the landowning groups about Kolosori.

That is the underlying reason, perhaps why custom falls to be determined from within the group or tribal grouping but cannot be the cause of litigation in the High Court; the judges do not necessarily belong to the group. For the people of the group and the oral histories which is their lore, and from which their actions and their expressions stem, shades of feeling that they have absorbed from their environment, their mothers and fathers according to their *mores*; and innate attitudes, are such that an outsider or foreigner can never quite seize or fully comprehend.

For it is an appeal to emotion, by Ochi, connected with the tribal fundamental root in land which has given voice and unity to the non-SMMS claimants reaction to the suggestion that their land has been stolen, a theme running through their evidence. This idea of Ochi's has welded these other claimants together and they have been swayed by emotion rather than reason. For Ochi had the knowledge and understanding of the processes he sought to manipulate.

Custom calls for consultation where such as here, disposal of interest in land is contemplated. That disposal had been dealt with in the acquisition proceedings in 1992. The appeals were concluded in 2000. The privation clause stops further disputation in relation to the acts and determinations of the Commissioner.

As Lilley QC says, the appointments would not lapse or fail by any reason not provided for by statute. This presumes the argument concerning the characterisation of the process moving from custom to common law or equity principles as they may be affected by the LT Act. The LT Act is silent on lapse or failure. It is then necessary to consider the common law principles of agency as they affect agreements in these circumstances.

Orders for specific performance against SIG.

Axiom makes the point that specific performance is grounded in contract law, and relies on breach so that only SMMS may claim provided a contract existed, for the other claimants were not a party to the contract.

I have dealt with Claim 11A earlier. I have found no contract existed. There arises no right to specific performance.

Position of the seventh defendants in relation to registration challenged by the claimants. The Vesting Order.

The principal argument of the claimants, that there never was a "registration" contemplated by the Act, was the argument underlying the claimant's case in paras. 48 to 71 of the Claim. That argument has been dealt with elsewhere in my reasons.

Clause 73 of the claim relates to the vesting order, containing on its face mistakes on both fact and law; matters pleaded in paragraphs 56 to 71 inclusive, of the claim [these pleadings] stated;

"the vesting order on its face contained mistakes of both fact and law, namely matters pleaded in paragraph 56 to 71 inclusive and

a] the Commissioner may the vesting order under such mistakes of fact and law;

B) the Registrar as a senior public officer administering the LT Act knew or ought to have known that the vesting order contained such mistakes of fact and law or at least some one or more of them;

C] registration by the Registrar of Lot LR 1063 as parcel number 130 – 004 – 1 was consequently affected by mistake;

D) registration by the Registrar of the seventh defendants title... was affected by mistake;

E] registration .. of the Axiom lease was effected and /or tainted by such mistake.

Particulars of Takata Customary Ownership

Sullivan QC criticises the approach of both Axiom and the 7th Defendants by failing to understand the true policy underling the LT Act in relation to customary land and the protection of customary interests. By obtaining "registration," the conduct of both parties he says, "flies in the face of that policy and makes a mockery of the Constitutional and Statutory protections offered to Solomon Islanders in respect of their customary land".

His philosophical analysis cannot be the starting point, rather I have approached this argument from the point of view of a proper application of the law of statutory construction as it appertains to the LT Act. The Constitutional and Statutory protections will be viewed in context of the facts of this case.

His suggestion that the Court, to give effect to that policy, must understand (and apply) custom as it affects a matrilineal society, ignores the line of authorities (touched on elsewhere) which constrains the High Court from stating custom as a consequence of fact finding. That role is left to others.

The assertion that the "Land Claimants" (non SMMS Claimants) have "demonstrated a clear interest in the relevant customary land so as to have standing to bring the proceedings" will be dealt with as well in other parts of this judgment for the assertion encompasses a number of issues.

Sullivan QC treats the first IBS meeting (or meetings) as evidencing the mistake, in fact and law, by the substitution of the original Trustees (so found by Palmer) by the Cortez group.

As a consequence there never was a registration as contemplated by the LT Act, because of the failure to validly appoint by custom, these Seventh Defendants.

The Seventh Defendants by their defence[159] plead the basis for the standing of the 7th defendants to seek to be substituted but do not solely rely on the fact of the IBS meeting.

At paragraphs 2-7 of the Defence, the 7th Defendants addressed the claim to represent by each of the non SMMS-Claimant parties, and deny their representative capacity for the reasons given. This is relevant to the R.3.42 issue (the right to represent need be substantiated) and of course, the "land issue" in Sullivan QC's submissions.

[159] 17a - Seventh Defendants defence to case *FAFA* claim.

At paragraphs 8 and 8A, the Seventh Defendant raised the immediate indefeasibility upon registration issue. They say that the non-SMMS Claimants are "precluded from asserting claims based on customary ownership or rights according to customary law or beneficial interests in custom over land which is alienated and registered under the LT Act for the Land "was the subject of a land acquisition hearing in 1992 and held in accordance with the law and the determinations of land the Acquisition Officer according to custom".

The claimants' submission that substantial non-compliance with Part V Division 1 of the LT Act caused failure of that process, conversion to registered land, resulted in the registrations being nullities, are pleaded in paragraphs 48 to 77 of the Claim and include the claims of mistake or fraud giving rise to rectification pursuant to s.229 (1) of the LT Act, for "Kolosori Land is and always was customary land"[160].

It can be seen from the Defence that the assertion is denied.

I must say that Sullivan QC's submission that for all these reasons (by the pleadings) the question of indefeasibility never arises rather overlooks the fact that registration has taken place. That argument is addressed elsewhere.

Iron Bottom Sound Meetings.

The Claimants criticise the resolutions of the meetings as not made in custom. They point to the lack of "notice" to the landowning groups. Sullivan QC has referred the Court to various Australian decisions as guidance when considering the sufficiency of "notice".[161]

He says the meeting may be contrasted to that procedure adopted by Palmer (AO), "from which it can be inferred that Palmer's process was

[160] 01 Claim-Para77(d).

[161] *Ward v Northern Territory* (2002) FCA 171 (8 Feb 2002) [XXIV] (O'LOUGHLIN J); *Lowson* on behalf of the 'Pooncarie' Barkandji (Paakantiyi) People v Minister for Land and Water Conservation (NSW) (2002 FCA 1517 (9th Dec 2002) (25, per Stone J).

conducted transparently and in public and in a way that explains the basis on which representatives were agreed upon by the participants and then determined by Palmer".

In relation to that Palmer meeting, the report (Exhibit 9A) says... "pursuant to my appointment I held a public meeting to identify the rightful landowners for the purpose of boundary demarcation and agreement in accordance with s.61 of the LT Act. In response to the above introduction, the landowners formed themselves into six groups. In this report I will refer to groups as G1, G2 etc."

Sullivan QC does not criticise the manner in which Palmer (AO) conducted his meetings. It is clear from a reading of his Reports, that the landowners themselves, formed into groups corresponding to the particular land parcels. The AO then made enquiry to satisfy himself that such people had right to claim such parcel. The groups themselves nominated their representatives for the purposes envisaged by s.61 - Acquisition.

The second meeting enabled those concerned or aggrieved by any act of the Commissioner in the first meeting to raise objection. Objections were raised and resolved by the Acquisition Officer. Notwithstanding the resolution of those various objections, there were a number of appeals which, as I say, have been dealt with including appeals to the High Court.

There is no evidence, here that the particular groups concerned with their Kolosori land were not represented at the IBS meeting. I see this as a non-issue for the representatives named there, for the purposes recited, were also found to be representatives by the DME and listed, at the pre tender awareness meetings held at Isabel early in 2010. Ochi had the detail. He impliedly acknowledged their representative capacity by, when they could not be convinced to accept SMMS, moving to have

them removed. To come to court to deny, in the face of that recognition, has no merit.

I appreciate the reference to the Australian cases but this Court has no jurisdiction to enquire into matters of custom affecting the manner in which tribes, groups or clans conduct their affairs especially in relation to "notice" sufficient for the particular purpose of the business to be conducted. The Seventh Defendants and Axiom did not suggest I should embark on any such enquiry. If it should be shown the issue is one for determination, it must be referred to an appropriate forum. The High Court is not an appropriate forum. The issue is dealt with in greater detail elsewhere.

Vesting and Registration of the Perpetual Estate of the Kolosori Land

SMMS- Changing Landowner Trustees.

In 2010, the DME listed representatives after it had conducted landowner awareness meetings before the time of the tender

SMMS had that list. After the announcement of the Award of the Tender and LOI in December 2010, SMMS had approached these persons. By email from Ochi to Kudo dated Monday, January 10, 2011 at 9.10pm[162], Ochi says

> .."Mr Kudo, the following is a report with respect with the subject line.

1. **Axiom group**

   It appears that the following 3 people have joined forces with Axiom and are becoming active in the Takata mining area.

   Elliot Cortez. Leader of the Goe clan and thought to be the leader of the 3 person group (he has been on vacation since

[162] Exhibit 113 – 55 at 1

Christmas at his wife's home in Kia and could not be contacted until last week). Based on the phone conversation I had once with him, I think he can be persuaded.

Francis Selo – Spokesman of the OFE Clan. An Awareness Meeting to be presented by Peter was set up for Friday afternoon of last week and so I rushed back to Honiara by boat and gave a presentation but he did not show up. The plan is to visit the leaders of these 3 clans tomorrow and obtain their signatures. I will consult with the leaders as to whether agreement can be reached or whether they should be replaced.

Trustee of the Leonard Bava Thavia Clan

We will hold a meeting with the Thavia clan today in the Huali village. Chief Martin Tango, who is not the trustee but is the substantive chief of the Huali village, will be there. Bava, who won't cut ties with Axiom, will be removed as Trustee and a different landowner will be appointed as Trustee.

2. **Status Check Regarding Signatures**

(Takata Mining Area) – Anika Thai Clan

Signatures were obtained from nine people on January 6th and from remaining 1 person today. All 10 signatures have been obtained.

Thavia Clan

Had joined forces with BLA in the past but rejected Axiom's approaches this time and signatures were obtained from 6 people today (January 10). The remaining 1 person is Bava's successor. We are scheduled to receive his signature on Thursday, in Buala

OFE Clan – Taroa

Scheduled to exchange tomorrow.

GOE Clan

We have set up an Awareness Meeting regarding Elliot [Cortez] and are trying. We are having Director Peter say that the actions that are currently been conducted are unlawful acts.

Veronica Clan

Huali Village. Group of Village Leaders. The leaders signed today so there are is no problem there but signatures from the remaining 6 trustees will be a race against time.

(Jejevo Mining Area) (Irrelevant)".

RESPONSE

Actions by Axiom, RLG and the Landowners becoming active on their behalf violate the Mining Law (Section 2 subsection 1-5) and we are explaining these at each meeting. Meanwhile Taguchi San sent a document obtained from JOGMEC, Sydney to the Director of Mines the other day and requested confirmation of its illegality on the part of AGC. (It was also sent directly to AGC who are asked to verify its content in advance as there would be an enquiry from Peter).

(1) We'll try to persuade Elliot. We may send a helicopter and bring him here and hold a meeting of the clan in Isabel.

(2) Have requested that a Mining Committee Meeting be held on January 19, and if they still refuse to sign at that time, we will explain this to the Mining Committee and request that they are brought before the Mining Committee to be questioned.

(3) Would like to hold a briefing session at the Japanese Embassy and see if diplomats can issue a complaint to the Australian Embassy.

Conclusion

> We are not particularly concerned by the Australian groups' activities as they are illegal. There have also been cases such as ARC Nickel in the past and the local landowners have made relatively level headed and sensible decisions and are not followers. What is more concerning is the possibility that crazy Kemakeza, who is unaware of the facts, will believe these letters and make a fuss at the Cabinet meeting, etc. We should quickly gather signatures, consult with the Mining Committee, and obtain the PL.
>
> **Ochi**
>
> From Cockatoo

With respect to the comments above, relating to the Thavia Clan, it is clear that this email is referring to the successor, Basil Clifton, who had sided with Bava in the earlier 2007 proceedings against the interests of SMMS at that time. This email refutes Ochi's assertion under cross-examination that he was unaware of those earlier proceedings. Ochi was complicit in the removal of Bava.

Dotho is not a member of that clan and was acting in SMMS interest.[163] The e-mail also refers to a Cabinet meeting. The e-mail is dated before the Cabinet meeting which determined to cancel the Award and LOI. An inference may be drawn that Ochi was aware Kemakaza may raise the issue of the SMMS Award at the meeting but there is no evidence that Ochi had detail of the paper which the Minister tabled before Cabinet, seeking the cancellation.

Exhibit 92 is the sworn statement of Malinda Vasula of Buala village. She is the daughter of Agnes Sasani and a cousin of James Ugura, Henry Vasula, Raoga and Nester Nose. She had heard that James Ugura wished to withdraw from these proceedings in about December 2012 [as the 4th claimant]. She says there was a meeting of the

[163] Exhibit 129

Kathelona family and the Kwajo family and it was decided, since the brothers of those females attending the meeting were not present, that independent advice and support of a male was required and a decision was made to approach Ruben Dotho, who is a leader of the Vihuvunagi tribe and a member of the Isabel Provincial Government. He was approached for he was respected in their community and they sought this help from Ruben Dotho.

Ruben Dotho recommended that a meeting be held to replace James Ugura as spokesman and representative of the Kathelona family and the Kwajo family in these proceedings. She said that in custom, strangers never involve themselves in family business unless they are invited to do so. "We invited Ruben Dotho to help us so it was not against our custom".

As to paragraph 16 of her statement, she says that she had a statement of Nesta Nose filed on the 5th of March 2013 interpreted for her by Aaron Mane. She agreed with the statement of Nesta Nose. She says that the tribal meeting to be addressed by Ruben Dotho was some two days before the Saint Paul's day celebration held on the 25 of January 2013. She says that James Ugura and Robert Afa are only the spokesmen for the Kathelona family and Kwajo family and that they did not need to be at any meeting. She said, "Both of them have never reported back to us on what was happening with these proceedings and of his intention to withdraw". At sub-para (j), she says "as to paragraph 14 of her statement (Nesta Nose), I admit the contents and say that Ruben Dotho paid each of the elders who attended an allowance of $150.00."

It is clear from this statement that she had not been informed of the fact of the injunction and its likely effect on the ability to disseminate information. Her statement is silent on her knowledge of the mining proposals by SMMS.

Exhibit 129 includes a receipt dated 23rd January 2013 acknowledging the sum of $2,000.00 received from Sumitomo Co. Ltd being for expenses relating to Trustee Meeting at Buala, signed by R.D. (Snr). I am satisfied the receipt is by Ruben Dotho and that it relates to the meeting to which both Nesta Nose and Malinda Vasula deposed. Ruben Dotho was the agent of SMMS.

Nowhere is it made plain in those womens' statements that Ruben Dotho was financially assisted by SMMS. I may infer, from the fact of the financial assistance, that it was in SMMS's interest to support this representative change.

Martin Tango had supported Bava[164] then briefly SMMS (when proceedings was successfully instituted in the High Court to have him replaced by the third claimants), a decision which was concerned more with continued representation in these proceedings. Tango had been approached by Ochi on occasions and had signed the SMMS SAA headed "Martin Tango Land" despite an earlier High Court decision of the now Chief Justice finding to the contrary, accepting the land was owned by the clans of the three brothers, not solely by Martin Tango.[165] I am satisfied the SAA heading was calculated to appeal to Martin Tango's ego and continual assertion that the land belonged to his family. I am also satisfied on the evidence surrounding the awareness meetings that a reasonable inference arose, from the manner of the DME's presentation, to the effect support for rights of ownership depended to some extent on the execution of the SMMS documentary SAAs.

Martin Tango's later refutation of support having earlier signed the SAA of SMMS reflects against SMMS since I am satisfied on the evidence that his signing was brought about by the manner of the DME presentation and the appeal to his self-interest in heading the document, "Martin Tango Land" all circumstances which did not comply with the

[164] Exhibit 19 and 101N
[165] 1998 HC on the .....day.....

tenor of the regulations, to afford landowners independent advice, least of all, advice influenced by SMMS in this case.

Ochi's *modus operandi* was revealed again in his email to Kudo[166], "we're dealing with signature collecting activities". He speaks of;

> "2. **Signature collecting activities**.
>
> **(1) San Jorge East**
>
> There are two more landowners still to sign. Ellison Bako promised to sign it but he has been avoiding signing it. So today I requested the elder chief to replace him. He is one of the Directors of BLA and an aide to Mr Manetoali. Every day, we are looking for the whereabouts of the landowner. If we cannot find him by tomorrow, we will ask for him to be replaced. This time, we have been using Directors of BLA and it has been very effective.
>
> (2) **Jejevo**
>
> Last night I made Chief David call Johnson in Buala to request him to select a trustee. When I went to his house this morning to confirm, he asked me to wait for his signature until the decision from the CLAC is made on the 29 of March. I told him that unfortunately, we are applying for the PL this week and so cannot include the signature in the SAA....I will look for Eddie Ene, a nephew of Johnson and the former PS of Isabel in 2007 and tell him the current situation and make him support David."[167]

Axiom then refers to the cross-examination of Ochi on Day 67 Session 2 at page 10.

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[166] Exhibit 122 (b) (YO-3) at 624

[167] Email Ochi to Kudo dated 23 March 2011 at16.56 – Exhibit 122 (b) (YO-3) at p 624

> Lilley QC. "But one thing that is clear is that at this time you know both of them are trustees in their land groups and you want their signatures, isn't that clear?"
>
> Ochi....."yes, of course".
>
> Lilley QC "in this case now, however, you adopted the situation that neither of them are trustees for their land groups. Isn't that correct?"
>
> Ochi. ".yes."

In that cross-examination, he is speaking of Selo and Cortez who had both been earlier named as representatives and trustees of their land groups in the BLA and by the DME investigation before the tender process. Ochi, by his answer, accepts that neither Selo nor Cortez are "trustees". The documentary and other witnesses evidence clearly supports this assertion of Ochi in cross-examination for Ochi, as illustrated, above, had been instrumental in having trustees changed when it suited his purpose.

The Axiom argument is that;

> "before Ochi and SMMS enmeshed themselves in the internal affairs of the relevant groups from about January 2011, Bava (of the Thavia clan), Cortez (of the Goe VihuVunagi), and Father Mapuru (of the Taraoa clan) were representatives of their clans, Selo (of the Iputu clan) was both representative and leader and Robert Malo (of the VihuVunagi tribe) had the authority of his father, Joel Malo, as representative. Any change to those positions was prompted by the influence and

interference of Ochi and SMMS, untempered by an independent DME officer."

Axiom argued that in so far as Selo's position was concerned, (the representative of the Iputu clan) an email shows the instructions given by Ochi to Mason that;- "explain to (Francis Selo) that his brother (Lonsdale Manase) supports Sumitomo".[168]

This supposition was made in spite of the fact that the evidence is to the effect that Ochi first met Manase on the 10th of January 2011, and consequently had no way of knowing Manase's personal view.[169]

Axiom says that the assumption called for an explanation. Ochi was cross-examined on this aspect. Axiom says that when cross examined when apparent conflict in evidence such as this invariably called for an answer, "well I do not recall well". Lilley QC suggests a review of Ochi's cross examination "suggest a lack of recollection was his stock answer when caught out".

Ochi was often caught out in his cross examination. The answer in this instance "Well, I do not recall well" does not directly support the argument that he was caught out but, does show that he has either forgotten or seeks to avoid [when I consider the exchange of emails in relation to the proposed representative changes], a consistent willingness to use persons of positions and authority (who are favourably disposed towards SMMS) to plead for SMMS when changes, in SMMS view, to representatives were necessary.

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[168] Exhibit 115 – 50 – email Ochi to Mason dated 6 January 2011

[169] Exhibit 113 – 49 (page 183 of bundle) (email Ochi to Mason dated 6 January 2011 at 4.39pm which refers to a meeting with Manase "next Monday") (SMMS.001.017.0231)

Ochi well knew the representatives of the groups about Kolosori, and he acted to change those who opposed SMMS interests as the email exchanges illustrate.

Francis Selo was Lonsdale Manase's brother and had represented the Iputu clan until Lonsdale had that changed too.

To summarize, before changes were made at the instigation of Ochi or through his subordinate, Mason, the claimants supported with financial and logistical assistance, meetings not consistent with custom, changes to representatives of the various tribes and clans and thus denied the relevant groups "free-will to make their own decisions" unaffected by outside influence.

The timings of the changes corresponded with Ochi's needs as shown by his various emails. The fact remained in December 2010, these persons were plainly recognised by the BLA, DME and landowners (for the DME Report came from the Awareness Meetings) and was seen by Ochi as such. Ochi's subsequent interference stemmed from his commercial need to obtain SAAs. Riagano did not accept intervention (driven by commercial interest) by "financial and logistical support" was consistent with custom as it affected representatives.[170]

These two at least, Bava and Selo, had been openly concerned to see mining take place as evidenced by their inaugural membership of the BLA and then in 2008, their specific decision to act independently with like-minded Kolosori persons, go it alone, as it were, leave the BLA association, and form their own Takata Group.

Since 2004 then and 2011 when they became registered, the Cortez group, I am satisfied, had publicly championed the mining of Kolosori land by a company of their choice; a company which would share profits of mining.

[170] Transcript Day 78 Session 3 page 36

"Rectification of Title

The claimants seek relief to undo steps by the Cortez group leading to registration as proprietors of the perpetual estate in Kolosori land and the consequent registration of Axiom as the Leaseholder.

Axiom says the underlying legal basis to such a claim is not articulated.

The claimants set out steps it says which show that errors have occurred, errors which on their own, require this court to reach the view that the Cortez group was never entitled in the first place, to seek registration based on the underlying purpose, the acquisition process, instigated in 1992 by Riogano as Commissioner of Lands. As well, the claimants say since errors have compounded errors, the issues and principles in the Papua New Guineas case of Emas Estates, are principles which should be recognised here and thus adopted as appropriate law.

In either circumstance, the claimants say, the Cortez group was never eligible to seek registration and hence both the Land Commissioner and the Registrar of Titles had no right to act as they did. Entertaining the claim for registration as they did was mistaken.

As well, as a consequence of the dealings by the 7th defendants with Axiom KB and if I may pharaphrase the claimants, "associated companies" of Axiom KB those dealings were "steps" in a process which contravened s. 241 of the LT Act. [S.241-restriction on disposition of customary land]. The claimants seek relief "*ab initio*".

By paragraph 63 of the amended further amended further amended Claim [Claim};

"63 [C]. Further,

(a) the vesting order;
(b) The registration of the 7th defendants

As the owners of the perpetual estate

In Kolosori land;

(b) the Axiom lease;
(d) The registration of the Axiom lease;

were all steps in furtherance of such arrangements or agreement."

"65A. - The Registrar in contravention of Section 70 of the LT Act purported to register the perpetual estate in part of Kolosori Land.

(a) Without first having received a vesting order made pursuant to Section 69;

(b) In the absence of a lease executed pursuant to section 69 (1) (b) (ii) of the LT Act;

(c) Prior to the preparation of the relevant registry map.

65B - the Registrar in contravention of Section 195 (3) of the Lt Act, purported to register the perpetual estate in part of Kolosori Land in the joint names of the 7th defendants without first obtaining a statutory declaration as required by the provision".

The pleadings about these discrete issues commenced at para. 48 and recounted facts [largely uncontested by the defendants; the evidence was that of the claimant's and that evidence by way of documents

produced under summons from the Lands Commissioner and Registrar of Titles] about the 7th defendants' application to the Commissioner for registration of Kolosori land and the vesting of a perpetual estate in that land in their favour.

A Vesting Order dated the 11 February was made by the Commissioner. It was pleaded that the Vesting Order [exh. 20] purported to vest the land in the 7th defendants for and on behalf of KHL free from other interests. The Commissioner applied to the Registrar and the Registrar registered the land LR 1063 [by previous survey] as Parcel No. 130-004-1 in the 7th defendants as owners. [no notification is made on the Land Register of any trusts].

The Parcel No. 130-004-1 covers much of the area of Takata coincident with the area the subject of the Axiom Application and part of the area of the SMMS PL.

On 22 February the 7th defendants "purported" to grant the lease of the land to Axiom KB and the lease was "purportedly" registered on the 23 February 2011.

The pleadings go on to deal with false statements by the Commissioner [that he was satisfied certain provisions of the LT Act had been complied with; that the 7th defendants had been [named] as rightful owners to lease Kolosori land and receive the rents by the Acquisition Officer; and that there had been no appeal]. Assertions as to the knowledge in the Commissioner of the breach of particular provisions of the LT Act coupled with recitation of matters about the acquisition proceedings and appeals were made. The claimants further asserted that [para. 58 of Claim] the acquisition proceedings had lapsed.

The purported replacement of trustees at the Iron Bottom Sound meeting on the 23 April 2008 [the IBS meeting] was *ultra vires* the

meeting of the 23 April and thus void and of no effect. [the 7th defendants were named replacements of those named by the acquisition officer at the IBS meeting].

Then a number of clauses pleaded that arrangements by Axiom and Axiom Nickel [Aus] with the 7th defendants had the purpose of enabling KHL and Axiom KB to acquire interests in customary land and a profit in breach of both the LT and MM Act. These latter pleadings were concerned with the "steps" which the claimants say were in breach of s. 241.

The Commissioner made the Vesting Order in the mistaken belief that there was power to make that Order because it accorded with the wishes of the customary owners of Kolosori Land.

So far as the Registrar was concerned, the pleading at 68A is to the effect that the Registrar knew or ought to have known that the registration of part of Kolosori Land was effected in contravention of Ss., 70, 195(3) and 241 of the Lt Act but, nevertheless proceeded with the registration in the mistaken belief the Vesting Order was made pursuant to Section 69 and that there was power to complete such registration "because it was in the national interest".

By virtue of paragraphs 73 and 73A of the Claim, the claimants allege the Vesting Order on its face contained mistakes by both fact and law. The claimants relied on the matters pleaded in paragraphs 56 to 71 inclusive of the claim. For the reasons then advanced by the claimants in their Claim, they say there was no registration as that term is properly understood in terms of the LT Act.

As a consequence, the claimants are entitled to the quashing orders and other relief sought in relation to the Vesting Order and such registrations.

In support they plead there was complete or substantial non-compliance with Part (V) (1) of the LT Act and also that the principle in *EMAS Estate Development Pty Ltd –v- Mea and Ors* (1993) PNGSC 7 should be applied in the Solomon Islands on these facts.

By reason of the principle in Emas Estates, the claimants says Sections 109 and 110 of the LT Act do not operate to confer indefeasible rights on either the 7th defendants or Axiom KB and consequently, each of the purported registrations are void.

Failing success in their arguments that there never was registration for the 7th defendants and [subsequently Axiom] were never persons or parties in a position to seek registration then the mistake of the Commissioner of Lands in making the vesting order and the fraud on the Commissioner by Cortez, the claimants seek rectification of the Register by virtue of such mistake and fraud.

Axiom and the 7th defendants denied rectification was available for reasons going to indefeasibility of title.

Principle of Immediate Indefeasibility of Title.

When addressing the claim for rectification Axiom referred to a UK Court of Appeal decision of *Mallery Enterprises Ltd –v- Chelsea Homes Pty Ltd*[171] ,

> The court said, "this was the very problem that arose in *Clark –v- Chief Land Registrar* and was a further reason why Ferris J decided in the exercise of his discretion not in any event to order rectification with retrospective effect."

[171] (2002) EWCA CIV 151 at 75, 76

In *Attorney General (Turks and Caicos Islands) –v- Richardson*[172], the Privy Council affirmed the approach of the Primary Judge and said,

> ..*"At paragraph 14 of his judgment, the Judge addressed the submission, made on behalf of the Government, "that it would be extraordinary if title cannot be disputed when it should not have been registered at all. He said this; 14 under the Torrens registration of land anywhere, registration creates a new title independent of that of the previous owner. Unless the law permits it, you cannot go behind the registered title to challenge the fact of registration and say that it should not have happened. In Australia, Barwick CJ, described it (in Briskvar v Wall (1971)HCA (70) as ....not a system of registration of title but a system of title by registration....in which....the title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. (In Australia in the interests of the indefeasibility of title except in the case of fraud (which is specifically accepted) the Act restricts rights which would exist otherwise at law or in equity. The situation is similar in New Zealand where there also are specific exceptions. The comments to which I was referred in Frazer v Walker (1967) AC569 at 582 are very relevant. In that case, Lord Wilberforce made the general point that:*
>
> *"....in all systems if registration of land, it is usual and necessary to modify and indeed, largely to negative the normal rules as to notice, constructive notice or enquiries as to matters possibly affecting the title of the owner of the land....The effect of the registration in each jurisdiction depends on the terms of the local law. The only aspects that vary between jurisdictions are the circumstances (always*

[172] (2013) UK PC9 at 24

> *limited) in which registration can be challenged. In Australia, there is an exception for fraud – In New Zealand, there are three main specified exceptions. Any exceptions that apply here depend on the terminology of the Registered Land Ordinance."*

It is plain from that reasoning..."*you cannot go behind the registered title to challenge the fact of registration and say that it should not have happened".* You may challenge the registration and seek it to be set aside for instance [rectified] but the cases do not admit challenge by the fact of registration.

Again, at page 25, the Privy Council quoted the primary judge:

> *"..the only way to challenge it is to apply for rectification. So long as the title remains registered, it cannot be disputed in any other ways. Unless and until an order is made to cancel or vary the entry, the proprietor's title remains intact and he can do whatever he likes with the land."*

Axiom developed its argument opposing Sullivan QC's assertion that the Torrens system in the Solomon Islands works differently in circumstances where the occasion involves the first registration of what was customary land. Sullivan QC's argument was very persuasive for he pointed to all those steps [touched on above] and the absence as it were, of connection between those steps sufficient, he said to fatally break any nexus between these Registered Perpetual estate holders and those persons earlier found by the Acquisition Officer, Palmer, to be entitled to sign an agreement with the Lands Commissioner as affected by the various Courts of Appeal decisions.

Lilley QC in reply, points to the Privy Council rejection of such an argument in *Assets Co Ltd v Mere Roihi*[173] -

> *.."in dealing with actions between private individuals, their Lordships are unable to draw any distinction between the first registered owner and any other. A registered bona fide purchaser from a registered owner whose title might be impeached for fraud has a better title than his vendor even if the title of the latter could be impeached by the Crown. The reasons for arriving at this conclusion are so clearly given by Williams J that their lordships do not think it necessary to do more than adopt them and supplement them by a few remarks on some of the arguments addressed to them and to which they are unable to ascend. It is to be observed that in Solicitor General –v- Mere Tini, the title of the first registered owner was successfully impeached by the Crown. But in Public Trustee –v- Registrar General of Lands, his title was admitted to be unimpeachable. Their lordships are not prepared to hold that a Crown grant or a warrant, or a certificate having this statutory effect of a Crown grant can be impeached except that the instance of the Crown or at any weight in an action towards the Crown is a party...it by no means follows that errors in procedure even in matters which in one sense affect jurisdiction, need be noticed or to be noticed by other persons whose duty it is to act on Orders brought to them. It is not their duty to attend to such matters – if it were their actions would be paralized. What they have to look to is the Order and if it is good on the face of it, it is their duty to act upon it, and it must be treated as a sufficient foundation for what they do. Not only are they protected from liability if the Order turns out to have been improperly obtained but if what they do either it is made conclusive on questions of title, a title which may be otherwise impeachable, must be treated as valid."*

[173] (1905) AC176 at 202

The comments of the Privy Council are relevant when considering the claimants' plea in relation to the Vesting Order. Once the Registrar acted on the Vesting Order which on its face was effective, the only way to challenge was by way of rectification. The claim of deferred indefeasibility has not found favour in this jurisdiction and the comments of the Privy Council are persuasive in this case.

When dealing with facts to which the court may have regard, Lilley QC further relied on *Housing Corporation of New Zealand –v-Maori Trustee*[174] - in terms of the Land Transfer Act 1952 (NZ) there had been "wrongful" registration of a mortgage over Maori Freehold Land for that the mortgage was registered without first being endorsed by the Registrar of Maori Land Court pursuant to Section 233 of the Maori Affairs Act. The question was whether lack of endorsement affected validity of the mortgage.

The High Court considered the question whether the immediate indefeasible title conferred upon registration under the Land Transfer Act was liable to be defeated because of the non-compliance with the Maori Affairs Act. McGechen J concluded that indefeasible title arose immediately despite non-compliance and that in the exercise of his discretion, made a declaration that the mortgage was a valid instrument binding *inter partes* having priority over all instruments subsequently entered on the certificate of title [subject to a discretionary power of correction vested in the District Land Registrar].

The Judge's reasoning quite clearly related to the immediate indefeasible principle which was expressed to be the law in New Zealand. On the cases which have been referred me, I am satisfied that it is also the law in the Solomon Islands.

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[174] (1988) 2NZLOR 633

Lilley QC further refers the court to the decision of *Registrar General of Land v Marshall*[175], where Hammond J of the High Court of New Zealand affirmed the approach of McGechen J in *Housing Corporation* in unambiguous terms..

> *."in short, on the sort of question of primacy, the Land Transfer Act trumps the Maori Affairs Legislation. At the end of the day, as a matter of high principle, that must be so. If there is any area of the law in which the absolute security is required – without any equivocation – it must be in the area of security of title to Real Property. I completely agree with the premise that, with respect, lies behind Matchu Megichen's reasoning that any watering down of the primacy of indefeasibility of title through failure to carry out collateral notifications to other registries ought to be resisted strenuously."*

Lilley QC further refers to the case of *Colmar v Rose Vanuatu Ltd*[176]; the Court of Appeal stated;

> *"consistent with views taken in New Zealand in respect of issues involving Maori Land, the Vanuatu Parliament has elected to apply the Torrens indefeasibility principle to leasehold interests. Those interests fall to be addressed in terms of Act and relevant common law or equitable principles. On the other hand, custom owners' disputes are left to be resolved as between themselves by Customary Land Tribunals or Island Courts. (Colmar v Rose Vanuatu Ltd (2007) VUCA 40.*
>
> *.. By way of illustrations of the New Zealand position, from 1905 (See 197-198 of Assets Company v Mere Roihi) to both Housing Corporation of New Zealand v Maori Trustee [1988]2NZLR 662 [HC]at 671-678 and Registrar General of Land v Marshall [1995] 2NZLR 189 (HC)at 198-199, the*

[175] (1995) 2NZLR 189
[176] (2011) VUCA 20

indefeasibility provisions of the Land Transfer Act [1952](NZ) had been held to override provisions that applied to procedural aspects of the alienation of Maori Land by what was then the Maori Affairs Act 1953 (NZ). Similar views would now be taken in respect of current legislation.

...In each of the more recent cases, the High Court held that a failure to meet a requirement that the Maori Land Court endorsed a consent on an instrument over land under its jurisdiction was insufficient to impeach the registered interest. A similar approach is justified in Vanuatu for the reasons given in those decisions."

By relying on the cases which I have set out above, Lilley QC asserts that the attempts by the claimants to undermine the principle of immediate indefeasibility, enshrined in our LT Act are he says, in truth, vain attempts to resort to the universally rejected principle of deferred indefeasibility. The court should not accede to that invitation.

Lilley QC referred the court to the judgment of Dixon J of the High Court of Australia in *Clements v Ellis*[177]. The concept of the deferred indefeasibility was dealt with by the High Court of Australia and was given no credit.

The Solomon Islands Court of Appeal in *Levers Solomons Ltd v Attorney General* (representing Commissioner of Lands)(representing Registrar of Titles)[178] makes plain this jurisdiction accepts the principle of immediate indefeasibility of title. The Court of Appeal said;

[177] (1934) 51 CLR 217 at 237
[178] SICOA CAC 24 2013

..*"62. in the appellant's submissions, the appellants deal at some length with the fact that the LT Act adopts a Torrens system. It is unnecessary to rehearse the authorities referred to there at length. It is sufficient to cite from Korean Enterprise Ltd v SoKo Pacific Islands Ltd;*

..*"the dominant feature of the Torrens system is that once registered, the interest of the owner of an interest in land is held "indefeasibly" – that is subject only to such other interests as are registered in respect of it but free from all other interests that are unregistered. In the case of the Land and Titles Act, these principles are given effect notably in the provisions of ss109 and 110 of the Act.*

...63. "The Register is everything (Whimiha Sawmilling Co. Ltd v Waiono Timber Co. Ltd). It is a system of "Title by Registration" as opposed to a system of "Registration of Title". [Breskvar v Wall].

...64. Both Parts (V111) and (1X) of the Lt Act incorporate the above as central attributes. It is unnecessary to rehearse the individual sections here but it is clear from the reading of those two parts that they give effect to the indefeasibility principle and the conclusiveness of the register. Section 114 falls within Part (V111)."

There is no doubt that the 7th defendants are on the registered estate. They consequently in accordance with the principles in *Levers Solomons Ltd* and the line of authorities which have been quoted me and which expresses the law as it affects immediate indefeasibility in the Solomon Islands, have the benefit of that principle.

There is consequently no place for any concept which may be called deferred indefeasibility, which would allow an argument as to the matters that came before registration.

The argument advanced by Sullivan QC relying on deferred indefeasibility cannot stand. Section 241 can have no application to customary land and by no interpretation, can it be read to imply further inquiry into the process leading to registration.

Rectification on the Grounds of Mistake and Fraud

The pleadings run from 48 to 77 and state the claimant's case in relation to the relief sought in 5 to 10 of the claim. The claim alleges [77] that the purported registrations of;

[i] Kolosori land;

[ii] the perpetual estate in Parcel No. 130-004-1;

[iii] the Axiom lease, were each obtained or made by fraud or mistake and thus the claimants are entitled to the relief which they seek;

> effectively rectification of the land register by cancellation of the registrations with recognition that Kolosori land is and was customary land. The claimant's deny any right in the 7th or 6th defendants to the benefit of the saving provision in S. 229 [2] of the Land and Titles Act. [Shortly, the right to protection from rectification where the owner is in possession and acquired the interest for valuable consideration].

I propose to deal with the Vesting Order which is the precursor to those registrations.

The 7th defendants at 48 of their defence to the claim, [referring to the same numbered paragraph of the claim] admit that the vesting of a perpetual estate in the land was done by the Commissioner for the purpose of S. 69 of the LTA but otherwise deny the allegations in 48 of the claim. The denial relates to the assertion in the claim that the 7th defendants applied to the Commissioner for registration of Kolosori land and the vesting of the perpetual estate in their favour. The 7th defendant's case is that the vesting flowed from the acquisition proceedings originally instituted by the Commissioner in 1992[179].

The Crown [by the 3rd and 4th defendants] admits paragraphs 48-55 of the claim. Those parts of the claim assert that the 7th defendants applied to the Commissioner and/ or the Registrar for registration and vesting of the land in their favour; the purported vesting of part of Kolosori land in the 7th defendants for and on behalf of KHL free of all other interests; recited the Vesting Order which stated inter alia that sections 61,62,64 and 65 [sic 62,63,65 and 66] of the LTA had been complied with and that the acquisition officer had determined that the named 7th defendants are the rightful owners to lease the Kolosori land and receive the rents on behalf of KHL; that there had been no appeal against that determination and consequently on 14 February 2011 applied to the Registrar for first registration of the perpetual estate in part of Kolosori land in the 7th defendants favour and on 15 February the Registrar purported to register the land Parcel no. 130-004-1 [being part of LR 1063 comprised in WL Plans 72/86, 76/64, 76/68, 80/64, 80/68, and 80/78] in the names of the 7th defendants as joint owners of the perpetual estate.

The claim at 53 states that Parcel no. 130-004-1 covers land coincident with Takarta; much of but not coincident with the area of Takarta subject to the Axiom application for PL and part of the SMMS area also covered by its PL.

[179] Section 69[1][b] of LT Act

The claim at 54 and 55 recites the grant of lease by the 7th defendants to Axiom on 23 February and the purported registration of the lease on the same day.

I find in fact that the Commissioner relied on material which is enumerated in paragraph 2 of Nester Maelanga's statement of 18 October 2013 [exh. 153] and on the material which was brought to court under summons of the 1st claimant[180]; she said;-

> *2. My substantive position is Assistant Commissioner of Lands [Rural] and in that capacity I had prepared a Vesting Order based on the following material provided by the 7th defendants;*
>
> *[i] CL Forms 2, 3, 4, 5, and 6*
>
> *[ii] Kolosori Land Acquisition Reports, [First and Second Parts];*
>
> *[iii] Brief Report on Land Acquisition for Kolosori and San Jorge Santa Isabel;*
>
> *[iv] Certificate of no appeal;*
>
> *[v] Previous Court decisions;*
>
> *[vi] Letter from Elliot Cortez dated 9 February 2011 clarifying replacement of trustees as per the content of the vesting order with Minutes of Meeting of Landowners/trustees explaining the change in Landowners/ trustees of Kolosori Land;*
>
> *[vii] Minute to Commissioner of Land.*

I accept Ms. Maelanga's evidence on this aspect and while she was attacked her cross-examination did not cause me to doubt the veracity of the fact that she was very aware of her role in ensuring the material on which the Commissioner was to rely was in order and available. In spite of the Claim denying that the Commissioner had not had particular

[180] Ex. 131 Documents produced by the Registrar of Titles.

material before him when he made his order, after the conference Maelanga had with him following her position paper I can infer the Commissioner had the relevant material[181].

I also have regard to the Minute to Commissioner of Lands[182]. I am satisfied that her evidence is internally cohesive when the whole of her cross-examination is considered for the claimants had sought to undermine her credibility by emphasising her resort to answering, when pressed, "I don't remember." Her statement and her Minute to the Commissioner, [a minute contemporanous with her discussion with the Commissioner] satisfy me that these documents were those on which she relied to prepare the Vesting Order of the 11 February and that the earlier Order had not been prepared by her but was one which, by inference from the facts set out in Exhibit 154, caused her to discuss the Order with the Commissioner. It is difficult to reconcile the claimant's cross-examination of the witness with their pleading in some parts although it does not, in my view, affect her credibility. The cross-examination by SMMS counsel called for censure, and counsel later apologised. The cross-examination had the effect, however of precipitating a further amendment to the claimant's pleading,an amendment later withdrawn. I can infer from the circumstances that reason prevailed.

The Solicitor-General asked the rhetorical question in his opening; whether the Commissioner is entitled to rely wholly without more, on the material provided by the 7th defendants when making the Vesting Order

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The claimants at 56 of the claim allege that the Vesting Order contained false statements. They are that the Commissioner was satisfied the relevant provisions of the Act were satisfied, that the acquisition officer had determined the 7th defendants were the rightful owners to lease Kolosori and that there had been no appeal against the acquisition officers determination. At 57, the claimants positively assert that the Commissioner could not have been satisfied in terms of his

[181] Ex.131
[182] Ex 154

responsibilities under the Act when accepting the 7th defendants as the rightful owners to lease Kolosori land and receive rent on behalf of KHL and that in fact there were appeals from the determination of the acquisition officer. At 58, the claimants asserted in any event, the acquisition process had lapsed.

At 56 the allegation is directed to the Commissioners misapprehension of his powers under the LTA for that, as alleged in 57, the 7th defendants named in the Vesting Order were not those persons named by the acquisition officer in October 1992, to enter into the agreement with that officer to lease customary land nor were there no appeals with respect to the acquisition officers findings about those persons entitled to enter into the agreement with him. [The allegation about no appeals mistakes the actual outcome of the appeals which were considered by the Commissioner, while the certificates of no appeals in evidence, are accepted as recognising the fact that no further appeals were extant at the time of the certificates].

The admissions by the Crown and the 7th defendants that the Vesting Order was made under Part 5 of the LTA make plain their acceptance of that part of the Act as relevant when considering this aspect. They are admissions on the pleadings and I shall treat them as such *[Lever Solomons Ltd v AG* {SICOA CAC} 24/2013] It was not a compulsory acquisition for instance.

The Order[183] is dated 11 February 2011, the Commissioner vesting the perpetual estate in part of the Kolosori Land in the Seventh Defendants "for and on behalf of KHL". The Claimants say that the order is not one contemplated by the Act and thus ineffectual for vesting the perpetual estate. The order stated, *inter alia*, that the Commissioner was satisfied as to compliance with relevant provisions of the LT Act.

The Claimants say the Lease Agreement made by Palmer recited in the vesting order was not made with the Seventh Defendants. There is no evidence at the time of the order, 11 Feb 2011, the Commissioner

[183] Exhibit 34.

wished to take a lease of Kolosori Land.The order recited the statement of "no appeals" from the Palmer determination and that recital was incorrect and a mistake.

In the absence of the agreement (lease) between Palmer and the named Seventh Defendants, the Commissioner could not have been satisfied that s.62 had been complied with, nor those subsequent sections of the Act. By his written submissions Sullivan QC also points to mistakes of fact (KHL never had any right to a beneficial interest in the land) and law (a company could not acquire an interest in customary land).

So registration, he says, was affected by failure to conform to the type of interest to be registered; by s.88 "a perpetual estate made pursuant to a vesting order made under an acquisition process". The vesting order was flawed so that the register did not record an interest capable of registration under the LT Act.

I find that the argument cannot stand in the face of the indefeasibility of title principle, for even where mistakes are shown [and I am not minded to accept any on the facts of this case] the Commissioner has acted on the relevant material and made the Vesting Order.

Fraud and Mistake - Claimants' case.

The fraud alleged is that against the Seventh Defendants for that their registration as owners of Kolosori Land was procured by a fraudulent representation that there had been a valid replacement of Trustees at the IBS meeting.[184] There were a number of authorities quoted, including an Australian case of *Gerald Cassegrain and Co. Pty Ltd v Felicity Cassegrain*[185] - which relied on the earlier case *Assets Co. Ltd v Mere Roihi (1905) AC 176 at 210 and Frazer v Walker.* "In other words the fraud must be "fraud for which the person becoming registered is responsible".

[184] Claimants' submissions paras 366-387.
[185] *(2013) 305 ALR 687 at 12, 13.*

The "honest man" is suggested as a true test in *Waimiha Samelly Co. Ltd (in Liq) v Waione Timber Co. Ltd*[186].

It is left for the Court to determine whether that person, the person becoming registered, acted honestly or not. The argument was joined to the argument that the knowledge of the fraud was knowledge at the time of the registration, or caused it or substantially contributed to it.[187]

The fraud alleged was the fraudulent representations in the Cortez's letter on the 9th of February. At paragraph 386 of the submission, the Claimants set out the representations which the Claimants say were knowingly false. They were, shortly, the mistaken claim to blood relationship with the original appointees; the false claim as to status by Robert Malo [as a landowner]; the absence of a basis for the replacement of Bugoro by Bava; the absence of authority in Likoho (since his appointment as a Trustee was quashed earlier); and Cortez claim through Likoho [which must be fixed with Likoho's knowledge of his absence of authority].

Those issues were joined by the 7th defendants and Axiom. The defences pleaded effective assignment and ratification of the changes to the statutory representatives so named [and as varied on appeal] and has been dealt with elsewhere. I consequently find there is no need to address these claims but will do so in any event.

The blood relationship is not something about which the High Court should be concerned. The defendants have satisfied me on the facts that Hugo Bugoro accepted and ratified Leonard Bava as his replacement. Likoho's authority was recognised and Cortez had no reason to doubt that authority. These matters are canvassed at some length elsewere. Fraud must be strictly proved. The claimants have not met the test.

Again, there arises the issue whether SMMS interests conform to the other claimants, for until SMMS involvement in seeking changes to tribe

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[186] *(1926) AC101.*

[187] *(1995) SBCA (27th October 1995) (Kerby, Savage N. Palmer JJA).*

and clan representative trustees, the Cortez group had, since the IBS meeting in 2008, not been queried as to their purported status or purpose to act, [least of all in a Chiefs Court] until the involvement of SMMS.

As well by (f) of para.386, the claimants say there was no evidence to support the minuted assertion in the IBS meeting that their replacement of the original Trustees was "to fulfil the desire of the Kolosori Customary Landowners to affect the registration" of the perpetual estate.

This surely must be a *non sequitur* for the Cortez group went on to become registered.

By (g) the absence of actual incorporation of KHL until 20 May 2008 (after the April IBS meeting) coupled with the attachment of the seal of KHL to those earlier minutes is evidence the Claimants say, of falsified minutes which were part of the Cortez letter.

Frankly I see little in the argument since the incorporation took place and no one has been misled. In any event, I would not find fraudulent conduct on the basis of this mistake when long after the event, no one has been to shown to have been misled as to the fact.

For the reasons that I have given concerning immediate indefeasibility, and since Maelanga has satisfied me the Commissioner had taken account of the relevant matters to which the claimants' point in their pleadings as having been ignored, I am not satisfied any mistake sufficient to justify exercise of my discretion to rectify has been made out.

Statutory Construction The Claimants' submissions recite the Interpretation and General, Provisions, Act (Cap 85) s.9(3)[188].

[188] Each Act shall be deemed to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true meaning and spirit...

The comments of the Chief Justice regarding wide reasonable and flexible and interpretation of the Constitution[189],

The Allan 1957 Report (Claimants works on custom) and Reports on Parliamentary Debates. At paragraph 256 of the submissions;-"The Courts may also have regard to reports of Parliamentary Debates to assist it in resolving the ambiguity as well as identifying the mischief".

The mischief to be corrected or avoided may not have been directly shown but relates to the absence, the Claimants say of an indemnity under the Act where loss is suffered through errors of the register and the imperative in s.117 (1) (which denies the validity to the creation of any registered interest in land unless undertaken in accordance with the LT Act) on the Court to recognise this as an "important statutory exception to the principles of indefeasibility in the Act, distinguishing the LT Act from its Australian and UK counterparts".

Again the absence of a UK rectification provision in wording different to that s.229 of the LT Act also (somehow) gives the Court power to rectify the register. (s.229 refers to fraud or mistake)

Rectification by the Court.

Section 229 of the LT Act;

> s.229(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 so empowered by this Act, or where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake.

[189] *Nori v AG (2006) SHBC 134.*

> (2) –the land register shall not be rectified so to as affect the entitlement 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 cause such omission, fraud or mistake, or substantially contributed to it by his act, neglect or default.

So far as the first registration is concerned, [that of the 7th defendants] the claimants plead mistake by the Commissioner and the Registrar of Titles. The mistake was apparent on the face of the Vesting Order. In addition, the claimants also plead that registration was attributable to the fraud of Cortez.

Further Axiom, it is pleaded, was not in possession and had not acquired its interest as leaseholder for valuable consideration. And in any event, was aware of the mistake and fraud which led to the first registration at the time of registration of its leasehold interest.

Mistake

The discrete question, the "mistake" in the vesting order falls to be decided on that "knowledge" of the Commissioner. The claimants answer to the request for particulars, (above) and their written submissions rely on the "knowledge" in Maelanga of a "mistake"; and consequent knowledge in the Commissioner and Registrar and in the argument, that fraud of Cortez by virtue of his letter of the 9 February, 2011.

The "knowledge" which they sought to impute to Maelanga in her cross examination, by Preston, was knowledge of the process of acquisition where the Commissioner by s.69, was concerned with a particular process.

For s.69[1][b][i] speaks of an order vesting the perpetual estate in the land in the persons named in the [1992] agreement. The mistake then is the fact that those originally named were not those in the vesting order. The fraud then, is that Cortez, was aware of that fact when he sought the vesting order by his letter of the 9th February 2011. That is the claimants' case, put simply.

The 7th defendants say, at 56 of their "Defence" (note 25-Court Book) that it is not correct that the acquisition officer determined the (named) 7th defendants as the rightful owners to lease the registered land and receive the rent on behalf KHL, (and it is not correct that there had been no appeal against the acquisition officers determination) but say that nevertheless they were, at least from the 23rd April 2008, until immediately preceding their registration as owners of the perpetual estate, the rightful customary owners to lease the land and receive rent on behalf of KHL, and that since the commencement of the proceedings, those named by the acquisition officer and the current trustees have all agreed that any mistake in the vesting order is of no consequence. On the facts of the IBS meeting recounted in the Minutes published, and the ratifications as they affected some, since, no mistake has been shown going to the knowledge of the Cortez group who subsequently became registered owners of Kolosori land.

The agreement [by these persons that any mistake in the vesting order is of no consequence] then is evidenced by assignment and ratification which is dealt with elsewhere. I accept that the assignment and ratification as shown elsewhere was effective to substitute these 7th defendants as parties in the lease agreement of 1992, in place of those named [and varied by appeal]. As has been shown, this assignment and ratification of the respective 7th defendants relies on a series of acts, and not solely on any supposed customary transfer at the IBS meeting.

For these reasons, I find the claim of fraud and mistake giving rise to a right to rectify, has not been made out. The pleadings at 74[a]and[b] must fail.

There is no basis for the claim of fraud by Cortez. His letter of the 9 February with the accompanying minutes were explanatory and did not, I

am satisfied, mislead the Commissioner. The Commissioner had, as evidenced by Maelanga's position paper and the documents apparent in exhibit 131, all the material [including the appeal judgment] on which the vesting order was made. The claiments' pleadings in effect, have been shown to be unfounded when regard is had to the material in the exhibit.

The Mistake by the Registrar.

Sections 118.[1][a] [protection of persons dealing with an owner for valuable consideration] and s.119 of the LT Act exonerates the Registrar from enquiring or ascertaining the circumstances in, or the considerations for which, an owner of a registered interest in land was registered.

The Court of Appeal in *Attorney General v Iodanis (2012) SBCA 6* spoke of unreasonableness, to expect the Registrar to check on materials provided. In so far as the Cortez group was concerned, he referred the letter of the 9 February to the Commissioner and the Commissioner furnished the Vesting Order in accordance with which, the registration of the 7th defendants took place. There consequently was no person who could fall to be considered as one envisaged in the first part of s.119 as one who might enquire about the title, since this was a first registration and no title had come into existence. The Registrar acted in accordance with his obligation when presented with the Vesting Order.

Insofar as the claimants' point to a mistake in the Registrar in registering the lease to Axiom, the provisions of s.118 protect Axiom from enquiry and consequently the Registrar, for the Registrar "shall not be concerned to make enquiry ... in relation to that interest [the ownership by the 7th defendants] which such person [Axiom] need not have made.."

In terms of s.118, Axiom are protected for its interest given by the 7th defendants was for valuable consideration.

The valuable consideration was the interest KHL [50%] held in KB Minerals[190]. For Axiom KB had been incorporated as the joint venture vehicle of Axiom Mining Ltd and the 7th defendants. Axiom SI held 80%

[190] 01-Claim, Annex 5 at 22; 3rd Defence-10 at 76[e][xxii].

and KB Minerals held 20%. The fact of the interest of KHL was pleaded and admitted. The registered owners control and own KHL.

There is no basis in the argument about the absence of particular documents concerning the survey not with the Registrar, for although necessary details for the survey particulars were unavailable at the time of registration they subsequently became incorporated. That issue falls if you like, to be considered as peripheral and applying the liberal approach, substance over form, I am not satisfied any mistake by the Registrar has been shown to warrant exercise of my discretion to rectify.

Indefeasibility of Title.

Riamoau v Falakolua[191] is presumed by the claimants to state the law in Solomon Islands as it affects indefeasibility where mistake is show. [I propose to deal with the argument even though I have found no fraud or mistake to justify the exercise of a discretion to rectify]

It was a decision by Izuako J at first instance. The judge found the acquisition proceedings had been done contrary to the provisions of the LT Act and were null and void and of no effect whatsoever.

In such a case I would have thought the land would revert to customary land.

The judge later found the registration in the proprietors' names was affected by mistake.

This was not an alternative finding, rather one which relied on another part of the LT Act.

The consequential order was for rectification of the register by removal of the names and their substitution by others to be chosen by the tribe.

I cannot see any assistance that the case affords these claimants.

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[191] 2013 SBHC 46

The case of *Sipisou v Acquisition officer*[192] decided by Kabui J (as he then was) said at 4 "there being no evidence of the Malaita Provincial Assembly wishing to acquire Namona Ako Land within the meaning of s60(1a)of the Act, the acquisition procedure conducted in this case is therefore invalid, null and void."

The case is clearly distinguished on the facts. There has been no argument that the Acquisition Officer in these proceedings was not validly appointed.

In *Talasasa v Hamupio*[193] Foukona J accepted that the Acquisition Officer had flawed the acquisition process at the very beginning. Such is not the case here.

Manele v Tiva[194] Palmer J (as he then was) is suggested by Axiom as having correctly stated principles which may give guidance. The Chief Justice's reference, there to the two matters which give rise to a discretion in the court to rectify the register, fraud and mistake, coupled with proof of knowledge in the party whose interest is sought to be affected, are the only grounds which may be considered.

Palmer J adopted the immediate indefeasibility principle which runs through the authorities. I do not accept those cases which presumed a deferred feasibility correctly state the law. As I say *Lever Brothers* decision by the Court of Appeal made the distinction plain. No credence should be given any deferred feasibility test.

In the absence of fraud or mistake, no discretion exists in the court to rectify the Register.

<u>The EMAS ESTATES Principle</u>

[192] 1998 SBHC 96
[193] 2013 sbhc 109

[194] 1992 sbhc 66

This case, being of singular importance in Papua New Guinea with its similar Torrens Title system of land registration to that adopted in the Solomon Islands, the claimants so urge this court to recognise its usefulness in the circumstances of this case by avoiding the strict application of the laws of indefeasibility of title, taking account of the similarities of the legislation under review and the matters leading to the first registration, matters which to pharaphrase again, "give cause for disquiet because of the failings of the Registrar and Commissioner" and thus to adopt the principles of *EMAS* and apply those principles here. I again propose to deal with the argument although I have not found failings in the Commissioner or Registrar.

It must be said at the outset, that I was dissenting in that case. Nevertheless, with a fresh mind, I have particular regard to Sullivan QC's argument. Lilley QC would have none of it. These arguments then need be put in balance.

Emas Estates was concerned with the forfeiture of a residential block of land at Boroko, Port Moresby by the Minister of Lands, for failure to pay rent and in breach of improvement conditions attaching to the lease, and the subsequent successful tender by EMAS Estates for the forfeited leasehold block. In judicial review proceedings, the National Court judge, at first instance, was satisfied there was no breach of rental payment conditions, in fact, the notice of forfeiture was irregular so that the forfeiture by the Minister was *ultra vires* his power.

The fresh lease, however to EMAS Estates had been registered on the Title so that the indefeasibility of Title principle was before the Court of Appeal for consideration. But it was not. For that registration of EMAS Estates had not been made known to the judge at first instance, LOS J, and there was no material in the judge's Trial Book touching on the fact of a fresh registered lease to EMAS Estates. Chief Justice Amet in the judgment of the plurality said;

..."the issue at the end of the day is whether in these circumstances, the registration of the lease vests in the appellant, indefeasibility of the title as against the first respondent. My view is that the circumstances are so irregular and unlawful at the very outset to the subsequent transactions that it ought not to prevail. I considered that the learned Trial Judge properly set aside the forfeiture of the lease by the Minister and re-ordered the reallocation to its rightful owner, the first Respondent. The manner in which the matter was handled subsequent to the forfeiture – the land exempted from public advertisement within a very short time of less than a week, a new lease issued whilst the legitimate aggrieved applicant had lodged an appeal which is still outstanding, and the new lease signed, not by the Minister but by a Departmental Officer as delegate – are all to my mind, less than satisfactory, highly irregular and counter-mount to fraud, such that the registration of title should not be allowed to stand.

"..The issues in this case raised for consideration the principle of indefeasibility of Title under the Torrens Land Registration System that hitherto has been applied in this jurisdiction. I do not believe that the system is necessarily appropriate in circumstances such as this, where an individual landowner is deprived of his title to land by an irregular procedure on the part of the officials and a department of the State to the advantage of a private corporation. I do not accept that quite clear irregularities and breaches of the statutory provisions should remain indefeasible. I believe that although those irregularities and illegalities might not amount strictly to fraud, they should, nevertheless, still be good grounds for invalidating a subsequent registration which should not be allowed to stand. Do not do so would be harsh and oppressive

against the innocent individual leaseholder such as the first Respondent."

Chief Justice Amet has plainly adopted that argument advanced by Sullivan QC; matters leading to the fact of registration are relevant when dealing with indefeasibility issues. However, in EMAS Estates' case, there is no argument about taking land officiously by colonial officers for "plantation purposes" or depriving customary landowners of their rights.

That case was decided on plain facts surrounding the supposed forfeiture of a residential lease block and the grant of such block to another which had commenced to build a residence. In fact, the original owner, Mea, had offered to settle his dispute by accepting a sum of money in the sum of K170,000 in consideration of the transfer of his title (granted by LOS J) to EMAS Estates. So damages, if you like, were easily determinable.

With the greatest respect, in the absence of evidence to make the inferences implied by speaking of the *"manner in which matter was handled consequent to the forfeiture... are all to my mind, less than satisfactory, highly irregular and tantamount to fraud, such that the registration of title should not be allowed to stand"*, rather relies on what Sullivan QC is wont to call a *Jones v Dunkel* conclusion.

The finding was based on the Appeals Court fundamental reasons; *"For these fundamental reasons, I am of the opinion that this doctrine which has hitherto been applied without any examination as to its appropriateness and applicability in the development of the underlying law, for this country should not be applied to this case."*

It is clearly law, then in Papua New Guinea which affords the aggrieved ordinary Papua New Guinean landowner a right to query the effectiveness of registration where the State or private corporations are involved.

There may well be a similar view in the Solomon Islands but it is usually expressed in legislative action. I cannot accept Sullivan QC's argument for it presupposes irregular and unlawful acts, [acts which need be viewed through the prism of the relevant legislation before so concluding] leading to registration which has taken place. As I have said, the Court of Appeal's decision in *Levers Solomons Ltd*, reflects the law and has affirmed yet again the immediate indefeasible principles of the LT Act.

The "irregular and unlawful" phrase used by His Honour Chief Justice Amet finds echo in the provisions to be found in Land Acts in our adjoining countries, provisions dealing with rectification which speak of "mistake" and "fraud". Aggrieved persons affected by the application of the indefeasibility provisions are not left without remedy, then. In fact in the courts discretion, the registration itself may be set aside.

In the absence of future legislative amendment, a Court of Appeal may be minded in particular circumstances to revisit EMAS Estates. But this court is guided by the string of authorities in this court and bound by the Court of Appeal which accepts the immediate indefeasibility principle. Factually, Emas Estates can obviously be distinguished. The Court of Appeal has made plain the indefeasibility principle in the Solomon Islands.

Rectification and compensation are remedies and rights conferred under the Land Titles Act in the event of an inequity as a result of registration brought about by fraud or mistake. But nowhere in the Act is this Court given a <u>discretion</u> such as that attained by the PNG Court.

The 6th and 7th Defendants Case as to agency-Assignment and Ratification.

Before dealing with their argument, I reproduce part of the minutes of the 1st IBS meeting.[195]

> "It was resolved that given the period of time after the acquisition of Kolosori Customary Land was done and yet there are still no progress of any registration of the Kolosori Land, the Trustees whose names appear on the Acquisition Report must be replaced in order to make way for new Trustees to take the leading role in order to fulfil the desire of the Kolosori Customary Landowners to effect the registration of the Kolosori Customary into a perpetual estate.
>
> IT WAS FURTHER THAT ENUMERATED that those who are nominated to replace those whose names to be in the Acquisition Report must bear the same status and the same standing in custom and that those appointed must also be in the category of being a primary owner of the Customary Land. IT WAS ALSO RESOLVED THAT it is time for the respective block owners within the Kolosori Customary Landowners must work together to achieve the common desire of developing their land and decision has been carried out over the said land, it is also time that each nominated Trustees must work together for the betterment of the respective beneficiaries of Kolosori Customary Land.
>
> IT WAS ALSO RESOLVED THAT it is time that all the respective block owners within the Kolosori customary land must work together to achieve the common desire of developing their land and that since acquisition has been

[195] (Exhibit 18)

> carried out over the said land, it is also time that each nominated trustees must work together for the betterment of the respective beneficiaries of Kolosori customary land".

I must say that I see this as an open, aspirational dissertation and acceptance by the Cortez Group of their manifest intentions and obligations. The lease agreement made in 1992 was still seen to be on foot.

The ratification of the change to statutory representatives is principally by the acts of those present at the IBS meeting coupled with other acts, if I understand Lilley QC's opening address correctly. He said on Day 88 at page 17 - when speaking of Cortez. quote:

> "...there is no evidence that he knew of any deficiency in the appointments of his fellow 7th Defendants by their respective principals. There is no evidence that he believed that there was anything wrong with the constitution or procedure of the Iron Bottom Sound Hotel Meeting. It was attended by 23 of the relevant landowners as opposed to about 60 who attended at the original Palmer Meeting. At least it was not paid for by other interested parties, as is the case with the meetings arranged by Sumitomo for the Third and Fourth Claimants. Indeed, such evidence as there is, support proposition that Mr Cortez could not have known of any errors in the Vesting Order."

The evidence supports the 7th claimants where they have refuted any knowledge of mistake in their representative capacity.

Sullivan QC in his later address attacked the implied assertion that the 23 who signed as Attendees at the meeting were landowner representative of the 6 land parcels designated by Palmer. In fact the Minutes recited that the IBS Meetings were read and signed. The Minutes (Exhibit 18) were headed with the purpose: -

"..Minutes of meeting appointing Messrs. Robert Malo....and Joseph Bengere (deceased)..."

And immediately under, were the signatures. In fact it was an actual assertion.

For Sullivan QC said, those signatures were of persons related through family to the named substituted Trustees. The argument has little force, since the various families are of the tribes found by Palmer (and by the High Court on Appeal) the family groups, to be entitled to the land.

The various assignments and authorisations of the particular Trustees, were detailed by the 7th defendants as follows:

1. Elliot Cortez[196]

   The annexure to his affidavit is a letter dated 16/07/07 to the Hon. Minister of Mines. It references Mineral Prospecting in Goe land, San Jorge and Ruatahi land within Takata, Isabel. A map of the (Takata) land was attached.

   It said at paragraph 3,.."*there are 4 land trustees who make decisions, sign legal documents, and deal with other matters which involve....the Ruatahi land. In major issues, all four Land Trustees are to sign legal documents. Mineral prospecting is considered major issue. Anyone else from outside our tribe.....shall not enter into negotiations and sign legal documents with mineral prospecting companies because they are not mandated to act for the Goe tribe.*

[196] Ex. 101r [affidavit dated 05/12/07 in earlier proceedings cc.386/07-annex CP 2]

The chairman of the Goe Land Trustees should be consulted, if anyone intends.....to sign any parcel of land....within Takata area..."

(Signed)

Elliot Cortex – Chairman Goe Land Trustee

Richard Fallows -Trustee,

Michael Doko - Elder Trustee,

Levi Likoho – Tribal Chief.

Levi Likoho was present and signed the Minutes of the IBS Meeting in April 2008. I am satisfied Levi Likoho clearly intended by his signature to authorise Elliot Cortez to stand in his place as he was named chairman. The authorisation extended to the ratification of Cortez where he was the substituted statutory representative in place of Likoho for Goe Land.

2:Francis Selo[197]

This email was more recently translated since the beginning of the trial when further requested by Axiom. Ochi said;

- "...Last night I had dinner with Manasseh and talked of various things. His tribe has been led until now by Selo, who is the spokesman because he is in Honiara, but he knows nothing about the relationship with Axiom. Consensus has been reached in the tribe, and as he is the leader, Selo must follow accordingly. I suggested that things would go smoothly if he was removed as Trustee because he has received money. Said he would get his signature.."

This email by Ochi acknowledges the fact that Selo led the tribe at that time. It also illustrates the *modus operandi* of Ochi, where he alleges bribery (because, he Selo, had received money) and he plays on the

[197] Ex. 113-56A e-mail Ochi-Kudo 20/01/2011 at 6.07am-[SMMS 002-121-0907 _002 RT

lack of understanding of landowners and possible cupidity (Manasseh, knows nothing about the relationship (of Selo) with Axiom).

Further by the terms of a joint affidavit[198] Selo and Walter Devi say at para. 4;

> "Kolosori land is within the Takata region. A map..... Our land has gone through Acquisition and our brother and uncle Hon. Lonsdale Manasseh was determined as the person entitled to represent the landowners. (concerning appeal). Hon...Manasseh has since appointed us to take his place since he became the Provincial Assembly Minister for Natural Resources on Isabel Province and Deputy Premier....."

Riogano accepted Francis Selo as the representative of his tribe, as one of the initial group of 13 who would choose the BLA Executive. At that meeting, Manasseh resigned from the BLA because of his position in the Provincial Government.

I am satisfied Francis Selo was entitled to act and did so act, as the replacement statutory representative for his elder brother Lonsdale Manasseh from the time of the IBS Meeting. For it is plain from Ochi's e-mail that Manasseh had accepted Selo's role.

3..Leonard Bava

The first document relied upon is the affidavit of Martin Tango and Leonard Bava sworn and filed in those earlier proceedings[199] At paragraph 1;

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[198] Ex. 101o –affidavit filed in earlier proceedings cc. 386/07

[199] Ex.101n [affidavit sworn 19/11/07 in cc. 386/07]

"...we are the owners, proprietors, custodians and trustees of customary land at Beuhutu otherwise called Kolosori – Periga land. We are also duly authorised to make this affidavit."

Paragraph 4...

"....We are members of the Thokokama tribe. The land Mr Tango and myself represent is called Periga-Kolosori (Beuhutu) within the Takata region. ....our land has gone through acquisition and Mr Tango was determined as the person entitled to represent the landowners."

Paragraph 7 ..

"....We wish to also state that we as landowners entrusted and to sign all our interests in the development of our land to BLA. As an Association, we are protected from abuse from international companies. The Plaintiff sees such Association as a stumbling block and seeks to vilify the Association by holding the view that BLA is not a Landowner or does not represent the landowners. Whilst BLA cannot be a person in the sense of custom to be able to hold land-interest in custom, we have entrusted it with the power to protect our land interest. As a landowner, we do not see any difficulty about that. BLA has shown to us that it is capable of protecting our land interest."

Paragraph 8 –

"....As landowners, we cannot remember a time when we were hostile to the Plaintiff. We are just been tough to crack. Our reasons are simple. We need to directly participate in the development of our resources. We can understand the fact that at the prospecting stage, the Plaintiff is basically expanding money and not earning. What we cannot understand, however, is that the Plaintiff wants to use our land for prospecting and the information derived from our land will earn him more money than it will expend. We have had that experience before with Inco Bugotu Nickel Limited and

> Pacrim. The Plaintiff may have good intentions but our choice is not with the Plaintiff because we have gone passed compromising with the Plaintiff."

It can be seen from the terms of this statement, the underlying reason for the reluctance in the 7th Defendants to deal with SMMS.

The next document is Email[200] Ochi –Kudo dated 10/01/2011 at 9.10pm.

> "..Trustee of the Leonard Bava Thavia Clan. We will hold a meeting with the Thavia Clan today in the Huali village. Chief Martin Tango, who is not a trustee but is the substantive chief of the Huali village, will be there. Bava, who won't cut ties with Axiom will be removed as Trustee, and a different landowner will be appointed as Trustee."

The earlier Affidavit filed at these proceedings which resulted in SMMS failing in its bid to have the Minister extend the term of an LOI, cogently sets out the reason, at para 8 for the reluctance to deal with SMMS. SMMS has never sought to share profits. (Axiom has agreed to share profits).

The Affidavit while reciting the fact of the Acquisition Proceeding, does not attempt to describe Tango's role as a Lessor or statutory trustee or representative. But the inference, since both acknowledged the role of the BLA in seeking mining development on the lands, that from the time of the IBS meeting[201] (where Martin Tango was present for at least one meeting, and I find, aware of the purpose of the other meeting) Bava replaced Martin Tango as acknowledged by Ochi in his email.

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[200] Ex. 113 tab 55
[201] Ex. 18

There is no evidence that Bava knew of any purported removal of him as Trustee before his letter of the 9th of February, 2011. There is sufficient evidence of the Assignment and Ratification of the substitution by Martin Tango.

4. Father Wilson Mapurau

Again, Father Mapuru gave evidence in these earlier proceedings[202];

> "1....I am the head of the Veragabuhi Landholding Group and members of the Taraoa clan of the Vihuvunagi tribe of Bugotu, Isabel Province....
>
> 4...our boundaries is as follows:
>
> (a) From Kokoilo Vathe (west coast) up the hill along the ridge, sharing common boundary with Kolosori Land of Francis Selo's clan:
>
> (b) from the top of the hill, three tribal group land boundaries meet, namely, Francis Selo's group, Levi Likoho's group, and my group:
>
> (c) (Francis Selo's eastern boundary, however, stops there but my boundary extends north-east where we share common boundary with Likoho's group (western side) and ours on the eastern side, until it reaches Hirogu:
>
> (d) from Hirogu, passing north of Rasa, eastward to Thabumanu and down to the east coast where

[202] Ex. 101t [affidavit dated 11/02/08] in cc.386/07

were share common boundary with Nathaniel Hebala's group: and

(e) on the southern coast from Kokoilo Vathe in the west to Gahirasethe on the east passing Havihua village, through Visohavi settlement...."

Paragraph 6:

"..Our group, to my belief and knowledge, had not sign any surface access agreement with the Plaintiff. I do not know who else may have an interest over our land and because of that interest, may have signed the surface access agreement with the Plaintiff. In Exhibit "Ht10" in the affidavit of Hideochi Takaoka filed October 18, 2007, I noted, however, that negotiations with our clan is on-going."

Paragraph 7:

"..I believe our clan rights to the land is under threat by claimants who are not authorised by our clan and who may have seen fit to sign a surface access agreement for the sake of receiving money. I have not been able to see any form of agreement affecting our land simply because I have no access to the records except with the knowledge as indicated above that negotiation is on-going with me..."

Paragraph 8:

"..I believe this is also the reason for us signing the surface access agreement with the Plaintiff with part of our land which borders Japuana land because we have a dispute as to the boundary on that side with the Japuana people. ....."

Paragraphs 7 and 8 above, touch on Axiom's argument on the evidence, in this present case which shows SAAs were treated by putative landowners as affording them rights as such (Anika Thai) and that only on signing, were signatories paid. His statement, in para 4, acknowledges the representative capacity of those named adjoining owners. From the description in paragraph 4, I am satisfied that his land falls to be described as G5 in the Palmer Acquisition.

As Lilley QC says, had father Mapuru attended the Palmer meeting, he may well be named as a representative for G5. The IBS meeting was held in 2008. The replacement of the late Joseph Bengere by Father Mapuru was made plain. His implied authority was never challenged until the intervention of SMMS.

Mapuru was chosen to stand in place of Bengere. Bengere was representative for G6 land. While the 7th defendants acknowledge the error in proposing Mapuru as the substitution for Bengere, his appointment was ratified by the surviving statutory representatives named by the AO in 1992.

I am satisfied that Mapuru is, in accordance with the proviso to s.110, fixed with notice of the statutory trustee obligations and stands as trustee for G5 and G6.

The Commissioner accepted the evidence as sufficient justification for his Vesting Order. In the circumstances, I am not minded to find any mistake.

5. Robert Malo – Statement of Joel Malo filed 14/3/14 (English translation filed in Court -27/6/14) – Exhibit 163.

He relies on his father Joel Malo's statement[203]

> "1.... I am one of the leaders of my Vihuvonagi clan and the people recognised me as owner of the land described as G1 in the Penrose Palmer Acquisition Report of October, 1992.
>
> Para 2... I can still recall the two Penrose Palmer Meetings where I represented my tribe and clan at Huali and Vulavu, in 1992.
>
> Para 10. ... The land which they identified in 1992 Acquisition at Huali village was Kolosori land owned by my Takata Clan. The power to look after the land was handed to me as a tribal chief. The power to inherit as tribal chief of my clan stays with me and I will hand it to a suitable person as I am getting older. My son, Robert Malo and my grand-daughter, Meverlyn Odu, will take-over as the next chair because I chose them and to look after the land for many years to come.
>
> Para 11. ... I chose my son, Robert Malo, because he is the suitable person and I gave the same power I have. I am one of the land trustees of the registered land from Takata to Gahirasethe.
>
> Para 12. ....My tribe on October 13, 2011, held a meeting at Talesi to choose who will represent our tribe and clan in any

[203] Ex. 163 filed 14/03/14-English translation filed in court.

> mining development over our land. We appointed Robert Malo and Alice Runai, as woman representative...."

It is clear that the assignment of authority by Joel Malo to Robert Malo, was ratified by the meeting held on 13 October, 2011. I am further satisfied that the substitution of the statutory representative, Joel Malo by his son, Robert Malo, was accepted by the Commissioner as effective for the purposes of the Vesting Order. I find on thse facts the effective assignment and ratification of Robert Malo as Joel Malo's replacement as a party to the earlier agreement.

No mistake has been shown to justify this Court's interference.

Lilley QC reiterated that, in the face of the offer by Cortez to have the Commissioner recommence the acquisition proceedings, no finding of fraud by Cortez is available. I agree.

Sullivan QC says these people could not have been validly appointed for they had not been shown to have been appointed in a customary way. I accept Lilley QC's argument on this point, for the appointments are not in custom *per se*, they of course owe much to custom, for the representatives standing in their tribe and clan is important, but they have replaced those statutory representatives, named by Palmer not solely because of the resolutions of the IBS meeting but as a consequence of all of the above matters.

That replacement then owes more to common law principles affecting agreements which I accept have been exhibited on the evidence, than custom. I say this notwithstanding the IBS Meeting acknowledges custom by having other landowning representatives in attendance.

Lilly QC, on Day 88 in his opening at p20 said:-

Can we ask your Lordship then to refer to the Transcript of Day 15 Session 3 at pages 8 to 9? It reveals that in January- and that's item 24- it reveals that in January 2011, a family meeting attended by Martin Tango appears to have refused to accept Mr Bava's resignation as Trustee. Mr Taukumana accepted, during examination-in-chief, that he told Bava not to resign. There appears to have been no meeting of the Thavia Clan to remove Mr Bava or Mr Tango until the meetings of the 25th and 26th of January 2013. Sumitomo went out and paid for those meetings. It can hardly be said that they were meetings in custom to remove a trustee or leader and that accords with the evidence of Riogano.

While Martin Tango and Willy Denimana signed an authority to Sol-Law on the 13th of July 2011, Martin Tango signed a statutory declaration withdrawing that authority on the 3rd of August 2011 and his withdrawal of instructions was communicated on about the 8th of August 2011. No doubt something will be said about Willie Denimana giving and not resiling from an authority. It is something more than a coincidence, we will submit, that Sumitomo employed Mr. Denimana when his signature was needed, but that his employment with them did not continue for long thereafter. In any event, there is nothing in evidence indicating that Leonard Bava was aware that his authority had been terminated at any time before the prospecting licence issued to Axiom KB. His authority to act as agent for Martin Tango commenced at least as early as the affidavit in the 2007 court proceedings.

I accept these arguments, they are evidence based.

The claimant's case, based on the failure to follow custom at the IBS meetings as evidence of mistake [and fraud by Cortez] misapprehends the defence. The appointment of Mapuru in substitution of the late Bengere is, as Lilley QC says, by virtue of the surviving jointly appointed statutory representatives' ratification in 2008. In the absence of dissension and in the face of the purpose of the IBS meeting, I accept

the effective substitution of Mapuru since that time and he stands to represent both the 5th and 6th landholding groups.

I find no evidence of mistake in the knowledge of the Cortez group or by the Commissioner by his act of the Vesting Order which led to registration of the 7th Defendants as the proper persons as assignees of those statutory representatives named by Palmer in the agreement and as varied by appeal decision, for by law they were entitled to stand in place of the parties named in the agreement.

The "Statutory Trusts" by virtue of s.195[1] of the LT Act.

It is probably appropriate here, to be reminded of that old adage "that in the ways of the world, the generality of mankind is to judge from what is now and not what was then". It is so much easier to address matters with regard to current norms than to seek to understand and appreciate what was then. Of course, memory being what it is, it is perhaps best to fall back on that which is clear now, and attribute it to then.

But we are not concerned with the now, so much as the then and great care must be exercised to tease out the important from the not so important and seek to find the facts then.

The first important matter was that the Acquisition Officer was concerned to register land in only 5 names to represent owners of whatever land was within the proposed boundaries. He had, as I have set out at the beginning, asked those at the first meeting to separate themselves into landowning groups and nominate a representative for the groups which he had designated G1-6. So there was the presumption of ownership which was not refuted in the process, although there were disputes over internal boundaries and the argument over Martin Tango's claim to own the whole part, an argument eventually resolved by order of the High Court on appeal, but which confirmed Martin Tango's right to represent the 3 families. A relevant fact is that, whilst the Acquisition Officer accepted that more than 5 groups claimed land in the proposed

acquisition, only 5 representatives could be named. [s.[195[1]LT Act].This was cured to some extent, for the two landowning groups in G1, Posomogho and Vihuvunaghi, accepted representation by Joel Malo and Hugo Bughoro [although Joel Malo refused to sign].

By the 2nd Palmer meeting, Lonsdale Manase represented landowners of G4, which meant Palmer had his 5 representatives. Had Martin Tango agreed to sign with Hugo Bugoro for G2, Palmer would have had 6 representatives and he would have been obliged to recommend to the Commissioner, vide s.195[1] and the Commissioner to accept "the first 5 persons named in the disposition as joint owners on the statutory trusts'. The statutory trusts refer to the obligation brought into being by the section, resting on the first named 5 persons, to hold the vested interest for as joint owners for all the groups named G1 to G6, by the acquisition officer. This phrase "statutory trusts" expressly recognises a different type of trust to that understood elsewhere in the common law for instance and must relate to the changed nature of the interest, from customary interest as a person entitled as a landowner, to that interest afforded by the LT Act and subject to the obligation to accord recognition to groups whose land has been registrated but whose representatives had not made it onto the vesting order or register.

There was also consensus, to a degree about representatives, and those aggrieved were able to appeal, after the 2nd meeting and their rights were adjusted.

Those persons who stood at the 2008 IBS Meeting as shown by the Minutes, accepted the land ownership, recorded by Palmer, the Acquisition Officer. The meeting did not seek to impugn the land ownership of the parcels making up the Kolosori land holding.

By the end of February 2011, the Kolosori Land had been registered. There was no provision for the registration of "trusts".s.212[3], although the "statutory trust" in s. 195[1] falls on the registered owners from time to time.

The concept of trust as this court has said varies from person to person and from time to time, such that it would be unwise to inform the title. But this usage of "statutory trust" is one solely concerned with s.195[1].

In appropriate circumstances, such as in this case, the court may call for the Registry documents with a view to determining if necessary whether and if so what "statutory trusts" affect the registered estate.

I have touched on the Trust concept – *Kasa v Biku* [204], Sir John Muria CJ said:

> "thus the Defendant is correct in saying that he is not a Trustee for the purpose of holding the land in his name on behalf of his tribe. However, as he is the representative of his tribe, he received and will continue to receive the benefits on behalf of his tribe for the tribes' land. This is where accountability before his actions is of paramount importance."

This principle accords with Lilley QC's argument. There is in effect recognition of continuing obligation to the tribal clan, notwithstanding registration. It is consequently not correct to say the land has been stolen. That obligation may be inferred from the terms of the Minutes of the IBS Meeting, the letter of Cortez of the 9th of February, and the fact of the KHL Association. In any event, the obligation was fixed at the time of the Palmer determinations (as affected by the Appeals) and attaches to the proprietors registered from time to time.

It is wrong to suggests as the claimants do, that importation of common law principles into Part (V)(1) resulted in a "transmogrification" of the agents into principals. The 7th Defendants make no such argument. Their reply of the Amended Pleading dated the 19th of March 2013, the 6th Defendants, by answer to request for further and better particulars, rely at 56 (c) on the express appointment and ratification, of those 7th Defendants.

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[204] (2000) SBHC 101

The five registered proprietors changed the beneficiary, Kolosori Holdings Ltd into a community company, Kolosori Holdings Community Co. Ltd on the 20 May 2012[205]. The directors are those registered proprietors. The shareholders are described as Cortez of the Goe Tribe, Eric Selo of the Vuhuvunaghi, Francis Selo of the Iputu, Wilson Mapuru of the Taraoa and Bava of the Thavia Tribe. As has been said by various judges of this court, trustee obligations relating to the tribe should be resolved amongst the members of the tribe. Here is an obligation recognised by the registered proprietors [by their acceptance of the statutory representative status afforded the original appointees by Palmer the AC and at the IBS meeting] and further recognition by virtue of the community company. Where dispute arises, changes after appropriate determinations by Chiefs courts for instance, may be made to the community company membership to reflect the Chiefs determinations for the better distributions of moneys received on the statutory trusts in accordance with the lease.

For the lease to Axiom is as these defendants say, a matter for the registered proprietors and unrelated to custom. The envisaged lease by the Commissioner to Bughoto Nickel never eventuated; the company faded away. As said, the Commissioner had a lease without a company able to pay the "rent" which had been described as a share of profits. No benefit as envisaged consequently could flow to the lessors under the lease. The obligation remained with the Commissioner whilst the agreement remained unrescinded. The registered proprietors were able to arrange a benefit envisaged by the Commissioner when he entered into the lease. That benefit would come from Axiom.

These defendants argument then is expressed by the principle they rely on simply put; if you enter into a contract you have an obligation pursuant to the terms of the contract to do everything within your power that is reasonable to ensure that the other party gets the benefit of the contract. The benefit was the rent, the Commissioner was thus constrained from stopping the other party to the contract from having the benefit[206]. So it follows, the Commissioner who had in terms of his lease with the statutory representatives, intended to require a further lease to

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[205] Ex.7A & B

[206] *MacKay v Dick* [1881] 6AC 251

Bughotu Minerals after the vesting and registration had taken place, may seek specific performance of the original agreement and oblige the registered proprietors to grant the lease to the mining company, Bughotu Minerals. Absent Bughotu Minerals the Commissioner cannot do anything to stop the registered proprietors from leasing the land for the original purpose, mining so as to obtain the benefit envisaged.

The claimants case is that custom determines the powers of the representatives and consequently no rights to lease in these circumstances ever arose.

I accept these other defendants argument on the point for the statutory representative capacity of the Cortez group is no longer to be found in custom.

The power to contract is with the registered proprietors in terms of the LT Act. This is not the case where the courts will aid an incomplete agreement, for the original lease was in terms recognising an agreement to come behind, an agreement with the miner which terms were yet to be finalised[207]. The reference in *Masters* at that point speaks of the later introduction of the formal document [the lease to the miner] for the original agreement only dealt with the major matter of the vesting and registration albeit recognising the purpose; the benefit to accrue to the owners" from the later introduction of the miner by the lease. The 7th defendants then have the right accorded them as owners under the LT Act to contract a lease agreement with a miner, in this case Axiom.

While this material which follows falls to be considered in the labrynth created by the claimants, and does not have relevance to the argument concerning indefeasibility of title upon which I make these findings,I will deal with it as shortly as possible.

Social organisation and Land Tenure.

Quite some research has been done to spell out the matters so described in Isabel. At paragraphs 130,131 of his written submissions

[207] *Masters v Cameran* [1954] 91 CLR 353 at 361

Sullivan QC has highlighted the different approaches to the "land issue" in this way.

> "The matrilineal principle, coupled with the recognised custom that women owners are entitled to make any decisions that would fracture the matrilineal system, does not accommodate the idea that five men can become owners of the land without the knowledge and consent of the true owners in custom".

The assertion does not address the wording in s.195[1] of the LT Act where on acquisition, only 5 representatives named will be registered nor does it give credence to Part V of the LT Act which provides for acquisition.

Not one single witness in this case disavowed the existence of the matrilineal system. The Seventh Defendants rely on it for their claimed rights in relation to G1 to G6. The Claimants' case provided evidence that women owners still act collectively in order to protect a group's rights. The Seventh Defendants' case is notable in that, unlike the Claimants' case, no evidence was called, let alone any evidence from women owners.

It is the case of (Axiom) and the Seventh Defendants[208] that these claims in custom ignore the effect of the land acquisition hearing in 1992, for that the Acquisition Officer had made determinations concerning the customary ownership of the respective land parcels, G1-G6 (excepting G5)(unchallenged apart from challenges going to particular boundaries and particular rights to represent which had been dealt with by the AO or the Court by way of appeals) and that such land ownership has never been denied. What has been denied is the right to represent in the non-SMMS claimants [for the reasons set forth elsewhere] and any right in SMMS to standing to contest the registration of the 7th defendants as owners or their right to lease the land to Axiom and Axioms rights as a lessor registered under the Act.

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[208] Pleadings 17a-7th Defendants defence to claim.-17 consolidated pleadings.

Acquisition Proceedings 1992

Paragraph 131 of the claimants' submissions is based on the premise that if alienation happened through the Palmer acquisition process, it did not affect "customary beneficial interest" in the land so that those claiming through their tribe or clan may continue to be represented in these proceedings.

That right to represent claimed by the non-SMMS Claimants has been challenged. The arguments are dealt with elsewhere.

While addressing the steps in the Palmer proceedings, at paragraph 153 of his submissions, Sullivan QC says at (b) *"Palmer was not deciding ownership of land and Palmer wanted representatives for a certain purpose only, namely the signing of the Lease Agreement".*

This assertion has been addressed in the Seventh Defendants' argument and its pleadings. I find that ownership was recognised by Palmer [for he called the groups into those tribes and clans associated with the particular land parcels with which he was concerned and after enquiry was satisfied with their claim to represent based on the facts found going to customary ownership]. Any persons aggrieved could appeal and some did. The ownership has not been in question. Anika Thai were found to have sold land and their claim is extinguished since they never appealed the AO's finding.

Sullivan QC's conclusion relies on Part V Div.1 of the LT Act that the "five trustees" were, in fact merely representative of eleven Land Holding Groups (or in the case of *Saina,* an individual) for the limited purpose of giving effect to the Commissioner's "wish" to take a lease of the land.

The assertion the named representatives were merely representatives to give effect to the Commissioners wish to take a lease rather overlooks the purpose of the acquisition, to facilitate the land registration which has the effect of extinguishing the customary nature of the land and to

imbrue it with statutory indicia as registered land, subject to all the provisions of the LT Act.

These arguments have been addressed by the Seventh Defendants and Axiom in their submissions supporting their indefeasibility of title and assignment and ratification.

THE CONSTITUTIONAL CASE

I have found that none of the Claimants have standing to seek relief. Nevertheless, the Sixth and Seventh Defendants have addressed the Constitutional claim in these terms;

> "..if ss109 and 110 of the LT Act would otherwise operate to give these Defendants indefeasibility of title, that would also contravene the land claimants' fundamental rights and freedoms, protected by ss3 and 8 of the Constitution, because they operate, in this case to deprive the land claimants of their rights in the customary proprietary interests in their customary land without compensation. To that extent, ss109 and 110 are inconsistent with s.2 of the Constitution and void".

To suggest that ss109 and 110 are inconsistent with the Constitution must be cause for disquiet when these sections deal with interests conferred by registration under the Act, and rather underpin the rationale for registration.

Be that as it may, Axiom says, relying on the authority of Commissioner Crome's finding on what constitutes "property" in terms of s8[209], the Claimants have by no means put before the Court any evidence of their interest or right over property that might be susceptible to deprivation or

[209] *Fugui v Solmac Construction Ltd* (1982) SILR 100

compulsory acquisition. For the deprivation (in s3) is protected by the prohibition in s8 against "compulsory taking possession of" property and later protection against "compulsory acquisition of property".

I do not propose to set out the section which is long and details matters giving rise to the comment by my brother judge [as he then was] Kabui J that such rights were not absolute , rather they had to be balanced.

Those phrases encompassing compulsory acquisition, the Commissioner concluded, referred "to an acquisition by virtue of Statute or Statutory Regulations" and he relied on the Privy City Council decision on the government of *Malaysia v Sellangor Pilot Association.*[210]

At page 347, the Privy Council said;

> "...their lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use. If in the present case the Association was in consequence of the Amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which was within the competence of the legislature to pass. In relation to Article 13(2) the question to be answered is: "...was any property of the Association compulsorily acquired or used by the Port Authority? Only if there was, could there have be a failure to comply with Article 13 92). The only property, launches etc, acquired by the Port Authority from the Association was acquired by voluntary agreement."

[210] (1978) AC337

Lilley QC pointed to the conclusion by the Privy Council[211] that it does not follow that a provision which leads to deprivation also leads to compulsory acquisition.

Yet he says there will be neither deprivation nor compulsory acquisition where in *Selangor Pilots'* case as in the present case, the acquisition was by voluntary agreement. By voluntary agreement he is referring to the Lease Agreement struck in 1992 when the land was to be registered under the Division 1 of Part V process, and not the Division 11 – compulsory acquisition of land process. His argument is sound since the Claimant's argument does stem from the false premise that the land was "compulsorily acquired", a factually false situation here.

In any event if I am wrong, there is redress under s.230 of the LT Act for Indemnity, where a person suffers damage for mistake (as the Claimants allege), or any error in the land register so that the Constitutional protections are not called into play[212].

In these circumstances, I decline to consider constitutional relief for it cannot arise on the facts. The Claimants' s.112 constitutional argument has no merit.

Possession

There is the claimants' plea contrary to that of Axiom's, [that Axiom had been in possession of the registered land since in or about May 2011], Axiom only in fact entered into possession of the land after the

[211] PP347-34 ibid
[212] *Lobo v Limanilove* [2002] SBHC 110 per Kabui J

proceedings had commenced and possession was not lawful for it was in breach of an injunction.

Axiom in the absence of any local law about the burden of proof under s.229 of the LT Act, says the burden remains with the claimants, including the negative state of affairs that Axiom is not "in possession" and did not acquire its interest "for valuable consideration". I deal elsewhere with the valuable consideration aspect.

These defendants rely on the authority of the ratio of Bowen LJ[213] who stated;

> "If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests with the plaintiff"

Axiom says this is so whether s. 229 is understood as prescribing the elements of the claimants statutory cause of action to obtain an order or the jurisdictional facts upon which the courts power to order rectification are enlivened.[214] These principles have been adopted as the law in the Solomon Islands since the Australian cases base their authority on the UK earlier decided cases.

The evidence about the date on which Axiom took possession of the Takata land was said to be gleaned from a number of statements and exhibits including an Australian ASX release dated 12 July 2011 [ex. 50] but I will rely on two principal documents, the email of Ochi to Goto dated 23 May 2011[215] and the statements of Rolland Pade [Pade] an employee of SMMS.

That first document against interest said;

> "the Axiom group entered Takata and started the ground levelling process, so he [Manase] has reported them to the police so they will not let them enter the area."

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[213] *Abrath v North Eastern Railway Ca* [1883] 11 QBD 440 at 457

[214] *Currie v Dempsey* [1969] 69 SR [NSW] 116 at 125 per Walsh JA;*Owners of the Ship "Shin Kobe Maru" v Empire Shipping Ca. Inc.* [1994] 181 CLR 404 at 426

[215] Ex. 123b, revised translation 13

The Pade statements originated in 2011 when he refers to three trips where he was able to observe the Axiom site. He relied on a statement of Mason [an employee of SMMS] and consequently photographed the site from a helicopter on the 22 August showing Axiom machinery on site. The statement of Mason speaks of having been told something by Manase about the Axiom activities on site. Pade's second statement refers to the 4 August flight and a further flight on the 22 August. Pade's April statement[216] was much more detailed and at para.7 he recounted hearing of the Axiom LOI when Mason asked him to look out for activity in the area [this was in April or May 2011] and the helicopter would fly low over the area. Sometime in late July while flying to work he saw men clearing an area which was the Axiom camp. He informed Mason who asked him to take photos.

Mason's statement of 2011 speaks of Manase informing him on or about the 2 August when he asked Pade to take photos.

While that corresponds with Pade's latest statement in cross-examination Pade conceded[217] his first statement referred to 3 trips where he was able to observe the Axiom site [since SMMS was working in the opposite direction]; in his January 2014 statement he says he would pass the site twice a week and in his last dated April, he would pass the site 6 days a week. He ultimately accepted he would pass the site twice a week on average.

Since Pade was the witness SMMS chose to principally rely on, for he was working out of Cockatoo base, after three internally conflicting statements, I am not satisfied on balance he may be relied upon for a finding Axiom was not in possession before the time of its undertaking or the injunction. My comments about memory especially memory specifically directed to a purpose after the event, is apposite. He is unreliable on such an important matter.

As Axiom says, the issue of lawfulness of possession must be read according to the terms of the section. Since the person entitled to the benefit of s.229[2] is the person registered from time to time, who has

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[216] Ex.132b

[217] Transcript Day 73, session 3 p26-27

bestowed on him everything described in s.109 including the right to possess the land.

The evidentiary burden on SMMS in relation to possession has not been discharged.
The section itself affords Axiom the right in any event

The later material of Pade and the manner in which the case has been presented [by production and disclosure after calls] can be seen to go to the criticism of these defendants of the knowledge in the claimants, particularly SMMS and absence of disclosure of material facts at the time of the application for the injunction.

Judicial Review of Axiom's Prospecting Rights

On the 12 April 2011, the Board resolved by a majority (4 out of 5 members) to advise the Minister "to issue an LOI over ...Takata in favour of Axiom.. for a 12 month period in order for Axiom...to obtain surface access and agreements".

On the 15 April, the Axiom SAA was lodged with the DME; the SAA agreement by the registered 7th Defendants granting access rights to Axiom on the terms set out.

On or about the same day, the Minister granted the Axiom PL in favour of Axiom KB.

The Claimants argue that the Board was constrained to approve the application by Axiom for the Minister had made that plain [without proper consideration of the application] while Axiom says the Board formed the opinion that the application was acceptable in accordance with s.21 (1) of the MM Act.

There can be no issue with the decision of the Board by majority for Clause 8 of the Schedule provides for majority decisions at a meeting of

the Board. Axiom relies on the "presumption of regularity" in so far as the quorum issue is concerned. The Minutes of the meeting[218] does not show the attendance of any landowner or provincial government representatives.

The claimants say that omission is contrary to s.7 of the Schedule of the MM Act. The meeting (chaired by Auga in his capacity as Director of Mines) was concerned primarily with the "purported cancellation of the Award and the SMMs LOI, and did not deal with the Axiom application on its merits but considered that the Cabinets decision directed their deliberations, and indeed Auga (as Chairman) considered that his office was simply the implementer of government policy rather than the administrators of the MM Act."

I should say the meeting had been postponed so that on the 12 April David Damilea (Senior Crown Counsel of the AGC) (Damilea) was present.

The Minutes included this introductory statement of the Permanent Secretary Dept. of Mines[219]

> .."The urgency of Axiom's application is in line with Cabinet's decision regarding implementation of various issues submitted to Cabinet, Minister of MMERE cancellation of SMM LOI and award letter and landowners Members of Parliament of Isabel and Isabel Provincial Assembly support to work with Axiom".

Then in Deliberation it says;

[218] Exhibit 42
[219] Exhibit 43

> Chairman: "Asks Attorney General's Chamber [AGC] rep to read through cancellation letter and Cabinet decision"
>
> AGC. rep." In general, Cabinet has spoken, Mineral Board is answerable [subordinate] to cabinet and Govt. of the day. In principal, how PS has made it clear that LO and Provinial members do not agree with SMM gaining another license in Isabel. Decision of the Cabinet has to be implemented. However the decision to take on board Axiom as an investor is entirely the decision of the resourse owners. There is a valid point that the International Tender is a Policy of the previous Govt. And now there is a new Govt. So new policies to be implemented."

Interestingly, the question of the delivering of the cancellation letter to SMM came up in the discussion.

Permanent Secretary Mines PS(Mines) (presents to Board letter of cancellation by Minister;

> "The Letter of Cancellation was to be hand- delivered by the Minister himself. However, the Managing Director of SMM denies having received any letter regarding the cancellation and approached myself to show him the letter but refused to accept. The second time he demanded, I refused. The Managing Director of SMM has seen the Prime Minister (PM) and Australian Govt. regarding this. However, cabinet decision is final. When Hon. Kemakeza resigned from NCRA Govt. The Letter of Award to SMM was signed by the caretaker Minister, Hon. Bradley Tovosia. On his return to Govt. Hon. Kemakeza was unhappy because letter of cancellation had already been issued to SMM".

The Minutes corresponds with the earlier evidence of the Permanent Secretary where he made the letter available to Auga after Mason's request for a copy for Ochi.

The Rebuttable Presumption of Regularity-SMMS criticism of the Board meeting on 12 April 2011.

Pursuant to s.10(1) of the MM Act, a Minerals Board is established, responsible for general matters relating to administration of the Act and by ss.(2), the provisions of the Schedule shall have effect as to the constitution of the Board.

The Schedule at (1) provides for nine members including representative members from other government departments and by proviso in addition, "the Minister shall appoint to sit as members of the Board when it considers an application for the issue of permit, licence or lease, –

(a) representative from Provincial Government;

(b) a representative from the Landowners."

It must be said that neither particular representative was on this Board Panel. Whether they were available or not, is a matter for conjecture but it is also a fact that Leonard Bava and Elliot Cortez (landowner representative for Takata) were appointed landowner representatives who sat on that earlier Board Panel which recommended to the Minister the successful Tender winner, SMMS on the 30 September 2010.

Axiom calls in aid the presumption of regularity "*omnia praesumunter rite esse acta"* to establish that the requisite quorum was present to transact the Board's business. It relies on the authority of *Morris v Kansess*[220] where Lord Simonds, delivering the judgment of the court said at 475....

> "One of the fundamental maxim of the law is the maxim "*omnia praesumuntur rite esse acta*". It has many applications. In the law of agency it is illustrated by the doctrine of ostensible authority. In the law relating to corporations its application is very similar. The wheels of business will not go

[220] 1946 AC 459

> smoothly round unless it may be assumed that that is in order which appears to be in order."

The applicant for the prospecting licence, Axiom, is entitled to assume the Board considering its application was properly constituted. There is no evidence to suggest it had reason to doubt until the point was raised in these proceedings and by Ochi in the Board meeting in 2013 when the Board in April purported to reverse its earlier decision to grant the PL.

The rule is designed to protect those entitled to assume (because they cannot know) that the Board with whom they deal has the authority which it claims. The Board panel included the PS Department of Mines and the Director. It had been delayed so that the AGC was represented. Two landowner representatives were jointly registered as proprietors of the land the subject of the application and they had granted a lease to Axiom to enable it to apply for this very licence. The Board in its deliberations does not appear on the face of the minutes to have expressed any reservation about a quorum or the members so constituting it. The record was prima-facie evidence of the lawfulness including the fact of the quorum present at the meeting.

> "It is a rule of very general application, that where an act is done which can be done legally only after the performance of some prior act, prove of the later carries with it a presumption of the due performance of the prior act, *prima facie,* then in the ordinary course of business, when a persons with specifically prescribed powers meet together, the first thing they would natural do would be to verify their powers and then proceed to act, and the fact of acting is *prima facie* evidence that they had authority to act, just as a person who attempts to deal with property is regarded *prima facie* as the owner. There is high authority for saying that this presumption is applicable to the proceedings of corporations. In the case of the *Bank of the United States.v Dandridge.* it was said "the same presumptions are, we think, application to corporations.

> Persons acting publicly as officers of the corporations are to be presumed rightfully in office, acts done by the corporation, which presupposed the existence of other acts to make them legally operative, are presumptive proofs of the later. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other cooperate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. In short we think that the acts of artifical persons afford the same presumptions as the acts of natural persons."[221]

The rule is available and I accept that the resolution of the Board on the 12th of April was a decision made in accordance with its process.

The decision in *McLeans* case is an answer to the claimant's asserted [mistaken] view that the Board, in adopting the Cabinet's decision cancelling the SMMS LOI, was wrong for "they believe they were constrained to do so by the position taken by the Minister and the Cabinet such belief reflected the proper lawful discharge of their duties."

The claimants had said "that the Board was answerable (subordinate) to Cabinet", but that its act in that circumstance, omitted its obligation in terms of S.20 of the MM Act to properly consider the PL applications.

Sullivan QC argued that the Board had not met to recommend the cancellation of SMMS Award (as elicited from Newyear, the Permanent Secretary in cross-examination by Sullivan QC), for this clouded the Board's purpose. Much discussion was taken up with the Cabinet decision, and the Board failed to take into account the relevant fact that SMMS had won the tender on the basis of merit.

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[221] (Mclean & Rigg v Grice [1906]4CLR 835 at850)

There does not seem to be a real issue between SMMS and Axiom over the standing of Cabinet decisions, or the function and the role of the Cabinet in Westminster systems of Governments. Sullivan QC prefaced his argument about the reliance on the Cabinet decision (impliedly accepting the function of Cabinet) as clouding the issue which was to deal on the merits with the application. But his argument went further and did suggest that the Board had power to override that Cabinet decision. He said "the majority (of the Board) were concerned to rubber-stamp a Cabinet decision rather than honestly and reasonably exercise its own discretion."

I should say this confluence of ideas is confusing, for the Board had no discretion in the matter of the SMMS cancellation of Award by Cabinet. The Board could neither rubber-stamp nor challenged the Cabinet decision. Cabinet is not reliant on the Boards imprimatur. But the Board could consider the Axiom application in its own discretion.

Lilley QC argued, in his written submissions,

> "508, the Cabinet as a whole, therefore, collectively answers for the conduct of Ministers. This reflects the role and function of the Cabinet in Westminister systems, as Widgery LJ, in *Attorney-General v Jonathan Cape Limited*, explained; "The convention of joint Cabinet responsibility (provides that) any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign.
>
> 509, the convention derives from the circumstance that Cabinet "is at the very centre of the nation affairs", which Professor WB Hearne described as "the cornerstone of (the) modern system of government."

In *Eagon v Chadwick*, Priestley JA described the notion of "policy" in relation to the functions of the executive;-

> "(the) function of the executive.... is, in a nutshell, to execute, or administer, the laws of (the country). Every action of the executive must be a lawful one and one is empowered to take by law. Government policy fits within these necessities in two ways, one relating to the law as it stands, the other as it is hope it would stand in the future. As to the first of this, statement of policy by the executive can only be statements of what the executive intends to do in a particular aspect of government in carrying out existing laws of what it will be choosing to do amongst various causes of action permitted by existing laws, and as to the second, what it proposes to do pursuant to laws it would seek to have passed by parliament".

I accept that the Board was required to follow directions given it by the Minister (S.10(3) of the MM Act.) The Minister's act in these circumstances is not susceptible to judicial review. It relies on a Cabinet decision. If as a consequence, there arises a cause of action in law or equity against the SIG then it may be pursued[222].

The Minister's direction in accordance with the Cabinet decision to cancel the award and LOI to SMMS addresses the SMMS PL which cannot stand. Where the basis for the PL, the LOI had been cancelled, the subsequently dated PL is no longer valid.

I quote from the Minutes of the Board Meeting. 12th April 2011

> *"Barnabas; So Axioms application now is lodged as a normal application for PL?*
>
> *Chair; Yes.*
>
> *PS (Mines); (presents to Board letter of cancellation by Minister of MMERE). Minister has hand delivered to SMMS.*

[222] Claim 11A-claim for specific performance of agreement pleaded at 97A of the Statement of Case [pleadings]

Somehow LO were able to get a copy of the cancellation letter and given it to interested party. SMM claims not receive letter.

Chair; This cancellation letter, can it be only delivered by the Minister?

PS(Mines); No, anyone can deliver it. But the Minister preferred to do this.

AGC; This is not a court document where only one person can deliver.

Chair; I have given a copy to Managing Director of SMM after being advised by PS to halt all assistance to SMM by Mines Officers."

This letter of cancellation is not a matter for review by the Board.

The Axiom application for the PL had been tabled before the Board. It was the business item. The Chairman of the Board, the Chief Geologist, AUGA, is the Director. SMMSs assertion that the Board could not possibly have reasonably or honestly formed the opinion that it did in recommending the issue of the Axiom LOI is an assertion, I find without support. The submission implies a dishonest opinion in the Director. It is without evidence. The Director, with the application as the only item of business, has not been shown to have acted "unreasonably" or "dishonestly".

The argument advanced by SMMS that the Board had not met to recommend the cancellation ignores the Minister's authority derived from the Cabinet decision. The Board is prevented from further consideration of the Ministers' act in cancelling the earlier LOI. The argument that SMMS had won the tender on the basis of merit is irrelevant. It is not correct to say that the decision to recommend issuing an LOI was made without involving the landowners or the Isabel Province. Two of the landowner representatives on the Board were joint registered proprietors

of the land and their interest implicit. They had given a lease to Axiom and signed the SAA Agreement.

Newyear the Permanent Secretary of the Mines Department recounted the attitude of the Isabel Provincial authority. I am not satisfied, the application having been tabled, that the Chairman has overlooked the business at hand. The maxim is available to Axiom, for it was a party to the Board proceedings but Axiom "cannot presume in its own favour that things are rightly done if inquiry that he ought to make would tell him that they are wrongly done".

Nowhere does the claimant point to matters which ought to cause enquiry by Axiom, or notice of anything "wrongly done". For these reasons this claim at para. 79 of the Claim must fail.

This leads directly to the next Claim at 81 that "on 12th of April 2011 the Minister purported to issue the Axiom LOI". The LOI is exhibit 44.

SMMSs says the power to issue the LOI was under S.21 (1) of the MM Act was never enlivened because, while the Minister may act on a Board recommendation there was no valid recommendation. The Axiom LOI recited the fact of the Board's deliberation and recommendation. Axiom says there is a rebuttable presumption of fact that *where an act that is done can only be done after the performance of some prior act, prove of the later act carries with it a presumption of the due performance of the prior act.* In other words, while the Board Determination [to recommend the issue of a LOI to Axiom] did not specifically say that the application accorded with s. 20 of the MM Act, the recommendation presumes the finding that the application is proper.

This presumption is a species of the earlier presumption *omnia praesumuntur rite esse acta* and has not been rebutted by SMMS. It

does not avail the claimants to say "*amazingly the Minister issued that Axiom LOI the same day (as the Board recommendation) presumably purporting to exercise his power under S.21 (1).*"

This submission may imply a suggestion something untoward has happened, by the Minister's immediate grant of the LOI; there is a presumption against fraud and while none is pleaded, here, the inference by submission, hangs without evidence.

Axiom referred the court to *Pearce v City of Coburg*[223] where Sark J applied the presumption in circumstance where the City Council was required form a particular opinion prior to issuing a permit. As his Honour concluded, the permit was valid in the absence of evidence that the council had not formed the opinion.

It may be a matter for surprise that the LOI issued on the same day as the Board recommendation. As I say, there is a presumption against fraud. Claim 89 include three assertions; no valid Axiom application for a PL; no opinion in the Board concerning the application and no valid recommendation from the Board with a claim to existing PL and LOI in SMMS favour, as grounds for the miscarriage of the Minister's power to grant the Axiom LOI.

For the above reasons, this claim 89 is not supported on the facts or law.

The claimants' argument that Axiom failed to consult with persons other than the registered owners when seeking its SAAs.

The claimant's argument in their submissions at para 647 and 649 stated

> "there is nothing to suggest that S.21(4) does not apply to registered land and even where land is registered, land

[223] (1973) VR 583

> owning groups or tribes are most likely to have beneficial interest, especially where the registered land has recently been converted from customary lands. The provision is designed to ensure that those groups or tribes are consulted (and not merely their "trustees" who may or may not be the landowners as defined), although it may ultimately be those trustees who signed the SAA.
>
> Because part of Axiom application, on this argument, covered customary land, there was never any justification for relying solely on the "registration" of the Seventh Defendants. Axiom was required to take steps, the claimants say, "to identify landowners, landowning groups and those persons with an interest in the land, other than the Seventh Defendants. Plainly this was not done."

BY claim 93 the claimant asserts, Kolosari Land" was (at this material time) customary land, and the Seventh Defendants had no right to deal with it.

The argument, then, in paras 647 and 649 of the claimant's written argument, is an argument which does not accept the fact of registration of the Seventh Defendants as proprietors, but says were the court to accept registration in the owners, an obligation attaches to Axiom in any event "to take steps to identify landowners, landowning groups, and those persons with an interest in the land other than the Seventh Defendants. Plainly this was not done".

This argument was not pleaded and I do not need to address it. As Axiom says, this unpleaded argument has no merit since "the only terms and conditions that may be imposed on the Axiom LOI (are) with regard to "Process"[224] The 7th defendants, as owners, had granted Axiom a Surface Access Agreement. The right in the Registrated proprietors to

[224] Mining and Minerals Act S.21[2]

grant an SAA over the area of their registered land is a right recognised by s.21 of the MM Act, where by sub sect [4] the definitions of groups are exclusive. As "landowners" the registrated proprietors have exclusive rights to the land[225].

AXIOMS LOI

Failure to comply with regulation 5 of Mining and Minerals Regulations-Claim 81

Axiom concedes that the Axioms LOI did not comply with Regulation 5 of the Mining Mineral Regulations but asserts that the LOI is valid and lawful despite that for it nonetheless complies with S.21 of the Mining and Mineral Act and that Regulation 5 was invalid and unlawful.

> Regulation 5(1) "where the Board considers that an application for a prospecting Licence is in order, the Director shall, before a letter of intent is sent, transmit a copy of the application to the Provincial Secretary of the relevant province depicting the area for which the application is made"

The regulation by its subparagraphs particularises the detail about such meetings.

Axioms defence to claim 81(c) (IV) pleaded that Reg. 5 of the MM. Reg:

> "(A) "Was made outside the express terms of the power to make regulations confer on the Minister under S.80 of the Mining and Minerals Act.
>
> (B) In the alternative is inconsistent with the provisions of the Act.
>
> (C) In the premises is invalid and unlawful."

[225] Section 110 LT Act

Dealing with (A) Axiom says this court should adopt the approach in *Shanahan v Scott*[226] where the majority of the Australian High Court (when considering a grant of power substantially in terms of S.80 of the MM. Act) stated;

> "(such) a power does not enable the authority by regulations to extent the scope or general operations of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends".

Axiom submits that the regulation "purports to impose requirements additional to those statement in S.21(1) of the MM Act " The requirement to transmit a copy of the application to the Provincial Secretary incumbent on the Board is not available to the Minister to seek by regulation, for it goes beyond the scope of the section. Particular reference is made to the Provincial Secretary of the Province at subsection 21(3).

> (3)"A copy of each LOI when issued shall be transmitted by the Director to the Province Provincial Secretary of the Province in which the prospecting direct area is situated".

We then have the situation where, by Regulation 5[1] the Director is required to send a *copy of the application* (for PL) to the Provincial Secretary before an LOI may issue and sometime after, the *Minister's LOI* need be sent (S.21(3)). Of course they are different documents but no guidance is to be gleaned from a reading of the Regulations, for

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[226] (1957)96 CLR 245 at 250

instance for what purpose the first is to be sent; but I digress S.21 (1) is explicit in its terms.

Once the Board has given its opinion on the acceptability of the application, the Minister shall inform the applicant (by way of a letter of intent), of his intention to issue a PL. There can be no implicit power to regulate beyond the scope of the section; the manner perhaps of evidencing the Board's opinion and the manner of addressing, perhaps, unusual or original applications to highlight how the opinion has been reached in those circumstances or the manner in which such "writing" of the Minister maybe conveyed, by ordinary post or by electronic means. But any power exercised under S.80 is to be circumscribed by the matters in the Act, in this case S.21.

Axiom also says that the Act neither requires nor permits the prescription of any matter or anything in the nature of the matters and things that are the subject of Regulation 5.

No provision of the MM Act either expressly or impliedly contemplates that the Board need send the application to the Provincial Secretary in the first instance.

The reliance by the claimants on S.80(a) for authority, "prescribing procedures for the acquisition of the Surface Access Rights" fails for the reason advanced by Axiom. Regulation 5 does not deal with the subject matter of S.80(a).

Section21(4) is clear in its intention; to come into effect as no sooner than the time that the applicant receives the letter of intent. That sub-section addresses the process or procedure to obtain Surface Rights in consultation with the Director. By Regulation 5(6) a LOI cannot be sent unless 30 days have expired after the meeting prescribed by the Regulation. The meetings have no common purpose with the procedure envisaged by S.21(4) since Axiom is not involved and Axiom is the company seeking SAAs from the landowner.

Axiom also argues that the Minister's power is enlivened by the Board's opinion about the application made under s.21[1] and it is mandatory then for the Minister to give the LOI. There is no proviso or discretion in terms of the Act; "The Minister shall inform the applicant..."

I do not agree with the proposition since s.21[1] must be read to take account of the amendments by s.4 No. 2/2008. Whilst not directly affecting s.21[1] the inclusion of provisions relating to tender have the effect of giving the Minister power to issue an LOI in two circumstances, the first where an application is made in terms of s.20[1] and the second where a successful tenderer has offered to comply with the terms of his tender to carry out the prospecting work. In the latter case, the common law principles affecting tender have been reflected in the Act and Regulations so that the Ministers act of "informing an applicant of his intention to issue the prospecting licence [subject to LOIs]" is constrained by the phases of the tender process; the letter of offer is an escrow as I have called it and conditional upon satisfactory undertaking by the successful tenderer. The Minister in the second case shall "inform the applicant" provided the applicant **has fulfilled the condition** whereupon the escrow is at an end.

The section should not be read as having a mandatory effect on the Minister, for it rather negates the purpose of following a tender process if the phases and obligation on the tenderer may be ignored by the Boards opinion which is but one part of the tender process. The Ministers discretion in terms of the tender, to proceed or not, would be obviated.

The section was not amended at the time those amendments were made to include the new tender provision. I am of the view it may need to be considered, for in the first case, the obligation is mandatory while in the second, for the reasons I have given to afford the tender process efficacy, the obligation is directory.

I am referred to a decision of the High Court of Australia in *Morton-v-Union Steamship Company of New Zealand*[227] for guidance on this point.

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[227] (1951)83CLR 402 at 410

> "Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or Regulations which go outside the field of operation which the Act marks out for itself. The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is a degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concern.
>
> In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the (Donee of the power) to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in details with the subject matter to which a statute is address"

I accept this as guidance, for the degree of intention concerning ambit of power is that to be found in s.21(4)

The terms of Regulation 5, are contrary to that clear elucidation of the power in a Minister to grant the LOI after the Board's affirmative opinion and are contrary to section 21 and the Act. The Regulations purport to impose on the Director and Board functions not mandated for in the Act. The Regulation 5 is ultra vires the power of the Minister and void.

Regulation 9 of the Mines and Minerals Regulation 1996 suffers from the same failings for that reg.has no statutory underpinning in s. 21 of the MM Act. By s.21[8] the surface access agreement follows arrangements after negotiation with landowners concerning the payment of surface access fees and compensation for damage. The agreement is then reduced to writing. The agreement envisaged by s.21[8] cannot in the circumstances be one submitted to the AGC before negotiation. The regulation is also *ultra vires* the power of the Minister.

It need be said that the application of the erroneous Regulation in this case has enabled SMMS to avoid the clear intention in s.21[4] to facilitate proper negotiation by an applicant with landowners in consultation with the Director.

AXIOMS COUNTERCLAIM AGAINST SMMS

This cross claim is found in the Third Amended Defence and Cross Claim[228] of the Sixth Defendants commencing at Page 63.para. 5.

Axioms recites the undertakings given by it consequent upon the First Claimant, SMMSs undertaking for damages given the court on its claim for interlocutory relief here and determined on the 21st of July 2011.

On the 15th of September, by further order, the court restrained Axiom form interlocutory, inter-alia entering the land or treating with the people on the land.

> The Restraining Order was made on the undertaking as to damages given by SMMS. By para 7, Axiom recites "As a consequence of the Restraining Order the Sixth Defendant was restrained from taking any steps in further compliance with the requirements of the MM Act and the MM Regulations to reach agreement with landowners, landholding groups, or any person or groups or persons having an interest in land".

I should interpose here, the particular consequences of the restraining order were perhaps unexpected by Axiom, for the greater number of the witnesses called on the other (Non-SMMS) claimants behalf before me were ignorant of the reason that Axiom had not approached them and expressed dissatisfaction with the company because of that. This is relevant when considering the undertaking as to damages given by SMMS. For it may have been expected the witnesses called on the claimant's behalf would have had some understanding of the reason, at least, for Axiom's inability to treat with them and the claimants may have allayed their misapprehension or misunderstanding.

[228] 10 in consolidated pleadings

For by 8 Axioms says;

"as a consequence of the undertaking as to damages and the restraining order the first Claimant is and was under a continuing equitable or legal obligation to;

(a)not exacerbate or increase the commercial harm suffered by the Sixth Defendant as a result of the restraining order;

(b)as far as it was within the power of the first Claimant not act or permit its agents in a manner which will result in any lose suffered by the Sixth Defendant not being adequately compensable by and a word of damages;

(c)and ensure any loss suffered by the Sixth Defendant as a consequence of the restraining order was reduced to the extent that it was in the first Claimant's power to do so."

[I need not address the possibility of damages in this context.]

However, long after the institution of these proceedings Ochi was able to address the Minerals Board on the 27' 28 March 2013.

Axiom pleads that Ochi's presentation[229] [exh. 121 annex p 51,52,53] was misleading and by its 3rd Defence [10- court book pleadings] at para. 11 of the Cross-claim:-

"(a) Was misleading in a number of respects, asserting that the Axiom PL was the result of very clear corruption and bribery of the Sixth Defendant when the First Claimant had undertaken in these proceedings not to make any allegation of bribery or corruption.

(b)was in breach of the obligations described in paragraph 8 of this cross claim [not to exacerbate the commercial harm]

[229] Ex. 121 annexures at pp 51,52,53.

(c)was made when these proceedings were still *subjudice* with the intention of avoiding a hearing of the matter on the merits

(d)included claims that as a consequence of the ground of the Axiom PL that the Japanese Government suspended all aid to the Solomon Islands with respect to mining."[230]

The minutes of the meeting are exhibited to Ochi's statement[231] of 20 March 2014 at YO-5 pp.50-60.

By its Resolution it stated;

> *"The MMB after difficult deliberations has resolved to acknowledge that the Award of the International Tender to SMMSOL was valid; we also acknowledge that the MMB decision to give PL to Axiom was based on ill advised and a mistake. We now know that MMB has the power and not the cabinet as previously and wrongly advised. And thus we conclude that the award to Axiom was invalid."*

On a reading of the minutes and having regard to my findings that Ochi is not a witness of truth, I accept the matters pleaded in 11(a]and[b]). So far as sub para(c) is concerned, I find that Ochi has had the Board reconsider matters from his perspective, as matters temporal to March 2013 while this Court is obliged to have regard to the matters prevailing at the time of the Board's earlier meeting in April 2011; what was then. The proceedings were then in March, *subjudice,* under judicial consideration. The Board has clearly adopted the claimant's argument in the proceedings concerning the power of Cabinet which is wrong.

The assertion about the aid withdrawal in [d] illustrates the omnipresent Ochi. This approach after the commencement of this action reflects on the willingness of the 1st claimant to abuse the process. Again in November the Board was still concerned with matters then before the court.

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[230] Defence page 65 11
[231] Ex. 124

As a consequence of these findings, I am prepared to make the declarations in my orders. A declaration is sought in para.17 at p. 66 to the effect that the Tender notice was not a valid call for tender. I find the Tender notice was valid and refuse the declaration. A declaration is sought in para. 22, dependant on the premises pleaded in the earlier paragraphs, 18-21. I accept the premise in 18 for that the Director was required to refuse the tender bid of SMMS for it was in breach of s. 20[5] of the MM Act. That is a finding on the evidence and the law.

I do not accept the premise in 19 that the restrictions in s.20[5] require that the applicant for a mining lease actually commence mining before such applicant may apply for more than 3 prospecting licences. The words of the section do not support that interpretation where the subsection has used the alternate, *or* . No argument has been advanced in relation to the Choiseul mining application.

I have sought to make plain that the provisions of s.20[5] of the MM Act affect applications for prospecting licences whether arising from a tender or applications made in accordance with s.20[1]. In these circumstances, the Director should appreciate his obligation to refuse any applications which are non-compliant with s.20[5].

I make a declaration in terms of 23 since it relates to s.20 of the MM Act and the [amendment] Regulations 2010.

Knowledge of the fact of the International Tender

The Claimants' argument that both Defendants had knowledge of the fact that the tender had closed by the 12th of February 2011 the date of registration, is irrelevant. The tender had been cancelled on the 17th of January, 2011. The knowledge of the tender in Axiom cannot have any bearing on the "fraudulent claims in the Cortez letter and the minutes of the IBS meeting" as they supposedly affect Axiom.

By paragraphs 406-409 the Claimants submit on the evidence of Abe and Ochi, that Axiom did not have sufficient financial resources to develop Kolosori. Again this is irrelevant in the pleaded case but reflects on the manner in which the case has been argued. It was initially set down for an 8 week hearing. The claimant's case has taken the very greater part of the 95 day hearing. While it has gone to further illustrate the fictitious nature of the proceedings so as to amount to an abuse of process, it also raises the issue of indemnity costs. I will hear argument on this issue.

The Section 241 claim and the claimant's Annexure 5 particulars.

The claimants in Annex 5 to their pleadings set out matters which they say go to show arrangements by non-Solomon Islanders having the effect of obtaining benefits in customary land contrary to s. 241 of the LT Act. I have found the particular land has become registered land and is no longer customary land. The claim about such arrangements has been denied by the 6th and 7th defendants for that reason but they addressed it in any event. Axiom says [were the court to find the land remained customary land at the time of its registered lease] the only relevant material for the courts consideration in relation to s. 241 are the Option deed of October 2010 and the February 2011 agreement between the Cortez group and the company.[232]The court should construe those documents and oral evidence concerning the meaning or effect of the documents is not admissible.

The first Option deed dated 15 October was between the 7th defendants as the Kolosori Landowner Trustees [including the Bungusule] as grantors, Axiom Nickel [Aus] as grantee and Axiom Mining as guarantor whereby the grantors purported to grant an option to Axiom Nickel [Aus] to acquire 80% interest through various corporate structures in the nickel and cobalt resources of the lands. It is an agreement to create corporate structures later to better realise their intentions. It cannot be seen as an agreement to create an interest in land. Neither Axiom Mining nor Axiom Nickel Pty Ltd are parties to these proceedings in any event.

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[232] *Ashton v Inland Revenue [NZ]* [1975] 3 All ER 225at 232 per Viscount Dilhorne; *Newton v Commissioner of Taxation[Cht]* [1958] 2 AllER 759 at 763-764 per Lord Denning.

Mr. Graeme Stace was called and provided a statement for the claimants. His evidence satisfied me either Nautilus or he provided funds [since his company was the agent for the Cortez group] to Selo to obtain registration of Kolosori land. The registration of the land had been expected before the 15 October meeting when the Axiom officers were first introduced to the Cortez group.

As Lilley QC says, the claimant's assertions to the contrary impermissibly impeaches their own witness. Ngelemane seems to have also been called to prove the assertion in Annex. 5 that Axiom funded the registration by the 7th defendants. I do not accept Ngelemane's evidence in any part. [I have dealt with aspects in the later part of these reasons].

Axiom KB was later incorporated on the 17 December 2010 as the joint venture of Axiom Mining Ltd and the Cortez group through KHL. Axiom SI held 80% and KB Minerals held 20%. KHL held 50% equity interest in KB Minerals. Axiom KB [Axiom] in consequence of its incorporation became the corporate vehicle of the Axiom group, intended by Axiom Mining Ltd and the Cortez group to apply for a prospecting licence over Takata [including Kolosori land] and ultimately to mine.

The later agreement[233]is between Axiom KB [Axiom] and the 7th defendants and happened after the group became registered. The agreement was between different parties to that earlier Option deed. The agreement contains an entire agreement clause, 14.3.

The new agreement is for the lease of the perpetual estate for a term of years subject to the MM Act [with all the reservations and protections for occupiers of the registered land in terms of the MM Act]. The agreement relates to registered land.

Section 241[3] provides the Commissioner may in his discretion, institute proceedings in the High Court where customary land is affected by an arrangement envisaged in s.241[1]. No such proceedings have been instituted and the power is not exercisable by anyone else.

The claimants Annexure 5 case is unmeritorious, without basis in fact or law but has unduely prolonged the hearing.

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[233] Ex. 37

The cross-claimant's case.

Riogano;

Mr. Josiah Riogano of Tanakoru, Bugotu District, Isabel Province was sworn on Wednesday, 29 April 2014 and his statement of 4 October 2013 became exhibit 146.He is a retired Public Servant, having served from 1970 until retirement in 2000. From 1986 to 1994 he was the Commissioner of Lands and appointed and directed Mr. Penrose Palmer to be the acquisition officer in relation to Kolosori land.

His statement was principally concerned with the business of the Bugotu Landowners Association [BLA]. He is the Chairman of the Association and Director of an associated company, Bugotu Minerals Ltd., [BML] which had over a number of years, sought to prospect over areas including Kolosori/ Takata land. He is also a director of Bugotu Resources Development Ltd which holds some 10,000 shares issued by BML, while the remaining 40,000 issued shares of BML are held by Silanda [SI] Ltd, [Silanda]. BML is a private company incorporated on 8 December 2005. The 40,000 shares held by Silanda were formally held by the BLA and transferred to Silanda on or about 29 May 2012.

BML's first application for a PL over land including Takata was made on 17 August, 2007 but the Director of Mines, Mr. Auga refused to accept the application. The application was again made on the 29 November and again refused by Mr. Auga. Mr. Auga informed Mr. Riogano that he could not accept the application because SMMS had obtained an injunction restraining the Director and the Board from considering applications [in relation to the land] but this time the documents were left in Mr. Auga's office. Nothing transpired.

In July, 2010 the Government advertised for International Tenders [the Tender} in relation to three parcels of land, including Takata, and on the 15 September 2010 BML lodged its tender. On the same day three applications for Mineral Right [PL] were lodged.

Yet again on the 7 December, 2011 an application for Mineral Right [PL] was lodged with the Deputy Director of Mines, Mr. Joseph Ishmael. That application was rejected by letter dated 23 February 2011 and correspondence ensued between the Director and BML.

Sullivan QC for the claimants then cross-examined. Mr. Riogano was Provincial Secretary, Central Province then Isabel Province from 1994 until he retired in 2000. His courses undertaken while a Public Servant included time in London, England where he had undertaken a Planning and Implementation course, and at the University of the South Pacific [Suva] senior administrative management courses.

He was asked about the geographical boundaries of Bughotu. His land is Hairei on San Jorge Island. He is a primary landowner of the Vihuvunaghi tribe. He acknowledged that he does not have the same rights as Vihuvunaghi elsewhere although he originally came from the group is known as Sinaghi clan. Ownership rights to land descend matrilineally.

He claimed title as a chief through inheritance; a born chief as contrasted with a chief appointed by community or Paramount Chief.He has not sat as an executive member of the House of Chiefs but has sat on chief's hearings to hear land disputes.

He appointed the acquisition officer, Mr. Palmer.

He was questioned generally about landowning on Isabel and the spiritual and economic connection with the land.

The main tribes in the Bughotu area are Vihuvunaghi, Thogokama and Posomoga and now the problem is that economic possibilities have created difficulties between different landowning groups especially where mineral resources are in particular areas spread amongst the groups.

Sullivan QC explored the ownership of land passing under the matrilineal system and the manner in which land passed where a female line, as it were, ceased.

An objection was taken about the manner of the cross-examination and after a ruling, Mr. Riogano's cross-examination resumed in the morning of the 30 April. [Day 76 Session 1]

There were further questions about customary land inheritance and transfer. He was then taken to the particular circumstance of the purchase on behalf of three brothers, Silas Tango, Dennis Hataharno and Paul Fota and the need for consultation by the families subsequent to the passing of the named brothers when dealing with rights to the land. I should say his evidence about this does not help me for he is not of those families and the decision of the Chief Justice is in evidence.

He was asked about a custom ceremony apparently called by Nathaniel Hebala in 1990 in connection with a transfer of Kigora land to three women but did not know of it. The ceremony was attended by Sir Dudley Titi, as Paramount Chief. As a consequence of the attendance, Mr. Riogano was asked whether it reflected on the validity of the transaction and he said "Yes". Since the 7th defendants dispute boundaries of the land the subject of the ceremony, Mr. Riogano was further asked if the ceremony held in the presence of Sir Dudley would indicate some validity to the boundaries agreed at that time. He said the question was whether the demarcation had happened before the transfer.

I should say here, that Mr. Palmer's acquisition enquiry took place after the ceremony of 1990.

Sullivan QC then passed to consideration of the term, "trustee". Mr. Riogano said; "Most of the people or most of the landowners who were appointed to look after certain areas or interests, certain families or tribe, call themselves trustees just because we trust them to look after the land. So they are trustees according to our interpretation". Sullivan QC then spoke to a decision of Chief Justice Muria in a case of Kasa v Biku [2000] where the word "trustee" had connotations in a western sense not confluent with that understood in the Solomon Island sense as it affects land and suggested, in terms of the Chief Justice's reasoning, that a spokesperson becomes a "trustee "in the real sense when it comes to the cash, when it comes to the money. Mr. Riogano said; "Probably my own understanding is that we can remove a trustee as being a trustee for the tribe if he's not honourable or he is not honest".

He was asked about the appointment of a spokesperson and opined **that the family or tribe look to the offspring and finds who is more capable**; probably choose the firstborn within the tribe or family. He automatically takes over the role of spokesman or if there is development taking place then he becomes the trustee on behalf of the tribe. [my emphasis][Although there was some talk of a community chief where different tribes comprised the community]. [White:]

Mr. Riogano was taken to the acquisition officer, Mr. Palmer's report. There was argument about the questions which Sullivan QC sought to put to the witness but Mr. Riogano was asked whether a change in representative of the Posomogo and Vihuvunaghi from Mr. Joel Malo [the father] following the appointment by the officer would require consultation of the tribes. Mr. Riogano agreed. That consultation process has taken place.

He agreed that the acquisition process in 1992 stemmed from a decision by Cabinet to acquire land for mining development, land which included

Takata and that the Bugotu Nickel Limited was the mining company concerned, then. Mr. Palmer was his more experienced Deputy Commissioner of Lands concerned with rural lands and he was given a letter of appointment which reflected the statutory prescription and powers of an acquisition officer. He recalled signing the letter of appointment, a requirement for appointment.

He spoke of the need for a survey to be done before the full acquisition was possible; the survey either by the Surveyor General or a private surveyor requiring approval before anything further. The appeal process was part of the acquisition process and where a named representative had passed away Mr. Riogano said that it was up to the trustees to make a [substitute] appointment. When asked; "which trustees?" he said; "those who had already been appointed". The acquisition officer would go back to the group and ask who will replace the [named] deceased trustee. He then qualified his answer by referring to the acquisition officer or the Provincial Government. He agreed that one thing which cannot be allowed to happen is that that deceased person be replaced without consultation with his tribal clan.

I find that the court is the final arbiter where the question arises about the succession of a deceased representative so found by the AO where the representative had executed an agreement in terms of s.62[b] of the LT Act.

Following the survey the parcel number or the land reference normally comes back to the Commissioner of Lands; he may see [ask for] the map or the plan.

Argument ensued over the witness's opinion on the right to change people other than those named by the acquisition officer and an objection was upheld.

Mr. Riogano was then asked about the two options in relation to acquisition, compulsory or lease. He said the compulsory acquisition was not proper in these circumstances and supported the acquisition by lease for it afforded the landowners greater benefits. He was aware that Bugotu Nickel lost interest but didn't know why.

He was asked about the manner in which consultation meetings would be proper in custom; the proposition was put that it wouldn't be proper to hold a single meeting in Honiara without giving an opportunity for all of those people concerned to be consulted. Mr. Riogano said; "Well, it depends on the tribe and the leaders of the tribe. If most of the tribe are somewhere else, they can be called. It's up to them where they hold the meeting. We have the leaders of the tribe and they can appoint a place to meet, not actually on the land".

He accepted the proposition that to change a particular representative would involve the people of the representative's tribal clan but the representative could not be of another tribe. Of course he is not able to give an opinion on the law as it affects common law rights of assignment under agreements.

He then spoke of the apparent need in 2003 to regularise the BLA when it was registered as a charitable trust after a meeting at Vulavu. The minutes of that meeting were tendered and became exhibit 147 A.

The Minutes were prepared by Mr. Peter Auga [Mines] seconded to PACRIM. Exhibit 147 B was the Constitution of the Charitable Trust. Those named members were Manase, Cortez, Casper Hughugo, and Leonard Bava, treasurer. Josiah Riogano was chairman and Philip Vahia vice-chairman. So from 2003 Manase, Cortez, Casper Hughugo and Bava had representative capacity as members of the Association.

A big General Meeting of the BLA was held at Tanakuru in 2007. A copy of the Minutes became 147 C. The three tribes split themselves into the tribal groups and the thirteen representatives are chosen, from whom three were elected to the executive.

There was talk of the relationship with Ewan Stoddart of PACRIM and Mr. Stace of Nautilus. There was a reference in the minutes to unity and

Mr. Riogano spoke of the need for unity and the direction which Nautilus afforded the BLA at the time. Mr. Danny Webb, [an employee of Nautilus according to Mr. Riogano] informed the BLA of a structure to advance the mining project. A 20% share of the project would be retained by the BLA and the dividend of that share would be dealt with by the directors. The charitable trust would receive the dividends from a company to be created, BML, but no distributions have been made. The purpose was for BML to obtain the PL and divest the other 80% shareholding to the mining investor.

Later when asked about the proposed acquisition by the BLA Mr. Riogano said the BLA would take a lease from the perpetual estate owners of the different parcels of land while the mining company, BML would apply for a mining lease.

In about 2007 the PACRIM PL expired and SMMS obtained a LOI which subsequently expired. BLA was opposed to the renewal of the LOI. At that time the BLA were looking for another partner which would accept the conditions in relation to profit sharing. **SMMS were proposing a royalty model.[my emphasis]**

SMMS claim to a right to renewal was refused by the High Court in proceedings in which BLA had been joined. Mr. Riogano's affidavit sworn in those proceedings became exhibit 147 C.

The affidavit exhibited landowning groups in the San Jorge and Takata areas with a map where numbers corresponded with the particular group. The map became 147 D, the handwritten notes 147 E and the typed list of groups 147 F. So far as a numbered part, 34 was concerned, Mr. Riogano named D. Tano, Alfred Jolo, and P. Vatia.

He disagreed with the suggestion that two landowning groups were concerned with 6 and 7 rather on investigation that was not confirmed. The boundaries on the map came from a 1922 demarcation and the 1992 acquisition proceedings were used to vary the demarcations. He referred to claims made by a different group coming in. The 38 was created to accommodate the probability of a likely dispute in relation to that area.

These names then were accepted by the BLA at the time with the doubt about the area 32. So at that time the BLA was satisfied that it had particular detail about the landowning groups sufficient to mark the relevant parcels on the exhibited maps, except for 38 where dispute was possible.

He was asked questions about the Option Deed dated 16 May 2007 reflecting a joint venture with Axiom BNL and the manner in which it was envisaged dividends would flow first of all through Bugotu Resources Development Limited. He was taken to the consideration for the Option and stated the BLA had not received the moneys or shares set out. In relation to the SI Company, Axiom Bugotu Nickel Ltd, he was dealing with Jake Gray, Lincoln Gray and Jack McCarthy. The Agreement recited; B "Axiom BNL is a subsidiary of Axiom Nickel Proprietary Limited and in turn Axiom Mining Limited". [234] Axiom BNL was not then incorporated but when it was the shareholders were named as Jake Gray, John McCarthy and Lincoln Gray[235]. Recital B has no probative falue in the face of the certificate of incorporation.

In accordance with the evidence of Riogano, 80% of the shareholding of BML has been transferred to Silanda {SI} Ltd[Silanda] a company which the 6th defendants plead[236]the assets of which are beneficially held by it for Axiom Mining Ltd for the information in the directors of Silanda John Cook and Lincoln Gray was knowledge in their capacity as director and manager, respectively of Axiom and the corporate opportunity of investment in the BLA was wrongly taken up by Silanda by reason of that knowledge in breach of their fiduciary duties to Axiom, knowledge imputed to Silanda because of the knowledge in the two directors of Silanda.

The 6th and 7th defendants deny any continued representation by the BLA with respect to the registered land since about the 24 April when the Cortez group discontinued their association. By letter dated 26 May 2008 the Takata group [Cortez group] wrote to Nautilus SI , "Nautilus is

[234] Ex 28
[235] Ex. 16A
[236] Para 3 Particulars of the Defence of the 6th defendants to the cross-claim- 24 of the updated trial book pleadings.

hereby instructed to cease communications and negotiations with Axiom {mining Ltd] in regard to the Takata Mining Project." Nautilus was the corporate entity of Graeme Stace [Stace] who acted as the agent for the Cortez group.

He had drawn an agreement on 30 April 2008 with the Takata group which stated that the purpose of certain loans by Nautilus to the Takata group was to enable them to complete land registration of that part of their land that held the nickel deposits.[237] The loan agreement was also expressed to assist with corporate restructuring in preparation of a joint venture with a foreign mining company/investor.[238]

The cross-examination continued on Day 77, Session 4; 01052014.

Mr. Riogano was asked about the split of the Kolosori Group from the BLA. He thought that outside interests may have contributed to the Kolosori Gp parting ways although he says he does not have a difference in the relationship, rather a difference in the manner of the development.

He said that whilst disappointed, "**that is a decision made by a group that owned the resources".**

The cross-claimant's relief is set out in the Further Amended Cross-claim [239] where the BML seeks a declaration that its application for prospecting rights made on the 17 August 2007 is the first application to be considered by the Board in priority.

A second declaration or in the alternative that its Tender was the only complying tender on the 15 September 2010.

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[237] Ex. 116A at 41
[238] Ex. 116A Annex CGS-2 at p348, cl 1
[239] 22 in the updated trial Book.

A further or alternative declaration that its application made on the 7 December 2011 over areas of San Jorge and Santa Isabel have priority over all other applications made in respect of the areas.

Consequential mandatory orders directed to the Board to consider such of the cross-claimants'applications or tender declared to have priority.

It sought costs including certification for overseas counsel and other associated orders.

The facts on which it relies are set out above and to a large extent from Rioganos statements filed and produced in these and earlier proceedings.

The argument by the cross-claimants raised the earlier proceedings 386/2007 involving SMMS which had leave to seek certiorari and had an interlocutory injunction restraining the Board and the Minister from considering any application for a mineral right over areas of San Jorge and Santa Isabel which had been identified in BML's earlier 2007 application. That application was struck out by Goldsborough J [as he then was] as an abuse of process and the interim injunction was discharged. This is relevant for the application of the 29 November 2007 by the cross-claimant had also been refused although the cross-claimant seeks to rely on the earlier refusal of the 17 August 2007 as affording it the priority in application which it claims if the 1st claimant fails in these proceedings affecting Takata land.

The fact of the Appeal Courts refusal to allow SMMS further time for its LOI then coupled with the striking by Goldsborough J are I can infer the matters which Abe took into account when he intimated the company would await the tender rather than pursuing further court action.

The refusal by Auga the Director, to accept the two applications in 2007 the cross-claimant says was in breach of its statutory duty. It says the Director refused to accept since he expected tender of the particular areas to be facilitated by the government although the moratorium legislation had not come into force and when it did, it had no retrospective effect .

The Crown says the argument must fail for notwithstanding the moratorium issue which relates to the application for mineral rights, the

moratorium does not affect a right to judicial review on any view of the legislation. I accept that argument for the cross-claimant has been defeated by laches, it has not taken steps to seek judicial review of the Directors refusal within reasonable time of the refusals.

I also accept the Crown argument that by its tender application the cross-claimant has exercised it right to the remedy which needed be pursued in these circumstances for it was available and taken advantage of by BML. A declaration in these circumstances is not available.

BML says it was the next compliant tender if SMMS should fail in its application to have its tender bid succeed as valid and effectual. Again this court cannot stand in place of the decision maker and seek to dictate to the Board the successful tenderer for the Board was concerned at the time with the tender bid which best satisfied it. It was not concerned with second best which would succeed if the better bid failed for some reason. That matter is for the Boards determination and the Board is functus in so far as that tender is concerned.

BML's relief sought by declaration concerning the tender bid also must fail.

The application of 7 December 2011 seeks an alternate declaration that its application for a mineral right in Form 1 under reg.3 of the Mining Regulations over land areas at San Jorge and Santa Isabel is the first application to be considered by the Board were the court to rule against the claim by SMMS.

For the reasons I have given, SMMS claim to prospect Takata land fails. With the passage of time and having found since the tender areas were amalgamated to form that area which principally affects the registered land area of the Axiom PL, once the SMMS PL is set aside, that application of BML remains extant to an extent where it does not affect the prospecting area of Axiom. I am not prepared to consider a declaration however since neither Axiom Mining Ltd or Silanda are parties to this case. It is difficult to see how they could or should be in the matrix of these pleadings but their interests may be vitally concerned with the application by BML of the 7 December 2011. Since Silanda is an 80% shareholder of BML and in the light of the cross-examination of Riogano who was dealing with Lincoln Gray, there arises an implication

of a breach of fiduciary duty towards Axiom Mining Ltd. In such circumstances if I had discretion I would refuse a declaration in terms of s. 18[1] of the Crown Proceedings Act since Axiom Mining Ltd has had no opportunity to be heard.

The Crown asserts the cross-claimant contravenes the provisions of s. 18[1][a] of the Crown Proceedings Act. The 6th defendant says the cross-claimants claims, 23-26 should be refused as a matter of law[240].

For where proceedings involve the Crown a court shall not grant an injunction or make an order for specific performance but in lieu may make an order declaratory of the rights of the parties. By R15.3.4 of the Civil Procedure Rules a claim for a declaration in relation to an Act or subsidiary legislation shall be made to the High Court for judicial review. The cross-claimant comes to court by further amended Cross-Claim [241] by way of statement of case under R 5.3, not by way of judicial review.

There is consequently no power in the court to entertain the claims as couched.

Mr. Yoritoshi Ochi [242]

SMMS had Mr. Yoritoshi Ochi [Ochi] commence duties in the Solomon Islands in April 2010. He took over from Mr. Sumio Kudo [Kudo] in about early June when Kudo left the country although he was not formally appointed as Managing Director, SMMS until later in the year. He remains the companies managing director and gave evidence in court. His evidence in chief was in various witness statements, the principal statement was that of the 10 September 2013. Annexed to his statements were voluminous annexures, variously referred to as YO-3, YO4 [and later YO5] which gave rise to difficulties when dealing with Japanese language documents initially untranslated into English until the difficulties were resolved from time to time at the behest of Axiom's counsel and the court. This was an issue which I have addressed. But I should say as background to throw some light on the complexity of the

[240] 24 of consolidated pleadings-6th defendants defence to cross-claim
[241] 22 of the consolidated pleadings
[242] Ex. 122[a]

exercise, the certificate of compliance required under the Courts [Civil Procedure] Rules 2007 in relation to the principal statement certified preparation by Messrs. Sol-Law as legal representatives of the Claimants with the assistance of Bingham McCutchen Murase, Sakai Mimura Aizawa Foreign Law Joint Enterprise, Japanese legal representatives of the First Claimant ["Bingham"]. Translations were said to have been prepared by Binghams. The translations then, were those of SMMS apart from some particular documents which fell to be reviewed in translation by the appointed Japanese/ English interpreters in the course of the trial. Ochi gave his evidence in English.

After graduating from Kwansei Gakun University with a Bachelor of Business Administration degree in 1975, he first joined the Sumitomo group. In 1985 he was made Director of Sumicorp del Ecuador in Equador then in 1991 in Peru as President of Sumitomo Corporation Del Peru SA.

I do not propose to detail the Sumitomo Groups history and its parts suffice to say that it is common knowledge the Group is a conglomerate with mining, minerals processing, insurance and banking interests worldwide. The 1st Claimant's opening set out in a little detail that Groups background.

From 1997 to 2010 Ochi lived and worked in the US for several Japanese automotive parts manufacturers. He was also a Director of the American Japan Society, Western Michigan. During the course of the trial I had occasion to say to Ochi that I had no difficulty in understanding his English.

He rejoined Sumitomo [using the name loosely] in March 2010 and was to told by Mr. Ichiro Abe [Abe] that he would be transferred to Honiara as office manager of SMMS with the expressed intention of replacing

Kudo as Managing Director who remained a Director of the company in Japan.

I propose to follow, as it were, Ochi's dealings as Managing Director for they touch on to a very large extent, the events which have given rise to this litigation.

In April 2010, SMMS had a prospecting licence [PL] over an area in Choiseul. It had 3 PL's covering areas designated B, D and E on Santa Isabel. Takata and San Jorge were identified by Areas H and I respectively and Ochi said in his first statement that he was aware of the court decision holding that SMMS did not have a right to renew earlier Letters of Intent which expired over Areas H and I.

The company had 3 Pls over areas on Santa Isabel leading up to the time of the Tender. It was periodically obliged to renew its PLs and did so as required. Areas D and E were renewed on 2 July 2010 and Area B on the 6 December 2010.

Ochi recounted being told by Abi that Takata and San Jorge were intended to be put out for Tender by the SI government and that after he arrived in Honiara he attended a presentation by Abi and Mr. Moriwaki of JOGMEC to the Prime Minister Mr. Derick Sikua, Cabinet Ministers and officials concerning the company's activities and future plans. The presentation touched on the nature of the nickel deposits, low grade limonite layered over a higher grade saprolite ore; the company's ability to treat limonite ore by its High Pressure Acid Leaching process [requiring coal or gas fired electricity power station support] at or near the mine site and the environmental steps which the company envisaged taking. With the attendees including the Premiers of Isabel and Choiseul Provinces, the Prime Minister, the Deputy Prime Minister, the Minister of Mines and Energy, the Minister of Lands, the Minister of Development Planning , the Minister of Environment, Conservation and Meteorology,

the Permanent Secretary of Development Planning and Aid Coordination and others coupled with the extensive material delivered by Abi , the presence of Mr. Moriwaki, [of JOGMEC] and Kudo , I am sure that Ochi would have had a proper understanding of the matters affecting the company's interests to mine nickel on Santa Isabel and elsewhere at that time. It should be remembered he was marked to be the resident Managing Director of a company slated to mine in a foreign country, a responsibility which presumes understanding.

The matter which was treated as of principal importance once the Tender process was announced on the 23 July 2010 was the 3PL issue.

During this time Ochi met with the Director of Mines, Mr. Peter Auga [Auga] and discussed the forthcoming Tender. There were a number of matters which concerned Ochi. They were whether or not the tender areas, Takata, San Jorge and Jejevo would be tendered separately or as a unit [with only one PL envisaged]; since the SMMS tender was to be prepared in Japan Ochi needed information to anticipate the matters required by the tender and the timeframe envisaged; detail concerning the tender committee to be appointed by the Minister to oversee the tender; the effect of a new section 20[5] of the MM Act [which Ochi was concerned to know whether it would affect the company and prevent it from taking part in the tender] and the resource estimate.

Ochi had met the Special Coordinator of the International Tender process, Mr. Don Tolia. [Tolia]. He also mentions his subordinate Mr. Andrew Mason [Mason] who played a part in these proceedings.

The matters concerning Ochi were in time resolved except for the 3 PL issue. He sought legal advice from Sol-Law.

Before I continue with the history as recounted by Ochi, I want to refer to two matters which arose from the investigations that Ochi had apparently instituted. The first relates to the membership of the tender committee members. [The "screening committee"] The second relates to the possibility of corrupt handling of the tender which is ironical for Ochi detailed the steps he took to ensure his advice corresponded with that legal advice given him by Sol-Law. [Ex. 122[a] at paras. 80-89]

Mr. Ochi's [Ochi] attitude following the close of tenders and after he became cognisant of the Screening Committees' and the Board's recommendation in favour of SMMS exhibited annoyance at the apparent procrastination by the Minister for Mines in announcing the Award. The earlier cross-examination was conducted to seek understanding of the extent of Ochi's briefings when he took up his position as the head of SMMS in April 2010.

The procrastination he principally laid at the door of the Minister whom he blamed for the delay. "The Minister was always out of the country and had criminal charges pending". [243]His impatience and exasperation was made manifest in a wish to have the Minister removed. It was plain from his cross-examination that he saw SMMS as the most suitable candidate to give to the Takata community its mining project yet no hand was stretched out to receive it; the Tender remained unannounced by the Minister.

Yet he was, on his own admission unaware of tribes' allegiances and alliances [evidenced by the BLA] and he did not know of the source of the indignation towards SMMS to begin with. He says it was not until the commencement of these proceedings in July 2011 that he became aware of the earlier proceedings against SMMS, involving problems over SAAs. His evidence in cross-examination was unshaken on this issue. He does not understand the background to the Takata landowners wish

[243] T: D 63 S 2

for reciprocation, for instance, [the equity interest in the projected mining] arising out of the Palmer acquisition proceedings.

He wrote to the Prime Minister [PM] following a conversation had by Dennis McGuire on SMMS's behalf with the PM [ex. 113-tab 36] relying on McGuire's advice that the PM was wrong in understanding the purpose of the tender. It had been put in cross-examination that the PM was alluding to the fact that the company did not have the consent of the landowners preceding the Tender process, but Ochi made plain that his letter was addressing the manner in which the investor gets its prospecting licence, by obtaining landowner consent to enter pursuant to SAAs.

This took place before the Minister announced the tender winner. It followed what must have been conversations with McGuire [of Sol Law and the lawyer for SMMS], who was concerned with the companys earlier travails with its SAAs and the court proceedings so it is ironical Ochi, moved as he was to write a letter critical of the PM [and impliedly his Minister] had denied knowledge of the previous reluctance of the representative landowners to support SMMS about Takata. That letter to the PM was at pains to explain the obligation of the company, *post facto* [of the award of the Tender] to obtain SAAs from landowners. To address that issue presumes awareness in the writer of the letter of the reason for McGuires supposed assertion that the PM was wrong; the PM was concerned by the supposed opposition of the landowners before the fact of the Tender.

I find it difficult to accept Ochi's initial assertion that he remained unaware of the existence of reticence in the Takata landowners before the Tender [until these proceedings were commenced] especially in light of his letter to the PM. Later under cross-examination he was again asked about the first letter of intent in relation to Takata land, the letter of intent in about 2006/2007, not renewed, of which he became aware from his legal advisor. He admitted he knew of the first [earlier] letter of intent

some time after he arrived in country [April 2010] before the Tender. He had a meeting with the legal advisor. When pressed he spoke of the fact of the complicated background of the Takata area; the history and that [the] issue was sent to court, too. Again when asked whether the legal advisors were Sol Law he said that the information came from Japanese legal advisors in headquarters. This evidence is again internally inconsistent with his answers earlier in cross-examination. He had then denied knowing about these matters. The inference which could be drawn about the particular legal advisors following his statement about the briefing after his arrival in April in country is that, as put in cross-examination, Sol Law were here to brief him. [This would be logical since that firm had been involved since the earlier letter of intent and court proceedings and was continuing to advise SMMS as evidenced by McGuires' involvement with the PM on SMMS's behalf in November 2010]. But Ochi expressly denied the proposition when put. Having regard to the admission that he was aware of the earlier letter of intent and the difficulties associated [the court issue] before the closing date for the Tender, I do not accept his earlier denials about his lack of awareness of the landowner reluctance to treat with SMMS for those denials were untruthful.

I am satisfied however, with that awareness, he would have realised that possession of the SAAs would lay to rest any lingering reticence in the landowners to deal with SMMS.

Most fundamentally, however in November Ochi had not gauged the true extent of the representative resistance to SMMS for his actions later belied the fact that his company's SAAs obtained early in the piece were sufficient. [Ex. 113 Tab 56A]

Before dealing with what I see as manipulation of the SAA process, I will go back a step and consider Ochi's approach to the Minister of Mines in about November 2010 when Ochi was anxious to have the Award of the Tender published and the LOI given SMMS.

I have little doubt that Otchi broke the understanding reached with the Minister to facilitate the Ministers publication of the award of the Tender to SMMS. It was not a term, so to speak of the Award but rather the breach of an inducement by SMMS to have the Award published without further opposition by the Minister. Ochi never admitted as much in court under cross-examination but his emails again belied his assertions. His object, as he said was to have the Award of the Tender announced and published so that he might proceed as soon as possible to have the SAAs signed in accordance with the Letter of Intent [LOI] and thus the PL would issue on the company's terms. By so doing, although the breach of the understanding may be seen to bring odium on Ochi, the publication of the Award and issue of the LOI was in the wider interests of the Takata landowners, the company and the country itself. The ends justified the means. Certainly on reading the emails it is plain that what Ochi believes as reasonable, must seem reasonable to all.

[The later email had not been translated in the string of emails passing to and from Ochi but redacted later. The claimant was obliged to have it translated. By then, Ochi's cross-examination was well under way with the concomitant result that his evidence was internally conflicted].

Two matters arise from this breach. The first is that the urgency by which Ochi pushed for the publication of the Award in SMMS' favour after the Board recommendation may be said to be driven by ulterior motives for the Tender process allowed for only one winner; there was no competition between companies on the ground. SMMS was the only miner in terms of the Award able to enter the Takata area and seek the landowners consent to prospect once the LOI was to hand. The second was Ochi's willingness to court the Minister's support while expressing his unwillingness to follow through with his proposal. This may be seen to be a dishonourable deception by a self-confident man very sure of his place in his company even if not so sure in his service to the greater good. For the greater good could not include a chasm in community relation, bureaucratic interference and political manipulation for which he

must bear some responsibility. For Ochi is an honourable man who reflects the honour accorded him by his company. He has been shown to act according to the circumstances then appertaining as he sees as most advantageous for the honour of his cause which equates in his mind with the best interest of the company which he serves. He certainly did not act without interest and reassurance from the company in Japan.

It would not be going too far to suggest that the sense of political instability surrounding the Minister [ex. 113 tab 42 at 3] unleashed Ochi's underlying feelings about bribery and corruption which found voice. [It is little wonder that individuals may have felt threatened in such circumstances where Ochi seemed, over time, able to have Departmental officers' suspended pending investigation and actively sought to have the Minister of Mines sacked.] He had even before the announcement of the Award, by the Minister, complained to RAMSI about his suspicions for the delay.

The discussion about the Ministers trip to the Philippines occurred in a meeting with the Permanent Secretary, Department of Mines, Newyear on 18 November 2010. [ex. 113 tab 42 at 15] The email from Ochi to Kudo recounted the Minister's wish to have a delegation go to the Philippines to visit the High Pressure Acid Leaching [HPAL] plant, the type with which SMMS had proposed to treat the ore. The wished for delegation would include the Minister, Kemakeza, the Director of Mines, and Dotho the Premier of Isabel Province, three members of the Provincial House of Isabel and five landowners. Ochi wrote to Kudo [his reporting officer in Japan] advising he had replied that an invitation to visit before the Minister's signature [to the Award] was impossible, and that a visit in the calendar year was also impossible for there was no budget. The email went on to request for consideration of such a visit, since the Choiseul tribes had so requested, the Mines Minister should be included [although likely to be replaced] and with that in mind, any such visit timed for Spring [northern hemisphere] that if a visit was possible, the proposal by the Minister could be used to obtain his signature [to the

Award]. [ex. 113 tab 42 at 14, 15, 16] On Friday 3 December, Ochi had a short meeting with the Minister. Ex. 113 tab 42 at 1, 2] where it was agreed the Minister would sign the LOI, the PL renewals for Choiseul and Isabel and prepare his request to visit the HPAL plant. The signed LOI and renewals happened on the Saturday, 4 December.

In cross-examination, while acknowledging the genuine value of an understanding in the delegation about a HPAL plant, [D 66 p72, 73, 74, 75] Ochi also saw the advantage to SMMS were the visit to follow the announcement of the Award. [Kudo accepted the suggestion and replied to Ochi that the Tender Award and announcement must come first. [Ex. 113 tab 42 at 14, 15, 16]] On Saturday, the 4 December 2010 the Notification of Award was given by the Minister [following the meeting on the Friday] and on the 7 December the Minister by written request asked for the visit. The request was answered by relying on impracticability at the time. [Ex. 81{i} at 263]

It may be surmised on the face of the email chain the fact of a visit was accepted by Kudo; rather the timing was the issue. But under cross-examination it was suggested to Ochi the manner in which this visit would take place, after the Award, compared to a visit before the Award, was more akin to bribery, in the light of the acceptance in Ochi of a right in the delegation to an understanding about the workings of a HPAL plant. I must say I could make little out of the exchanges and relied on the email chain as illustrating a clear wish in SMMS to use the Minister's suggested visit, by having the Award announced, as a prerequisite. For in the period leading to the Notification on the 4 December there was no doubt in anyone's mind that the successful tenderer was SMMS, the reluctance to announce was the Ministers for particular reasons. On the day after Notification, Ochi by email wrote to Kudo [ex. 113 tab 42 at 1] recounting that he had the Notification and setting out his action plans.

I find it curious that, despite references to trips to the HPAL plant throughout the email chains, and his reference to a request by the

Minister to visit Japan at the Friday meeting, no mention of reciprocation for the Award Notification as discussed at the Friday meeting, by reference to the Philippines trip, was made by Ochi. On the 13 December, Ochi emailed Kudo in Japan and said that he did not want to take the Minister anywhere but to make good use of him until he had signed the PL for the three tender areas. [Ex. 122d][Ex. 123{a} at 21] Ochi's wish to take advantage of each chance [of having Kemakeza sign the PL for Takata] by offering him a trip to Japan was thwarted by the cancellation of the Award on the 17 January 2011.

In fact no visit to the HPAL plant took place. Under cross-examination, Mr. Ichiro Abe [Abe] the responsible officer for the Tender in the Japanese Headoffice conceded a visit was both reasonable and proper. [D 19 s 1 at 37; D 20 S 1 at 9] Ochi's manipulative manner exhibited itself on the contemporaneous emails, his answers in cross-examination on the issue while often unintelligible, could not obscure his manner. He dissembled whenever he felt it necessary.

He was not above using political pressure to achieve his ends. [Ex. 123 {a} at annex p. 13] He was keen to have the Japanese Ambassador in PNG [responsible for Solomon Islands affairs] threaten to withdraw funding for a hospital project in Isabel, a threat not adopted by the Japanese representative, it would seem. [Ex. 113].

Mr. Ochi has evinced these attributes in his evidence and under cross-examination.

No code of honour between Solomon Islands and Japan. Honourable representative of SMMS. No respect towards Solomon Islanders. Looks after SMMS. Envy is a close cousin to malice.Japanese do not take easily to defiance. "San"is a respectful nomenclature.

Ochi is strongly of the view and believes that if something seems reasonable to him it must seem reasonable to all. His attitude towards the clans is not that likely to bind the clans together, because he

understands them and they respect him; it is more likely fear or distrust which is engendered in the clans. He is didactic and opinionated.

He does not know the history of the clans' alliances, of their grievances one against the other. He cannot smooth over the indignation of one clan towards the other for he does not understand the source of the indignation to begin with. For he is a stranger here. It is as though he had travelled to a place where the laws of nature different. His ideas of justice and fairness does not hold here

I find that Ochi was dishonest in his dealings with the landowners and the government.

Stace;

Mr. Graeme Clive Stace' statements of the 30 August 2013 and 22 August 2011 became exhibits 116[a] and [b]. He was sworn on Wednesday 19 March 2014 Day 61 Session 2. The 6th defendant's objections to the statement were no longer pursued apart from the part deleted by consent at para. 62.

His evidence touched on the relationship his Nautilus Group of companies had had with the Bugotu Landowners Association and the Kolosori or Takata landowner groups where the Nautilus Gp sought to assist in finding companies willing to join with landowners in a mining venture where the landowners retained 20% of the equity in the project.

He took on what he termed, scoping work to find joint venture partners willing to undertake a joint venture subject to the equity interest required by the landowners. He did not take any interest in determining actual landowners. He accepted as accurate that the Bugotu Landowners Association represented the landowners although at the time he took a fee of US$125K for an introduction he was reluctant to accept the proposition put to him that the investor would rely on the fact of the introduction as sufficient proof that the investor was dealing with

landowners able to contract. Lilley QC suggested that 4 or 5 days [leading to an agreement] in country by an investor pointed to that fact. Mr. Stace eventually accepted the proposition that he believed he was bringing to the table people who were genuine landowners able to contract or "deal" as it was put.

Despite much equivocation I am satisfied Mr. Stace believed when he introduced the BLA to Axiom Minerals that the Association was comprised of landowners able to deal with their customary land and in 2007 Axiom paid US$250K to the Association from which amount a fee of US$125K was paid Nautilus.

It stands to reason that the mining company's expectation in consideration of the payment was predicated by the fact of the introduction as proof of the standing of the Association to represent those able to "deal". The introduction of a resource owner to a miner. For Nautilus stood to benefit when mining took place.

But the "company" with which the Association had "dealt" was one created by directors of Axiom Mining; Mr. Jake Gray, Mr. McCarthy and Mr. Lincoln Gray. The "deal" had been hijacked, for Axiom Mining Ltd. [The Australian company] was not the parent company as alleged.

Mr. Stace denied the proposition that the "deal" with the BLA fell over because the SI business registered under the Foreign Investment Act 2005, Axiom Bugotu Nickel, had no connection with the Australian company, Axiom Mining Ltd. Referring to the contract itself, he spoke of a guarantee clause from Axiom Mining over its subsidiary. At 78-89 of the annexures to his statement the Option Deed dated 16 May 2007, in Recital B states; "Axiom Bugotu Nickel Limited is a limited liability company incorporated in the Solomon Islands under the Companies Act [Cap 175] of Solomon Islands and is a subsidiary of Axiom Nickel Pty Ltd and in turn of Axiom Mining Ltd [ARBN 119 698 770]".

Axiom Bugotu Nickel Ltd was incorporated in the Solomon Islands on the 23 May 2007. The approval for the business, registered on the 14 May 2007 listed Axiom Bogotu Nickel as the business having FIB approval for "mining and quarrying not elsewhere classified". Information included that the company was a private company to be incorporated in the Solomon Islands and owned by Axiom Mining Ltd Australian 100%.

The Option Deed was signed, sealed and delivered by Jake W Gray, John V McCarthy and Lincoln P Gray for and on behalf of Axiom Bugotu Nickel Ltd. It has stamped duty paid of $337.50. The Option Deed in the body of the document at 4 stated;" ... that if the Grantee [ABN Ltd]... In any respect...Commits a breach ...the parent company or any of its nominees will indemnify the Grantor..."

The Deed was not seen to be adopted or executed by Axiom Mining Ltd.

Mr. Stace was asked in cross-examination and agreed that the Deed was terminated. He was asked whether Axiom Mining Ltd was a shareholder in Axiom Bugotu Nickel Ltd and he agreed it was not. There were three shareholders, each with one share and he thought two of the three were directors of Axiom Mining Ltd. He did not know whether the two whom he thought to be directors of Axiom Mining Ltd held their shares on trust for that company. When again asked whether the agreement ['Deed"] was; "cancelled, terminated and is dead" he said "no" and again pointed to the recitals in the Deed and relied on the statement that the SI Company was a subsidiary of the Australian one.

When it was put to him that "subsidiary" means that the parent company holds all the shares in the subsidiary, he conceded and said "yes". In

fact the shareholding in Axiom Bughotu Nickel was held by the three individuals, not the Australian Axiom Mining Ltd.

The reluctance in the witness to concede that Axiom Bugotu Nickel Ltd was not a subsidiary of the Australian company appears to have arisen from his ill-feeling towards the Australian company as a result of his grievances brought out later in cross-examination.

In his earlier statement of 22 August 2011, Mr. Stace, when speaking of the agreement, said; "In 2007 one of the companies contacted was Axiom Mining Co. Ltd. They were prepared to enter a joint venture with the landowners at a 20% level. However in 2008 the financial crisis occurred and they withdrew." His earlier statement is inconsistent with the admitted reasons given under cross-examination for the failure by Bugotu Landowners Association to proceed with the agreement. Those reasons related, as was subsequently admitted under cross-examination, to the "hijacking" of the company name, Axiom by particular individuals. No-where in his later statement of the 30 August 2013 does Mr. Stace speak of this "hijacking" although I am prepared to infer that Mr. Stace was aware at the time of his second statement, that the company Axiom Bugotu Nickel Ltd was not a subsidiary of the Australian company, Axiom Mining Ltd. He had become closely involved during the October 2010 meetings with Axiom Mining Ltd and in the absence of the Grays, knowing that he was dealing with the new Axiom, that inference is open.

Mr. Stace was then taken to his consultancy agreement between Nautilus and BLA entities dated 8 December 2005 [page 3 of his annexure to his statement] and the recitals, which Mr. Stace acknowledged set out the accepted facts on which the parties enter into the agreement, at A says; "The Bugotu Landowners Association, BLA are a properly constituted body comprising the custodians and customary owners of the Bugotu district of Isabel Province."

He was referred to the Minutes of the BLA annual general meeting held at Tanakoru Bugotu, Isabel Province on February 20, 2007 to February 22, 2007. [page 32-47]. He had said in his statement that he had advised the BLA on the corporate structure set out in the Minutes and financed its establishment through Nautilus. In cross-examination he appeared not to recollect detail about the meeting, saying when asked if he had read the minutes; "I suppose I have if I've got them in here." And later said that there was no point in Lilley QC asking him about the minutes.

When asked about the roles of Paramount chiefs in determining land ownership he denied knowledge. He was not familiar with the particular names given him by Lilley QC. But he did recognise the name of Mr. Josiah Riogano as the Chairman of the BLA at the time, although he was unaware that he was or had been a former Commissioner of Lands for the Solomon Islands. He agreed that he had prepared an application for prospecting licence on behalf of Bugotu Minerals Ltd. [page 133-137 of annexure] where, at page 137 of the annexure, headed Legend, there was a statement to the effect; "The trustees for each land block was also included for future reference."

Page 137 of the annexure had, at the top right corner, the number 8. That page had columns headed "Land" and "Trustees". In the "Land" column particular numbers appeared adjacent to the named trustees. Nowhere in the annexed document was there any correlation of numbers with particular land parcels. In other words, the annexure was incomplete. Mr. Stace agreed that the annexure included a schedule of trustees and landowners that the BLA had told Mr. Stace [who drew the document] were the owners of the land.

Lilley QC had Mr. Stace identify another document which he gave the witness who agreed that it formed part of the application for the prospecting licence. The document became exhibit 117 where the numbers on the maps related the particular land parcels to the particular

landowners. Mr. Stace agreed that the parcels of land in the application were the parcels of land of the Takata group and the Bungusule group [San Jorge] about which negotiations were had by the BLA at the King Solomon Hotel on the 13, 14, 15 October 2010.

Lilley QC then took the witness to his earlier evidence about the failed Option Deed between the BLA and Axiom Bugotu Nickel Ltd which had been executed on BLA's behalf by Ambrose Bugotu. Lilley QC put to the witness that Mr. Bugotu was the Deputy Paramount Chief of Isabel and consequently that the organisation for which he was prepared to contract would have a very good idea of who the landowners on Isabel are. Mr. Stace said; "Yes, of course."

Since Mr. Stace's company, Nautilus stood to benefit from the execution of the Deed and did in fact benefit, I accept that he was cognisant of the importance of the factual matters recited in the Deed and that execution by appropriate persons on BLA's behalf was also to his benefit. I am satisfied Mr. Stace was conversant with the matters in the application for PL at the time he compiled the document. He had been dealing with the group for some years and had a financial interest in the outcome, through Nautilus.

Mr. Stace was asked about the break-away of the Takata or Kolosori landowning group from the BLA and was referred to a meeting at the Iron Bottom Sound meeting in April, 2008. Whilst Mr. Stace said he was not there, he referred to the Minutes of the meeting and annexed them to his statement. [343,344] He affirmed in cross-examination that his role with the new group was to negotiate some new deal for them. This affirmed that stated in paras. 39, 40 and 41 of his statement where he referred to and annexed [347] the document entitled; "Takata Landowners Group-New Direction and Proposal". At para. 41, he recounts drawing up an agreement [348,349] that the purpose of loans by Nautilus was to complete land registration of that part of the TakataGroup lands which held the nickel deposits.

When asked about the registration he initially resiled from the suggestion that he had provided funding to Mr. Selo for that purpose but when shown 348 of his annexure, reluctantly agreed that the loan moneys were for that purpose. He provided loan moneys pursuant to the agreement, 348, to the Takata Group to help them get the land registered. Lilley QC referred him to his statement at para. 78 where Mr. Stace spoke of assisting Mr. Selo for several years before 2010, with funds to have the nickel deposit land registered.

As part of the process to register, Lilley QC suggested that a survey of the particular land was necessary and that Mr. Stace knew Mr. Selo had the support of Government to undertake the survey. Mr. Stace agreed and further, in terms of his appointment as Takata Mining Project Coordinator agreed that the loan moneys referred to in the main agreement [347] were paid over to the Takata landowner group.

In accordance with his proposal Takata Nickel and Kolosori Holdings were incorporated and Kolosori Holdings affirmed his appointment as coordinator and ratified the main agreement. Then Kolosori Holdings approached Mr. Stace in relation to an option deed which Kolosori wished to avoid and again Nautilus came back to assist, including funding Mr. Selo in relation to the registration of the land.

Mr. Stace was aware the vesting order in relation to the Kolosori or Takata land was made on the 2 December 2010. He accepted that there was not anything outstanding to delay the registration of the land as a perpetual estate. He accepted that the party he had described in his statement as a very major mining party and project contender would be introduced once his outstanding loan interest debts were secured and that party was Axiom Mining. He had made enquiries and found the company was no longer associated with the Jake Gray or Lincoln Gray although Mr. McCarthy was still there.

As a consequence Mr. Stace contacted Mr. McCarthy, was invited to Sydney, met Steve Williams and Ryan Mount and suggested they write a letter to the landowners notifying the landowners there was a new Axiom.

A meeting at the King Solomon Hotel was set up for the 13 October 2010 where Mr. Stace introduced the people identifying themselves as the Takata and Bungusule landowners to Mr. Ryan Mount and Mr. Steve Williams. Prior to the meeting he had drawn up an agreement between the Takata and Bubgusule to join together to further their interest in mining the land. As part of that agreement, he recited that Nautilus had designed and facilitated the significant agreement which effectively combined the two parties' trustees.

[Mr. Stace's statement, at 383-389 contained a copy of the Minutes of the landowner group's intentions and the Agreement between the two groups to join and to re-engage Axiom Mining as a joint venture partner in the mining venture.]

This meeting of the two groups was dated by the Minutes as 13 October 2010 while the meeting with the Axiom representatives which followed, was I am satisfied, held on the 14, 15 October 2010.

There was much difficulty arising from the cross-examination in accepting Mr. Stace's role in the negotiations held on the 14, 15 October. He suggested he was an onlooker giving advice to the landowner representatives on the side. He had previously denied being at the meetings with Axiom but when shown 8 coloured photographs which he acknowledged included him and others whom he identified, photographs time and date stamped, accepted he was there but as an onlooker. I upheld an objection to the tender of the photographs at an earlier time.

Mr. Stace was reluctant to accept his active participation in the meeting and negotiations taking place. When asked about the people at the table shown in the photographs, he recognised Mr. Elliot Cortez, denied Mr. Leonard Bava until he was reminded that Mr. Bava was then one of his clients when he dissembled, saying; "if he was there, he was there".

I find that difficult to reconcile with the tenor of his evidence for he had had dealings with the Takata Group for some time and one would think he would be familiar with the individuals making up the group, notwithstanding his close relationship with Mr. Selo. The two day meeting with these persons, not many, would lead me to believe he would have been conversant with the particular individuals.

I upheld the objection to the tender of the photos in the first place. Mr. Stace had referred to a Mr. Lavery, as the lawyer retained by Axiom as not there but retracted that when referred to a particular photo dated 15.10.2010 at 13:09.

Lilley QC than changed the tenor of his cross-examination to focus on an Option Deed [390-407] [which had Kemp Strang lawyers detailed on the first page of the document]. Mr. Williams was the representative of Kemp Strang. Mr. Stace said; "I know there was an option deed from somewhere, I don't know where it came from." After acknowledging the purpose of the two day meeting to be the negotiation of that very deed of agreement and then the fact set out in his statement that he furnished a document setting out milestone payments sought by the two landowner groups, despite equivocating in his replies to Lilley QC's questions, he was asked about Mr. Lavery whom he had said, was giving Axiom advice. When it was suggested that Mr. Williams, described as a senior partner of Kemp Strang, was giving Axiom advice, Mr. Stace maintained his assertion that Mr. Lavery [a local lawyer] was advising Axiom for in his statement, para. 71 he stated; "I understand that Mr. Patrick Lavery, a Solomon Island solicitor, was present at the meetings for Axiom."

Lilley QC asked whether Sol-Law had suggested that to Mr. Stace in the course of preparation of the statement. Mr. Stace denied the suggestion.

It is difficult to accept the evidence of Mr. Stace on this point. Whilst his answers in cross-examination did not detract from the statement,[para. 71], the very next document in his annexure, [408] is a letter addressed to the Directors and Trustees, Kolosori Holdings Ltd., dated 15 October 2010 under hand of Graeme Stace, Director on Nautilus Company letterhead with, at its foot, an endorsement reading; "cc Patrick Lavery Solicitor for Nautilus."

I am satisfied the internal inconsistency in his evidence reflects on the credibility of Mr. Stace where Axiom's interests are concerned. He later admitted he did not like Axiom and whilst he may honestly believe that his evidence reflects the truth as he recalls, I am satisfied his bias against Axiom requires me to treat his evidence with circumspection.

When questioned about his reasons for his dislike, he said the company was deceitful for it failed him in relation to the 2008 agreement. He was non-committal when it was pointed out that he had received US$ 125K and following the meetings of the 14, 15 October, another US$ 50K.

On further questioning, he said that it did not pay its debts Lilley QC elicited that as a result of the cessation of payments by Axiom under a consultancy agreement sometime in 20012, 20013 Mr. Stace claimed a breach of the agreement by Axiom to pay. Lilley QC first suggested Mr Stace saw Mr. Mount as dishonest and later, as deceitful. Both descriptive words were accepted by Mr. Stace. Lilley QC then had Mr. Stace accept the proposition that Mr. Mount was deceitful since Axiom owed Mr. Stace money. He accepted the suggestion that deceit went

beyond the fact of a debt owed. He accepted the fact that the injunction in 20011 prevented Axiom from proceeding with its mining venture.

Mr. Stace accepted the suggestion that the only thing between him and Mr. Mount was a money dispute. This related to the consultancy agreement which predated Mr. Staces discussion with Mr. Sullivan, a discussion which led to his later statement in these proceedings. The first statement was prepared on Axiom's part in 2011 before what I might call the falling out which is attributable by the witness to the perceived breach of the consultancy agreement.

Now I do not need to make findings in that respect, rather I accept the witness' statement in his cross-examination that his problem was with Mr. Mount and he attributed the failure under the consultancy agreement to Mr. Mount, notwithstanding the fact of the injunction which prevented Axiom from proceeding with its mining venture. This was plain from his answer where he agreed Axiom could not make money from the deal which Mr. Stace had brokered in October, 2010 because of the injunction. He agreed that no one had foreseen the possibility of Sumitomo obtaining an injunction restraining Axiom from following through with its prospecting [pursuant to its PL] or even going onto Isabel but nevertheless he blamed Mr. Mount as deceitful.

Lilley QC referred back to the deceit and spoke of the consultancy agreement with Axiom. He accused Mr. Stace of a breach of the agreement [523] at 11.4 where Confidential Information [that information resulting from the activities of Axiom and Mr. Stace pursuant to the agreement *as well as Confidential Information of the company*] remained the property of the company whilst maintained as confidential by the company. Mr. Stace, in his view, was of the opinion that termination of the agreement released him from the obligations under the clause.

Mr. Stace may have overlooked clause 11.9 of the clause which stated confidentiality would survive termination or expiry. I am satisfied the witness was not disinterested for his motive in giving evidence was clearly shown to be affected by his personal animosity towards Mr. Mount. His evidence consequently must suffer from my assessment of the value or weight to be placed on it where particular criticism is levelled at it.

Lilley QC took Mr. Stace back to the photographs which he had sought to tender earlier. The photographs were again shown the witness and from the answers to the cross-examination I am satisfied Mr. Stace was present for the two days, 14, 15 October and participated. He agreed the milestone payments clause was included on the morning of the 15, Mr. Lavery addressed the meeting, Mr. Stace accepted his appearance in the photographs while apparently dealing with papers and his obvious inclusion in the group. The photographs became an exhibit, Exhibit 118 A-H. I accept he was a participant in the meeting, not just an onlooker for he had accepted a fee to facilitate a meeting and it behoved him to pursue it to successful conclusion by some agreement.

He denied that he had verbally told Mr. Mount, on or about the 7 October, that registration of the land would be completed in about seven days. He denied that, yet in his annexed documents, at [430] the exchange of e-mails with Mount refer to a conversation Mr. Stace had had with Mr. Mount about the status of land registration and without denying the fact of the assertion [about the land registration] Mr. Stace says, in his mail of 28 October, 2010 that; "I have tried ringing Francis Selo's mobile the last couple of days-without contact. He alone is dealing with that matter. Dan is back in Honiara tomorrow and he will follow up."

Lilley QC's cross-examination sought to elicit from Mr. Stace the expectation in Mr. Stace that at the time of the meetings on the 14, 15 October, the parties would be dealing with registered land. While

denying the assertion, it is difficult to avoid the inference when reading the e-mail chain touched on above.

In the first statement, Mr. Stace at para, 10 says; "From the signing of our agreement with the Takata/ Kolosori landowners on the 30 th April 2008 we began to assist them with funds and advice as to the registration of their corporate entities and their land. This was because I knew that properly registered companies and registered perpetual estate would be far more attractive to potential foreign investors than when dealing with individuals on customary land. This was the central purpose of the concept of registration of land. This concept was not initiated by Axiom or any other mining company." [244]The registration was central to Stace's concept of a venture with a mining company and went to justifying his advisory fees. For customary landowners cannot grant interests in customary land necessary to satisfy a miner willing to risk large sums of money in the venture.

But the negotiations with Axiom Mining Ltd stalled after the letter of instruction given Nautilus 26 May 2008 to cease dealing with the company.[245]

Later Stace met with a new Axiom in Sydney where he has talks with John McCarthy and Ryan Mount and Stephen Williams following which he arranged with the Cortez group to meet with Williams and Mount in Honiara. It had been envisaged that the Cortez group would have become the registered proprietors of the perpetual estate by then but by the 15 October, 2010, that had not happened.

An amount of USD$30,000 was paid Nautilus to facilitate a meeting with the various landowner representatives and Stace arranged the meetings in Honiara over the 2 days.[246]

As a consequence of the meetings, an option deed was prepared and executed.[247]The deed was prepared by the lawyers for Axiom Mining Ltd. The company to be the joint venture operating company was Axiom Mining KB Ltd [Axiom] and a following agreement in February [dealt with

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[244] Statement of Stace 22 August 2011 at 10
[245] Ex. 116A Annex CGS-2 at p. 356
[246] Ex. 116A at 65,66.
[247] Claim 01 Consolidated Pleadings Annex 5 at 15A

elsewhere] between the Cortez group and Axiom KB more correctly contained the terms of the legal relationship.

Lilley QC then went further to attempt to show the animus in Mr. Stace towards Axiom by referring to para. 76 [of his later statement] which referred to the BLA declining to be involved with Axiom. This fact was conveyed to Mr. Stace by Axiom giving him a copy letter addressed to Axiom from the BLA on the 12 November 2010. The inclusion in his statement was impliedly critical of Axiom, Lilley QC suggested for it could have no other purpose. I am satisfied the implication was intended when I read the two e-mails, [exhibit 119A] and the draft letter to the BLA [exhibit 119B], for Mr. Stace responded to Mr. Mount [of Axiom] and drafted a letter to the BLA on Axiom's behalf. He was then supportive of Axiom for Nautilus had an consultancy agreement with Axiom until be purported to terminate the agreement for breach, a claim peripheral to the proceedings but which underlies the animus Stace exhibited to Mount.

There is clear inconsistency between the inference apparent in para., 76 left hanging, as it were and the actual sequence of events which puts an entirely different light on the matter, involving as it does Mr. Stace's active involvement in support of Axiom.

Further in his cross-examination to show Mr. Stace's earlier support for the proposed joint venture of the Takata/Kolosori group with Axiom, Lilley QC referred to an e-mail sent by Mr. Stace to Mr. Mount [of Axiom] on the 11 October 2010 [before the King Solomon Hotel meeting] [427] where Mr. Stace quotes Mr. Selo's conversation with the SI Permanent Secretary of Mines.

Again Mr. Stace was reluctant to accept the plain meaning of the words for the e-mail, in part recounted; "One of our team [Mr. Francis Selo]- who is also one of the 5 Takata trustees met with Perm. Sec. Of Mines yesterday, who reiterated that govt will [and must] go with the company who have the direct support of the landowners..."

He accepted that he was dealing with the landowners but let lie the proposition that the email was also directed to suggest Axiom did not have to worry about the International Tender. In any event, the responsibility to issue a letter of intent was with the Minister and Stace or the Permanent Secretaries attitude to landowner support recounted by Stace I can infer was merely a puff.

On the following day, [Day 62] Lilley QC took to Mr. Stace to [45] where the Minutes of the BLA Annual General Meeting recounted the successful candidates for the Executive were set out. They included Mr. Elliot Cortez Pade, Vihuvunaghi tribal executive; Rev. Lot Bako, Posomogo tribal; Mr. Leonard Bava, Thogokama tribal executive. Mr. Stace knew and agreed that Mr. Elliot Cortez and Mr. Leonard Bava were Kolosori landowners while Rev. Lot Bako was Bungusule.

He further agreed that whilst Mr. Selo was asked to resign as a member of the BLA executive when the Kolosori/ Takata landowners broke away but that Mr. Selo remained both a landowner and trustee notwithstanding his resignation from the BLA.

He was taken to [470] an e-mail from Mr. Stace to Ryan Mount, Danny Webb and Francis Selo where he spoke of primary evidence of relevant landowner support given the time-frames; agreeing that the people who constituted the Kolosori Landowners were the proper landowners to support Axiom's prospecting licence and consequentially the BLA without that group had no standing as landowners.

He was asked about a stake in the joint venture but said Axiom stated an equity stake was a matter for the landowners who refused him.

As a consequence, he signed a consultancy agreement with Axiom about the 20 December 2010, an agreement backdated but which Mr. Stace terminated by letter dated 28 August 2011.[exhibit 120 B] The termination letter was preceded by a letter of demand for $25K dated 26 July [exhibit 120A]. Mr. Stace was asked to read parts of the consultancy agreement dealing with Nautilus' provision of services to Axiom in relation to the project or nickel deposits on Isabel and San Jorge and that termination was by 3 months notice by either party or payment in lieu. Mr. Stace agreed the company was prevented from doing work on the project by the injunction from about August 2007 but that payments under his agreement concluded about February, March 2012. He was paid some $15K on the 19 April 2012.

His letter of demand claimed 5 months payments although did not account for the $15K acknowledged to have been paid. A letter by Ryan Mount [Axiom] to Nautilus was tendered [exhibit 120C] showing Mr. Mount not willing to accept the termination letter and asking Mr. Stace to reconsider. There was then talk of insolvency when Mr. Stace accepted the proposition that dispute in relation to a bill [money owing] in itself is not insolvency. Mr. Stace has not yet sued on the debt.

The documents relating to the debt come from the possession of SMMS and relate, Lilley QC suggested, to the wish in the witness to cause as much trouble for Axiom as possible by making the documents available to the claimant.

I am satisfied that, in the circumstances, it shows the possibility of a dispute between Nautilus and Axiom but that any rationale for disclosure in these unrelated proceedings does tend to support Lilley QC's assertions about what I term, animus.

Again Lilley QC came to the issue of Mr. Lavery's lawyers' client in the proceedings and negotiations over the 14, 15 October 2010 meeting.

The proposition put to the witness was that in the absence of a lawyer representing the landowners, trouble might be caused to Axiom [since the landowners rights are affected by the Option Deed, a deed of Axiom's drafting] and with that in mind, Mr. Stace has contrived to suggest that Mr. Lavery acted for Axiom. He denied the suggestion but as the evidence stands, he had suggested Mr. Lavery had in fact, given advice to Axiom which was acted upon. He went on to say; "Lavery acted for Axiom on several occasions. In fact, if I can say, your Honour, in this particular day there was something wrong with the actual contract that the landowners were having to pay. And there needed to be an amendment to it, which Lavery told them about and they changed it and initialled it---".

In those circumstances I would be inclined to the view that Mr. Lavery was acting in the landowners' interest by bringing up the need for the amendment. I am supported by the earlier reference to Nautilus letter of 15 October 2010 [408] under hand of Mr. Stace naming Mr. Lavery as the solicitor for Nautilus which had "designed and facilitated the agreement which.. combines the two party trustees..." [388]. When specifically shown that letter [408] he maintained his denial that Mr. Lavery was his solicitor or that he had him at the meeting for the landowners. I do not accept his denials in the face of his letter.

Again Mr. Stace's attitude undermines his reliability as a witness; I prefer his contemporaneous records to his later testimony. There is internal inconsistency in particular parts of his evidence, inconsistency which may be attributed to his animus towards Mr. Mount.

That animus was not lessened on re-examination; rather he was asked to comment on particular parts of the cross-examination and took the opportunity to justify his views. He spoke of Axiom interchangeably with Axiom Bugotu Nickel Ltd and notwithstanding his concession that "Axiom" had been hijacked by the Grays, emphasised the failure of "Axiom" and Lincoln to comply with an undertaking to get scholarships in the University of Townsville. I find his evidence suffered from his apparent lack of or unwillingness to appreciate the changes to the

Australian Axiom Mining Ltd leading to the October meetings at the King Solomon Hotel. I find that the moneys paid him before that meeting by Axiom Mining Ltd related to the introductory meetings anticipated in Honiara for the consultancy agreement was separately concluded in December of that year.

He was equally able to recontract with the new Axiom pursuant to the consultancy contract of December, 2010 and received fees. His consultancy work under the contract related to Isabel and San Jorge but he claimed fees for work done in Bougainville from February through to the end of July 2012. It may be an ambit claim.

I am satisfied that the Cortez group were separately represented at the King Solomon Hotel meeting and can infer on the evidence touched on above that regal representation was afforded by Mr. Lavery at the instigation of Nautilus.

The agreement entered into speaks for itself and does not amount to any arrangement to grant an interest in customary land.

Newyear

Mr. Benjamin Newyear statement of the 10 September 2013 was exhibit 121. He was sworn on 20 March 2014 Day 62 Session 2.

His statement deposed to these facts. He was the Permanent Secretary, Ministry of Mines, Energy and Rural Infrastructure contracted from 15 September 2010 to 1 August 2011 when he moved to the Office of the Prime Minister.

He commenced work at the department on the 9 September 2010 when he was briefed about the International Tender [the nickel project on

Isabel] by the Special Coordinator for the International Tender, Mr. Don Tolia and the Director of Mines, Mr. Peter Auga.

He was as a consequence of his appointment, Chairman of the screening committee for the Tender and an ex officio member of the Minerals Board.

He was administratively responsible for the Ministry, and implementing government policy relating to his Ministry. He advised the Minister.

He knew Mr. Ochi of SMMS. He had many meetings with him. SMMS had prospecting licences and he sometimes talked about them but mostly the International Tender. He met Mr. Ochi alone, also with the Minister or with Mr. Tolia or Mr. Auga. The meetings were in his office at Lenggakiki or the office of the Minister.

On the 10 September 2010 he received advice from the Attorney General's Chambers [the "AGC"] stating that SMMS could participate in the Tender even though it held more than 3 Prospecting Licences. ["PL"] It was never again raised with him as an issue.

He listed members of the Screening Committee made up of himself, Mr. Tolia, Mr. Auga, Mr. Shadrach Fanega, PS Finance, Mr. Raynick Aquila, Manager, Foreign Exchange, CBSI, Mr. Daniel Damilea, Legal Officer, AGC, The Provincial Secretary, Isabel, Mr. Elliot Cortez, representing Takata landowners, Johnson Vunagi, representing Jejevo landowners and a landowner representative for San Jorge.

The Committee was assisted by the South Pacific Applied Geoscience Commission ["SOPAC"] which helped draft the specifications and criteria for the International Tender.

Tenders closed on the 15 September 2010. Tenders were opened on Saturday, 25 September but stood over to the Sunday when they were discussed.

He listed the tenders which included SMMS and Bugotu Minerals Ltd. There were 4 tenders but one failed to pay fees and was rejected.

The Committee met for two days on the Monday and Tuesday to consider the bids in accordance with the criteria in the tender specifications and scored the respective bids in accordance with a system devised by SOPAC. The Criteria was set out.

The Committee met on the Wednesday to make a recommendation to the Minerals Board. Newyear said that SMMS had easily the best score and was plainly the best bid. He referred to the SMMS program which included the local construction of a plant to process low grade nickel and cobalt ore. The next best bid was Bugotu Minerals.

On 30 September the Minerals Board, chaired by Mr. Auga met and approved the recommendation of the Committee to award the Tender to SMMS and resolved to recommend to the Minister that a Letter of Intent ["LOI"] be issued for Takata, San Jorge and Jejevo.

The LOI authorises a party to identify landowners and others with interests in the land and then to negotiate surface access rights. A surface access agreement or agreements are a precondition to the grant of a prospecting licence.

Mr. Goodyear prepared both the LOI and the Notice of award on the 4 October and they bore that date. He took the documents and went with Mr. Auga and Mr. Tolia to the Minister, Mr. Kemakeza for signing but the Minister refused to sign. The Minister said the new government wanted to ensure as many applications as possible and asked if the tender period could be extended. The Minister also said Isabel MP's and some landowners did not support SMMS.

He advised against it and discussed the matter with Mr. Auga and Mr. Tolia when it was agreed to seek advice of the AGC following which a letter or memo was sent in early to mid October. [The memo was called for but not produced by the Crown] I can infer in the circumstances in which the Minister granted the award and gave the letter of intent to SMMS, that the AGC advice was to the effect that the Minister had no option but to sign following the Boards recommendation. That opinion flows through to the Boards capitulation in March 2013 that the Minister had no power to cancel the award or LOI.

Mr. Kemakaza continued to refuse to sign.

During October Mr. Ochi often called to ask when the result of the Tender would be announced. He was increasingly agitated to have a formal announcement for he seemed to know SMMS had won the tender.

In about October the advice from the AGC to the effect that there was no power to extend the tender was communicated to the Minister who was most unhappy.

Mr. Kemakeza continued to refuse to sign the Award and LOI but did not discuss his reasons.

Mr. Goodyear recalled that diplomatic pressure was brought to bear by the Japanese Government for he was present at two meetings with the Japanese Ambassador and the Minister when the Ambassador pressed

the Minister for a public announcement. At one meeting the Ambassador explained his country's interest in the SMMS project through a Japanese entity known as JOGMEC. He recalled Mr. Kemakeza saying he would not sign unless he and a group of other Ministers, officials and landowners were invited to visit the Sumitomo nickel ore plant in the Phillipines.

He told Mr. Ochi perhaps late October or early November 2010. Mr. Ochi told him it would be very expensive but he would enquire of his head office and later said it would not be possible until February 2011 because the plant would be closed for maintenance. Mr. Ochi suggested that after the announcement of the award an alternative visit by the Minister and one or two others to Sumitomo's smelter in Japan might be possible.

Mr. Kemakeza was angry that SMMS would not accept a big party and continued to refuse to sign the documents. At one point he agreed and a date was set for 23 November 2010 when fresh documents with that date were prepared but nevertheless the Minister refused to sign unless an overseas trip was arranged.

The Minister signed the Notice of Award and the SMMS LOI in his office in the witness' presence with Mr. Tolia on Saturday, 4 December 2010. In fact the document dates differ for the Notice is dated 4 October and the LOI 23 November.

Later that day he was present in the Minister's office with Mr. Tolia when the signed Award and LOI were given Mr. Ochi. There was further discussion of an overseas trip.

Mr. Newyear said the Minister resigned only to come back into office in January 2011, but went on to say the Minister resigned twice before

being sacked in mid 2011. The acting Minister in the absences was Mr. Bradley Tovosia.

Mr. Kemakeza told him in mid January that he, the Minister intended cancelling the Award and LOI because Cabinet had so resolved. The reasons he gave were; SMMS had not obtained SAAs within 3 months; the landowners objected to SMMS; Isabel MPs objected to SMMS; the Government wanted to open up the tender areas to more applicants.

Mr. Newyear advised the Minister strongly against cancelling the award for the LOI had been given SMMS on 4 December and the LOI allowed 12 months for the company to obtain SAAs, Mr. Newyear doubted the Minister's power to cancel and that he should obtain AGC advice.

Mr. Kemakeza was insistent, took a paper to Cabinet on 10 January and on the 17 January Cabinet endorsed cancellation of the Award and LOI, whereupon Mr. Newyear was instructed to prepare the cancellation letter. The letter was signed by the Minister and put into an envelope and addressed to the Managing Director, SMMS.

At no time prior had a meeting of the Minerals Board convened to recommend cancellation of the International Tender and the SMMS LOI.The letter was taken by the Minister who said he would deliver it himself. Mr. Newyear was not told whether the letter had been delivered.

There was late in January a conversation with a Mr. Alex Wang who told Mr. Newyear that his company, Pacific, the front for WY International, had been given a letter of intent from the Minister earlier that month. He was not shown the LOI. No Minerals Board meeting had considered any application by WY/Pacific except in relation to the International Tender.

At some time in February 2011, Mr. Ochi spoke to Mr. Newyear from Isabel to say that one of the landowners at a surface access meeting said he had a letter showing that the SMMS Award and LOI had been cancelled; was it true?

Mr. Newyear told Mr. Ochi that it was true for the Award and LOI was cancelled in January at the direction of Cabinet.

A couple of days later Mr. Ochi came and asked if Mr. Newyear had a copy of the letter and when shown became angry and refused to accept a copy. Later Mr. Ochi called to ask for a copy but Mr. Newyear declined. In March, 2011 Mr. Andrew Mason called asking for a copy of the letter and was told to ask Mr. Auga. Mr. Newyear gave Mr. Auga a copy for Mr. Mason.

Mr. Newyear then spoke of becoming aware of Axiom's interest in the tender area a month or so after he took up his post. He was visited by Mr. Ryan Mount and by a lawyer, Mr. John Zama and was asked whether the tender could be extended.

In early December he recalled receiving a copy of a letter from Axiom to the Minister seeking a prospecting licence for Takata and part of San Jorge, but did nothing for the Tender had been awarded.

In late March Axiom filed an application for a PL for Takata and San Jorge, the Minister was pressing for an early meeting of the Minerals Board to consider it. An extraordinary meeting of the Board was convened for the 6 April 2010 but adjourned for it wished for legal advice from the AGC about the SMMS LOI. On the 12 April the AGC

representative Mr. Damilea was present and the Axiom "matter" was discussed.

Those present with the PS were Mr. Auga, the Director and Chairman, Raynick Acquila [CBSI representative], Barnabas Bago, Douglas Billy, [public servants] Damilea from the AGC and the secretary to the meeting was Lily Danitolea.

The meeting was held in the context of the Minister's cancellation of the Award and SMMS LOI. Mr. Auga said the landowners and Isabel Provincial Assembly members opposed SMMS and wanted Axiom. The witness informed the meeting of the Minister's position and he reiterated that the Minister's decision to cancel the Award was in line with a Cabinet decision and political support for Axiom.

The witness said he spoke to the meeting of the history of the matter; tabled the Minister's cancellation letter of the 17 January spoke of Mr. Ochi's refusal to accept a copy and the Minister's decision as final.

Mr. Damilea adopted the Cabinet decision but said he was not sure if the Attorney General was aware of the Cabinet decision or if he had advised the Cabinet. There was discussion about the possibility of SMMS legal action. The witness told the Board the Minister had personally taken the cancellation letter to SMMS and that Mr. Auga said he had given a copy of the letter to Mr. Ochi after Mr. Auga had been instructed to cease giving SMMS assistance.

It was resolved to issue a LOI to Axiom for 12 months. Since it did not appear necessary, no resolution to cancel the SMMS LOI appeared necessary in view of Mr. Damilea's advice.

Mr. Newyear said that the normal process in relation to the issue of a LOI was not followed. The Board made no enquiries about the claims of landowner and Provincial Government opposition to SMMS.

Mr. Newyear did not agree with the unsigned copy of draft minutes of the Board meeting annexed to his statement for he said it was inaccurate.

His concession that he had little if any independent recollection of the meetings leads me to accept the draft minutes of the Board meeting since it is a contemporaneous document and whilst it was used to refresh his memory, without other evidence to undermine the accuracy of the document, his assertion about its correctness is not reliable.

Axiom's LOI was prepared by the office of the Director, for the Minister's signature.

Lilley QC took Mr. Newyear to the evidence of advice from the AGC with respect to the Screening Committee's acceptance that SMMS was eligible to tender notwithstanding it had other prospecting licences. He was aware the advice had come from Mr. Daniel Damilea, an officer of the Department.

He was asked about Messrs. Mason and Damilea but knew them from his time at the Mines Ministry. He was unaware of the friendship between the two nor that they had meetings in relation to the advice given to the DME about the 3 PL issue.

When asked, if he had been concerned about the independence of the advice given, would he have considered a second opinion, he agreed. There was then an appreciation in the PS that independent advice was to be expected from the AGC. There was no discussion of the 3 PL issue by the Screening Committee.

Mr. Damilea was on the Committee.

Mr. Newyear was then taken to the Minutes of the Minerals Board of the 30 September when it considered the Screening Committee's recommendation for the Award. [exhibit 24].

The minutes show that the 3 PL and the 100% foreign ownership issues were discussed, having been raised by a landowner, Elliot Cortez. He did not remember when it was suggested, whether Mr. Damilea did most of the talking when the two issues were discussed. He did agree that as Chairman of both the Committee and the Board meeting, the appearance of fairness was an important consideration in these confidential deliberations and had he known that Mr. Damilea was discussing the matters with Mr. Mason of Sumitomo, and telling Sumitomo everything that happened, he would have taken steps to have had him replaced.

I am satisfied that the PS accepted the relationship of Mr. Damilea and SMMS on the facts suggested, was one which reflected poorly on the independence of the advice given by the AGC.

Mr. Newyear was asked whether he was influenced by the legal advice at the time of the Screening Committee and Minerals Board meeting and agreed that he would accept the advice. [borne out in his statement where, at para. 68, he said "There was no resolution to cancel the SMMS LOI. That did not appear necessary in view of Mr. Damilea's advice that the Board had to follow the Cabinet decision".]

But Lilley QC addressed the landowner concerns raised about the foreign ownership at the Board meeting where Mr. Damilea was recorded as responding, speaking of the expense of the tender process which Mr. Newyear agreed, was not a legal issue. While remembering

the discussion, Mr. Newyear said "we couldn't do anything at that point in time."

When considering his responsibility to advise the Minister, had he been made aware of the relationship between Mr. Mason and Mr. Damilea, the apparent breach of confidence by Mr. Damilea about the various meetings and the influence of Mr. Damilea at the meetings as the representative of the AGC, he stated in cross-examination that he couldn't answer for the issue on which Mr. Lilley was addressing had already been settled. I find that he failed to appreciate the risk of bias in the circumstances put and the apparent influence of the AGC representative, Mr. Damilea by his answer, where Newyear accepted the *fait accompli.*

The witness accepted the suggestion that the Minister could not do anything about the tender because of [the presumed] advice from the AGC that he could not. He also accepted the suggestion that there was no knowledge in the Minister of the relationship between Mr. Mason and Mr. Damilea nor of the meeting processes.

The following day, Lilley QC again raised the issue of the Prospecting Licences held by SMMS and the landowner attitude to the company. Newyear was asked to look at exhibit 23, the Screening committee report of the 29 September 2010. He was specifically asked whether he had an independent recollection of the meeting and he recalled the matters to which he had his attention drawn by Lilley QC. He acknowledged that he while he didn't recall the specific 3 PL issue, he did say that SMMS had more licences than any other company operating or holding licences on Isabel.

When asked, having recognised the problem, whether the Committee left the final decision with the Minister, [but] the Committee must perform

due diligence and recommend the best tender to be declared the winner, the witness said; "yes, that is what we did."

The Minerals Board members were virtually the same people and Mr. Newyear agreed that the Board did not discuss these concerns. Again, I accept the Minutes of the Board Meeting as a more reliable source of information about the matters raised by the members of the Board for the reasons above.

He was then asked about his meeting with Mr. Ryan Mount [of Axiom] on about 15 September 2010 when Mr. Mount was accompanied by a Mr. Williams, Mr. Selo and a couple of other landowners when he was told that they had "done a deal" in relation to mining at Isabel and that they "had the support of landowners". Mr. Newyear denied knowing Chief Bako or having gone to school with him but accepted the importance of having the support of landowners. He did inform them the tender had been closed.

The point which Lilley QC sought to make was that at that time the company was asserting it had the support of landowners.

Mr. Newyear did not acknowledge the fact but rather resiled from any suggestion he had accepted the assertion by saying; "Secondly, I told them of course, that the main thing is, you know, deal with landowners. And I had no instructions not to so advise companies or landowners who want to associate."

He was asked about the Philippines Ministerial trip and agreed that early in December, 2010 the impasse between the Minister and Mr. Ochi was resolved by the Minister agreeing to sign the award then asking SMMS for a trip and that SMMS would provide the trip. He was aware of the impasse and agreed to the suggestion about settlement.

I am satisfied since the matter had become of such importance that the witness' was aware of the impasse and the outcome.

Mr. Newyear agreed that Axiom had written in December 2010 with a draft prospecting licence in relation to San Jorge and Takata to the Minister or Ministry and again in late March 2011, Axiom filed an application for a prospecting licence. With the knowledge that the International Tender had been cancelled in January, he was of the impression that the cancellation, being legal, no obligation or requirement arose to refuse the application.

He also agreed that one of the roles of Cabinet as a collective is to formulate Government policy and that decisions about mining should be made with the support of relevant landowners. He did not agree with the proposition that the Minerals Board should give effect to Government policy. It was not clear from his response but it was plain Mr. Newyear was cognisant of the fact that the Board had powers under the Act.

He did agree that, assuming the Board had power to cancel the LOI, the Board would have to give effect to Government policy if the Minister said to cancel it. This knowledge was not in the Board when Ochi again addressed it in March 2013.

Lilley QC took him to the events surrounding the Ministers' cancellation letter. Mr. Newyear recounted the conversation that he had had with Mr. Ochi after Mr. Ochi rang him from Isabel. Mr. Ochi called at his office where Mr. Newyear showed him a copy of the letter which Mr. Ochi declined to take. This office meeting took place about early February, 2011.

Mr. Newyear then showed him the letter written by Mr. Joseph Ishmael, Chief Mines Inspector. Mr. Newyear read the letter and agreed the letter was written without authorisation. {it confirmed SMMS'LOI] [Tab 64, exhibit 113] He was asked whether he knew how the letter had come about and he ventured the opinion that certain officers of the Department were disappointed by the cancellation. He named Mr. Bataánisia as one other although he was unaware whether Mr. Damilia had been involved with the preparation of the letter by Mr. Ishmael.

He was shown another letter, which he recognised having come from Mr. Selo on 3 January 2011 [Tab 48 exhibit 113 "Newyear"] objecting to the proposed arrangements with SMMS. He said this was typical of representations made by landowner groups to the Minister.

He confirmed all the tenders had been received by the Department before he became the PS.

Mr. Banuve cross-examined Mr. Newyear. Mr. Newyear agreed that he prepared the paper taken to Cabinet on 10 January 2011 by the Minister, Mr. Kemakeza. That paper was the basis for the cancellation of the Award and LOI by Cabinet. He was shown exhibit 31 and agreed that the document was the cancellation letter which he had drafted following the Cabinet determination.

He was asked about the Mineral Board extraordinary meeting of the 12 April 2011 specifically the agenda and apart from the unrelated item, agreed the item for consideration was the Axiom PL application. When asked who drafted the agenda, he suggested that while the Minister may advise the Director to call a meeting, the Director is principally responsible. He agreed that contrary to the inference in para. 68 of his statement, there was no agenda item in relation to cancellation of the SMMS LOI for that while discussion had taken place, he conceded, the

suggestion that a resolution was necessary was false in the absence of an agenda item to the effect.

Mr. Nemepo for the 7th defendants cross-examined Mr. Newyear although I do not need to consider any particular aspect.

Moshinski QC re-examined the witness. He asked him for his recollection of the Meeting in October with Mr. Mount and Mr. Williams. Mr. Newyear said they queried him about the tender but he told them the tender had closed. He was asked about the topic of landowner consent and agreed the topic was raised. He reiterated what he had said earlier about some landowners who supported Sumitomo and others who supported the mining while others objected.

He either had no recollection of the specific matters raised by the landowners who came to the meeting with Mr. Mount of Axiom, for there was talk, obviously or he was unwilling to recount the conversation.

His evidence shows the difficulties when witnesses are dealing with matters which happened so long ago and which not necessarily had such connection with the witness to expect a better recollection. I find Newyear to be a witness of truth but where his evidence diverges from the obvious inferences to be drawn from contemporaneous written documents, I rely on the documents.

Pade

Mr. Rolland Pade sworn on 7 April 2014 [Day 72 Session 2]

Mr. Pade is the external relations officer employed by SMMS at its prospecting camp at Cockatoo on Isabel Province.

His statement was given in pidgin [with the English interpretation forming part] and became exhibit 132 [a] and [b]. The [b] was further evidence in relation to material in his first statement. Annexed to the statement were photographs of a camp site of Axiom and two authorisations to act addressed to Messrs. Sol-Law by Trustees Martin Tango and Willie Denimana of the Thavia clan both dated 13 July 2013.

His first statement was concerned with his actions following instructions from Honiara Head office to investigate whether Axiom had conducted activities on Kolosori land. The first two photographs taken from the helicopter on 4 August showed buildings being constructed adjacent to a beach where trees had been felled to facilitate the work. The third photo showed the old INCO jetty and a shipping container, a backhoe and other items at that jetty. The jetty is distant from the camp site. Both are within the land the subject of the International Tender and the registered land the subject of the court case. This photo was taken on the 22 August and Mr. Pade said it showed a bull-dozer clearing the site and roads. Mr. Pade was familiar with the area since he said he went past either by helicopter or boat on average about twice a week.

As a consequence he opined that the equipment had not been long in place before the 22 August; not more than a week.

In his further evidence [exhibit 132 {b}] he said he worked a six day week which involved prospecting work from about late April 2011 to some-time in 2012 working with drilling teams about tenement D. He heard from Andrew Mason to look out for activity in the Tender area for Axiom had a LOI over some of the area. Sometime in late July 2011 while in the helicopter he saw men starting to clear an area which he knows to be the Axiom camp. The clearing continued for a few days and local construction started.

He told Andrew Mason by phone on the 2 August. He was told to investigate. He recounts reading a statement by Nathan Conway filed on 1 April 2014 where the deponent apparently attests to land clearing for Axiom soon after 10 July 2011 at paragraphs 8 and 9, but Mr. Pade takes issue with that, saying it is too early.

He also takes issue with para.9 of Mr. Conway's statement, in relation to a date, the 25 July.

He was cross-examined by Lilley QC.

After marking various sites on the map, [annex A to the Further amended further amended Reply- Map 1] he was asked about a series of e-mails from Mr. Ochi on the 17 April 2011 asking him to deliver particular documents to particular persons. After much prompting he recalled going with Rota Baátanisia to Noel and Martin Tango with some documents [which were called for]. He recalled Ben Devi was also with him.

He recollected that the documents related to the fact of the registered land in the chief's area. He saw Paul Fotamana, Etchell Kofemana and Ben Salusu but did not recall seeing James Ugura. He saw Alfred Jolo and Jimmy Bareke Manideka at Tagi, their home village on Buena Vista.

The issue to which Lilley QC's questions were addressed related to the involvement of the DME officer, Mr. Baántanisia in the business of SMMS where SMMS was seeking to bring to the notice of particular chief's the fact of the land registration. I accept that Rota was concerned with the business of SMMS at this time.

Mr. Pade was then questioned about his involvement in having an authority signed by Mr. Denimana who was working at a bush camp.

Mr. Pade said Denimana had been contracted to work in the bush with the drilling teams to facilitate the use of the drilling rig and involved clearing the site and preparing roads. The contract was for six weeks and during this time an authority by him addressed to Messrs. Sol-Law to act in these proceedings was taken him for his signature.

He denied any knowledge of a meeting arranged about the 13 January 2013 with the clan of Henry Vasula Raoga at Vara village. When asked who would arrange such a meeting he said the camp manager, Cockatoo Camp, Mr. Ben Devi.

The following day, Tuesday 8 April the cross-examination continued about the January 2013 meetings but he maintained he was not involved. He was particularly directed to meetings about the 23, 24, 25 January 2013 involving Mr. Raoga or Mr. Denimana's group but reiterated that he was not involved. He was not involved in boat trips to arrange the meetings suggested by Lilley QC.

He was asked about his communications with headquarters and whether he had been queried by anybody about emails regarding this case. He said no.

He was later asked about his work with landowners when SAA's were involved. He explained them to the landowners and said it was up to them whether they signed or not. He, in answer to further questions, said he paid them money after the meeting.

He agreed he attended most awareness meetings and SAA meetings early in 2011.

Lilley QC then asked;

Q. Were you ever told that the BLA was opposed to Sumitomo because Sumitomo would not share their profits with the BLA?

Answer: What I know at that time is –BLA wanted shares—and then the company would operate under BLA.

Q. And was it your understanding that the shares would entitle the landowners to a share of profits in mining?

Answer: I only know shares, whether it was revenue or profits, I don't know.

Lilley QC suggested he had been told these things by SMMS but the witness said he knew the people, Leonard Bava, Elliot Cortez and Francis Selo and had knowledge as a layman, of the BLA wish. He had read their statements where they had said they were opposed to SMMS mining their land. When asked about statements given in an earlier case, Mr. Pade said Casper Huhugo had told him sometime about 6 February 2011.

He was asked whether he was then told that included Martin Tango's opposition to SMMS mining, but only the three named were mentioned by Casper Huhugo.

It was clear he was partisan in his support for SMMS since he had been employed by the company and was well regarded sufficiently by the company to have him come to court to support it. His evidence need not suffer as a consequence although his three statements had undergone subtle changes and as the 6th defendant's case through cross-examination unfolded. I accept he had little real recollection of the salient matters going to the proof of SMMS's case on the possession aspect for he was acting under instructions, to observe, take photographs etc while he was expected to maintain his own work.

Later the map was admitted marked exhibit 134.

Then came a series of questions and answers where Mr. Pade was forced to concede that of his three statements he had sworn in this case, his evidence about the opportunity to view the Axiom camp site and wharf had varied, one from the other. Lilley QC referred to Mr. Mason's earlier statement, of the 18 August 2011 suggested that Mr. Mason was correct in his evidence about hearing of the Axiom activity from Mr. Lonsdale Manase and that he asked Mr. Pade to investigate on the 2 August and that Mr. Pade told Mr. Mason that Axiom's local workers were setting up camp. Mr. Pade agreed and further conceded that by his earlier statement of September 2011 he had seen Axiom's activities on three occasions, while his statement of January 2014 states "we frequently go past this camp on the way to work" and yet again his addendum to that statement he says he was working six days a week at tenement D, which from a view of the map tendered, exhibit 134, was away from the registered land area.

The internal inconsistencies were manifest.

Lilley QC suggested to the witness that the addendum statement was made up to try and show that Axiom had not taken possession of the site until the end of July, to which Mr. Pade replied; "Axiom took up the position after July."

In view of the inconsistencies in his evidence, I am not willing to find that Axiom took up possession of the site after July on the basis of Pade's evidence.

Mr. Pade did concede that the site work shown in his photos of the 4 August represented the situation when he first reported to Mr. Mason on the 2 August although he denied that the work had commenced by the middle of July. Of course he had referred to what he had been told by villagers concerning the works going on. I am not satisfied there is any cogent evidence to suggest the 6th defendant had done work in furtherance of it prospecting activities, work which needs a direct connection to such activity; mere presence of equipment at the site is not enough. The fact that the company is in occupation of the old Inco

site and has equipment adjacent does not make the connection. What he had been told by villagers is not cogent evidence able to be nor need it be refuted.

The 18 August statement of Andrew Mason was tendered as exhibit 135 and that of Mr. Pade dated 9 September 2011 exhibit 136. The claimant's claim asserting breach of undertakings and injunctive orders has not been made out.

Ngelemane

Philemon Ngelemane Sworn on 8 April 2014. [Day 73 Session 2]

Mr. Ngelemane had done work for the 6th defendant, Axiom KB Ltd ["Axiom"] in relation to particular tasks. His redacted statement became exhibit 137. He referred to an earlier statement filed in support of an application for joinder by Mr. Denimana and Mr. Bugoro as 3rd. Claimants in these proceedings, [representing the trustees and members of the Thavia clan]. While repeating that statement he corrected parts. His corrections reflected the criticism made by Axiom in Lilley QC's cross-examination of this witness.

His credibility was attacked. I will deal with the nature of the attacks when addressing the cross-examination.

In his statement he spoke of working out of Axiom's office at Post Office House , Honiara from 4 January 2011 most days of the week when in Honiara. He worked from a desk in an open space. He would be given tasks by Mr. Mount or Mr. Edwards. He also dealt a lot with the 7th defendants especially Francis Selo and Leonard Bava. Elliot Cortez was chairman of the 7th defendants and while he never saw Wilson Mapuru

or Robert Malo at Axiom's office he had some dealings with Elliot Cortez.

Francis Selo is his cousin and worked for Axiom. The witness said, for instance at para. 6; "He [Selo] appeared to work very closely with Mount. He had his own desk in the open space area but was often in Mount's office [my earlier statement says they shared the same office. I intended to refer to the whole office and not to Mount's room]. Only Selo had free access to Mount."

I reproduce this passage for Lilley QC attacked the objective reliability of the witness and the passage raises this issue. I find for the reasons, later that his objectivity was clouded by his view of the main chance.

Mr. Ngelemane said that Selo dealt directly with the Commissioner of Lands, Director of Mines, Minister of Mines and the Registrar of Titles. Selo told him whom he was going to meet. He usually went alone.

On such occasions Selo would usually go into Mount's office to get envelopes with money from Mount before he left. Mr. Ngelemane could see that it was money as the envelopes often had a transparent window. On one such occasion Selo opened the envelope and it had money in it. "He jokingly told me to go and buy beer but he never gave me any money".

He was there and saw and heard this on many occasions from early January 2011. On his return he did not have the envelope with him.

"When [Selo] returned he would sometimes tell me what had occurred but only generally like that it went well, but never any details, or Selo would put up his thumbs up, smile and say that everything is working well and was going to his plan".

Lilley QC attacked the veracity of the witness on these points of evidence. The motive underlying the witness' testimony was made plain in cross-examination.

The witness did not like Axiom. He had not been given a contract by Axiom. His cousin, Mr. Francis Selo worked for Axiom. Mr. Selo was one of the 7th defendants. Mr. Ngelemane did work for the 7th defendants. It is open to find that Mr. Ngelemane was envious of Mr. Selo. Envy is a cousin of malice.

Lilley QC was at pains to show that Mr. Selo had done nothing to hurt Mr. Ngelemane and by his answer Mr. Ngelemane accepted the supposition. Yet by his deposition, Mr. Ngelemane has implied that Mr. Selo was a party to behaviour which, if not evincing an intention to bribe, was tantamount to Mr. Selo's willingness to exhibit that intention.

He was asked; "did you decide of your own free will, to tell a story about cash in envelopes?" And answered; "it could be right". When asked to clarify whether right or not right, the witness answered; "but that is what I know".

After hearing all the cross-examination, I am satisfied that Mr. Ngelemane evinced malice intent when describing the money in the envelope, an intent to damage Axiom's credit.

As a consequence Lilley QC said the witness was lying. Whilst denied, I do not accept the witness's assertions about the money in the envelopes.

Often the witness would say, "I stick to my statement; that is what I've said".

This answer clearly goes to the style in which the witness related his events in his statement. It tends to a dialectical process where the witness may be said to say what the witness feels the note-taker wants to hear. This narrative style reflects the storytelling manner where contradictions often provoke disagreements in public needlessly. If necessary, corrections to the story will be made in the absence of the story-teller. His phrase, "I will stick to my statement that is what I've said" is suggestive of this narrative style.

The note taker was Mr. Mane employed by SMMS. Mr. Ngelemane no longer works for Axiom which is defending these proceedings brought by SMMS and others.

The cross-examination went some way to illuminate this witness's style whereby he relates these events and his background viz. a viz. the company, Axiom; his cousin, Mr. Selo and those other individuals making up the 7th defendant group. Contradictions became apparent.

His malice towards Axiom was further explored in cross-examination when it was suggested he was then in financial difficulty and needed money to pay debts. The cross-examination went as follows;

> Question-You didn't have any debts? You didn't have any debts that needed paying when you decided to give a statement to Sumitomo? Would you say yes to that or no to that?
>
> Answer: No.
>
> Lilley QC asked; "You had no debts that needed paying?" when Sullivan QC interjected and said; "The answer was no debts to Sumitomo, I think, your Lordship."
>
> Lilley QC persevered and the witness confirmed that he was not in financial difficulty.

This style of interjection often I am satisfied, put the witness on notice of the possibility of a trick question. In this instance, the witness maintained his denial.

Much later Mr. Ngelemane was questioned about a lease of his wife's house to a tenant; Mr. Philemon Gagahe in 2010 where an assignment of rent was signed by both Mr. and Mrs. Ngelemane in favour of Leonard and Doris Bava for money owed the Bava's. The assignment was for three years and when asked about how the debt arose, Mr. Ngelemane said; "I cannot remember."

Lilley QC then put this question; "That's not surprising. I'll suggest to you how that debt arose. You were paid money by someone to give it to the Immigration Department to keep you out of jail; is that correct?"

Answer; "That is not correct."

By later evidence in the 6th defendants case it was shown that in fact Axiom had given him money which was not appropriated to the purpose for which it was given. As a consequence Mr. Ngelemane lost the opportunity of work with Axiom, the 7th defendants and changed his alliegence, if it could be called that, to SMMS. I am satisfied from that time the witness's malice coloured his actions where they involved the 6th defendant.

He was asked; "I suggest that Mr. Bava conducted some awareness meetings with his clan, do you agree with that?"

Answer; "I agree with that."

Question; "and I suggest that Mr. Bava at no time asked you to keep Martin Tango away from Sumitomo; do you agree with that?

Answer; "That is not correct."

Question; "I suggest that you put that in your statement to make things look bad for Axiom; is that correct?"

A. [repeat question] Answer; "Yes."

Question; "And you also put that in your statement to make things look bad for Mr. Bava; didn't you? " Answer; "That is not my intention but to make the statement straight forward I put this name in the statement."

Now his use of the impersonal "I put this name" when referring to Mr. Bava in this fashion appears to imply no animus towards Mr. Bava, rather the animus was wholly towards Axiom. When asked whether he disliked Mr. Bava, who was then in the back of the court, after a series of questions to bring the witness to the point, he said; "No, I like him, he is my brother-in-law."

Yet earlier in cross-examination in relation to his statement where he had deposed at paragraph 18 to having been asked by Mr. Selo and Mr. Bava to have a blank land transfer document signed by persons, a document which he had prepared because; " neither Selo nor Bava could write neatly, I was asked by them to write the name." The implication in his statement was that such a course of action was contrary some-how to proper practice and that both Mr. Selo and Mr. Bava by asking Mr. Ngelemane to do this act sought to distance themselves from any such criticism. I do not accept his implied criticism of either Selo or Bava. Both were shown by the claimants to be worthy of their representation until SMMS's involvement. Both then had the trust of the landowners.

Paragraph 18 is somewhat of an enigma. The witness said that he had been asked by Selo and Bava on about the 6 April 2011 to get [sic] a transfer document signed by Rev. Wilson Mapuru who was in Islabel. He said; "I was told to have him sign a blank form undated document which they would then complete and lodge after it was signed." He said he was given the names to be written.

The Perpetual Estate Register Parcel Number 130-004-1 [the Kolosori Land LR 1063][Exhibit 138[a]] records the registered owners of the land as Robert Malo, Francis Selo, Leonard Bava, Rev. Wilson Mapuru and Elliot Cortez. The names Mr. Ngelemane had written on his document as transferors were Rev. Wilson Mapuru, Joel Malo, Martin Tango, Livi Liko Hu and Lonsdale Manase. The names differ from those on the register and had the names been on the document at the time of its

signature by Rev. Wilson Mapuru one would think the discrepancy would have been queried by Rev. Mapuru who may presumed to have been aware of the fact since he was a party to the earlier registered transfer. So the document may, as the witness said, have been blank when signed. Since he was given the names to be written by Mr. Selo and Mr. Bava, both registered owners, again one would ask why the discrepancy? Lilley QC suggested to the witness that Mr. Selo and Mr. Bava would be unlikely to give the witness names which would make the document unregistrable. [Because of the discrepancy in the names of the transferors and the registered owners on the Estate Register] His answer; "I don't know" rather under- plays his intelligence.

The suggestion that neither could write neatly when both were well educated with responsible positions is plainly untrue and calculated to deceive. His use of the name, Elliot Cortez Pade in the transfer document does not accord with the manner by which the 7th defendant, Elliot Cortez is commonly known nor the name on the register of lands document. It consequently is not safe to accept Mr. Ngelemane's evidence about the preparation of the transfer document and the statement about the steps he took in relation to the document suffers from the same criticism. It has no supporting basis in fact when I look at the statements of other witnesses who have not been shown to be accentuated by malice.

Lilley QC was by his cross-examination, pointing to the improbability of the witness acting on Mr. Selo or Mr. Bava's instructions. He suggested it was orchestrated by SMMS or he had done it on his own account for he had neither a budget nor consultancy fee with respect to the work done when his practice had been to prepare budgets and his business was consultancy work. There was no explanation for the absence of a budget to be met by Mr. Selo and Mr. Bava on the 7th defendants' behalf for the trip to Isabel was not a walk down town to have the document executed. I am satisfied the work associated with the document would have called for expense.

The witness had made an earlier statement in which transfer had not been there mentioned; it was only in this statement that its existence was made plain. Whilst the explanations for the absence in the earlier document were relatively innocuous, the witness denied that either SMMS or he had created the instrument of transfer.

I am satisfied the document was created by Mr. Ngelemane but I am not satisfied that it was created at the instigation of either Mr. Selo or Mr. Bava

In his statement, Mr. Ngelemane recounted the Axiom practice to have a dinner at King Solomon Hotel and at the end of every month, a beach party where officers from the Mines and Lands department usually attended. He knew they were from the departments for they would introduce them-selves and he had seen some of them at those departments. He was cross-examined on these parties. He conceded that whilst not having dealings with the Mines or Lands departments on Axiom's behalf he knew the officers from dealings he had had with the departments on behalf of his brother. This evidence is contrary to that suggested by his statement.

His evidence with respect to the officers' attendance at beach parties was the subject of cross-examination to show his recollection was wrong about the number and likelihood of Mines or Lands department officers being present for the parties were for staff and prospecting people. Since the witness expressly stated he attended the parties many times, and that these department officers attended, I am satisfied there is external inconsistency with that evidence and I do not accept his recollection.

He was present at a number of meetings of the 7th defendants held outside Axiom's office and he stated names of those there or not there and the fact he acted as secretary at three of these meetings.

At paragraph 16 he opined that the relationship between the 7th defendants was not always good.

Much cross-examination was directed at the witness's insinuations about the honesty of Mr. Selo, found particularly in paragraph 16. Mr. Ngelemane recounted the 7th defendants' disagreement amongst themselves about Selo's unilateral decisions and actions, their assertions that Selo was misusing funds and receiving salary as a director of Axiom while receiving rent payments for the land lease at the same time. Another cause for argument was that Selo was receiving money advances against lease payments without the others knowing. He recounts that he took minutes, copies of which were given Selo but he cannot locate his copies.

He recounts arranging a Chief's meeting on the 7th defendants behalf at the Pacific Casino, Honiara shortly before awareness meetings. He said Selo was not present at the meeting. The other 7th defendants were. He said Chief Josiah Pone and Mr. Martin Tang also attended. The Chiefs were paid for attending.

In paragraph 18 he recounted he was asked by Selo and Bava to get a transfer document [annexed to his statement as p22-25] signed by Rev. Wilson Mapuru in Isabel. He was told to have a blank form document signed, a document which the witness prepared since asked by Selo and Bava "because neither could write neatly..." The names of the transferor and transferees were given him and written on the first page.

He had Rev. Wilson Mapuru sign on the 7 April 2011 at his village and returned the original to Selo and Bava after making a copy. His brother Elliot So'oli was with him there.

Mr. Ngelemane then spoke of conducting awareness meetings for Axiom between 24 April and 30 April in villages from Huali to Lelegia, Bogotu District, Isabel. Again on 29 th May 2011. He annexed a letter from the Premier of the Isabel Province given him by Selo dated 20 May showing the Premier's support of Axiom. He said none of the 7th defendants accompanied him, no one from the Mines department attended and no one from Axiom was present. Moneys were given the Chiefs at each village meeting in the sum of $500 and an allowance of $100 per day also paid them.

Lilley QC cross-examined on the awareness meetings which the witness had conducted on Isabel when the 7th defendants had given cash money for the people who attended and while initially denied, the witness answered that he paid the chiefs cash. The point obviously made by the reiterated question and answer was that the cash moneys were provided by the 7th defendants.

The point of differentiation which became apparent was that the company, Axiom paid by cheque when Mr. Ngelemane paid Finance in relation to immigration fees on behalf of Axiom permit prospecting workers. The witness denied ever going to the Mines or Lands departments on Axiom's behalf.

He said Martin Tango was under verbal attack by the village people. Mr. Tango only attended the first of the awareness meetings. "People were asking him too many difficult questions such as who registered the companies, who registered the land and how it was done without their consent and approval."

The witness had stated the awareness meetings were at Axiom's behest, while under cross-examination he conceded they were meetings with landowners represented by the 7th defendants.

The importance of this concession is plain for the criticism which the witness recounted as coming from the landowners was impliedly directed towards Axiom when he actually was there on the 7th defendants behalf. Once again he has been shown to be willing to dissemble for he had said in his statement that the 7th defendants had paid for the trip and conduct money for the Chiefs. Under cross-examination he agreed that the 7th defendants also paid his expenses. It had been suggested to him that Axiom had no need of awareness meetings for the company had a SAA but the witness was not aware. Since awareness meetings were part of a process leading to Surface Access Agreements, Mr. Ngelemane exhibited an understanding of the requirements for he was clear in his statement when recounting the fact that none of the 7th defendants were present, the Director [of Mines] was not present nor were any officers from the Mines department. No-one from Axiom was present. Yet under cross-examination when it was suggested that it wasn't an awareness meeting he said; "I don't know".

The manner in which the paragraph was couched plainly implies criticism of Axiom since the company would be concerned with "awareness meetings". These meetings were at the behest of the 7th defendants and paid for by them. His evidence cannot be believed on this point.

The witness statement about villagers verbally attacking Mr. Tango suffers from my finding that he was dissembling about who had instructed him. I do not accept his evidence on that point.

On the 29 May he went to an awareness meeting at Sepi his home village. No-one from Axiom or DME was there. He was given two letters seeking compensation from Axiom for damage done by a helicopter landing at the village. He gave the letters to Selo in Honiara but says "I do not know if the claims were resolved."

Cross-examination went to show he had contrived the claims and intended to keep any money that Axiom paid following upon the letters of demand. I am unwilling to make findings about the true source of the demands. Since the letters are attached to the witness statement, they are plainly drafted by someone cognisant with such form and Mr. Ngelemane is named in the letters as "your representative." The demands were addressed to Axiom. I am satisfied Mr. Ngelemane was concerned with their creation despite his denial under cross-examination [which was internally inconsistent with the wording of the letters which named him as meeting with the village committee] and was acting against his principal's interest if he saw himself as Axiom's representative. It is indicative of his malice intent.

He was asked by Selo to draft a letter of receipt of the May quarter rentals payment from Axiom of SBD $281,625 for signature by four of the 7th defendants. [p. 26 of his annexures].He was concerned with the business of the 7th defendants.

He says in late July or early August 2011 Mount and Bava called him and asked him to have Martin Tango and James Ugura come to Honiara to sign some documents. He was to prepare a "draft statement based upon the template he gave me".

The draft was at p. 27, 28 of his statement. It contained no prepared written statement, rather only the attestation clause and a statement of compliance with the Civil Procedure rules; sheet 2 [where the sheet has these proceedings CC no. and the 5th, 6th, and 7th defendants' names at the top.] In other words, the supposed statements were the basis for his assertions concerning the need to have Tango and Ugura come to Honiara; he had no idea why.

Mr. Ngelemane then spoke of a budget which Mount asked him to prepare for get Tango and Uguru to Honiara The budget was handwritten and Bava had it typed. The budget was given to Mount who approved it. [Mr. Ngelemane annexed it to his statement, p. 29-it does not refer to Ugura, rather Martin Tango/James Ava and is dated 16 September.]

The evidence is internally inconsistent and unreliable.

He recounts he and Bava were given a cheque by Edwards for about $8000. He said "I was told that Bava had already taken $4000 from the budget." The cheque was cashed at the bank and Mr. Ngelemane further recounts how he came to Honiara with Tango to be met by Bava.

Mr. Bava gave the witness $1500 to book a room at Bulaia Motel for Tango. Mr. Ngelemane says the idea was to keep Tango at the Motel while trying to convince him [Tango] to switch sides from SMMS by signing a Statutory Declaration. Eventually Mr. Ngelemane was present when Tango signed the statutory declaration witnessed by Glen Hivu and Bava gave Mr. Ngelemane $ 2000 which was given Tango. Tango was happy to receive it.

Mr. Ngelemane understood that Tango had previously supported SMMS and he says Bava promised him $1000 if he "was successful with the tasks given me for Tango". He says all this happened about August 2011 and while he has seen a copy of a declaration by Tango dated 3 August 2011, and it looked like the one he saw him sign, Mr. Ngelemane thinks the actual date was later.

Once again this is internally inconsistent. The budget of the 16 September 2011 cannot have anything to do with a Declaration signed by Martin Tango on the 3 August. The payments recounted as having

been given were the subject of cross-examination. Mr. Ngelemane admitted to giving sums of $2000 and $3000 to Martin Tango and an amount of $1500 for expenses on another occasion. In his statement he spoke of a sum of $2000 paid to Mr. Tango. The wide differences in his testimony left me in no doubt that his evidence was unreliable on the point in relation to payments to Mr. Tangoor their basis.

He goes on to speak about drafting a letter at Bava's request for Uguru addressed to SoL-Law and referred in that letter to a statutory declaration which it was intended Uguru sign, but having given the letter to Bava, he recalls no more about it. [No letter was annexed.]

He then speaks about Danny Webb; but only recounts the fact he came to Axiom's office and spoke to Mount, Selo and Edwards apparently in a close relationship. Webb attended Axiom parties and asked Selo and Bava for them to do things.

At the conclusion of the redacted statement, Mr. Ngelemane says "I went to see Lonsdale and told him $40,000 was there but Lonsdale refused to sign.

He finally says the attached letter from Bava to Mount dated 9 October enclosed minutes of a meeting held at Vara on 9 September 2011. [The letter and minutes p.30-33].

Axiom cross-examined the witness, and Lilley QC confirmed the witness's relationship as the cousin of Francis Selo as well as the facts that Leonard Bava is his brother-in-law and Father Bako is married to his cousin's sister.

He denied knowing that these people had for many years wanted to mine their land with an investor who would share the profits from mining. He had grown up with these people. They had not done anything to hurt him, whether financially, or embarrassed him or caused him a problem in life.

Despite denying either Selo or Bava tried to get him business opportunities, he admitted Bava got him a job with Axiom. Later it became plain that he had work from the 7th defendants, who include Selo and Bava.

He was asked whether he knew when he gave the statement to SMMS that SMMS would use it to accuse Francis Selo of bribery. He denied that he knew [the purpose] although admitted he knew the meaning of bribery.

He was asked for some reason why he gave a statement to SMMS to destroy [these peoples] dreams to mine their land and share the profits. He responded by saying that "in the first place Axiom promised to make me a contract" which they didn't do. He denied approaching SMMS and offering his services, rather SMMS approached him through the late Casper Huhugo.

When revenge was suggested as the motive, for his support of SMMS against Axiom he said; "not really", rather the truth of what he was deposing to was his motive.

The truth of his testimony was clearly in issue. On Day 74 Lilley QC continued his cross-examination, and suggested that the witness had had conversations with Father Lot Bako telling Bako to have Axiom sign a contract with Mr. Ngelemane failing which he [Mr. Ngelemane] "would disclose everything." The conversations were denied. Because of the

internal contradictions which I have touched on in his evidence I prefer the evidence of Father Lot Bako on this point. It further illustrates his bias against Axiom.

He was cross-examined about his place of work and reiterated that was Axiom at Post Office House, having started with Axiom there. As he said, "That's what I know". He conceded that he was not an employee but did specific tasks involving immigration and labour for the incoming workers. He did not mention awareness meetings.

Lilley QC then sought to show that his evidence regarding the cash money seen in envelopes was improbable. He asked Mr. Ngelemane a number of questions where Mr. Ngelemane equivocated about his actual work station in the office. He said he sat next to the receptionist, then he said he sat at Adam's office [behind the partition wall] [yet he showed Adam on exhibit 139 as in Mount's room] and when talking about the Fire Evacuation Plan, [exhibit 139] Adam's room being the first room after the reception desk. Mr. Ngelemane accepted the plan as a proper representation of the office spaces. He was quite vague and unresponsive to those questions by Lilley QC which were directed to show quite where he was when able to see the envelopes in Mounts hand.

Mr. Ngelemane had accepted at one point that he sat behind a half height wall at a desk about a metre from the wall, the passageway was some 2.1 m and Mount's desk in the opposite office was about 2 m from the door opening onto the passageway. Mr. Lilley suggested Mr. Ngelemane could not have seen money in a windowed envelope which Mount was handing Selo in Mount's office and proffered an windowed envelope from the Bar table to the witness [some 7 m distant] and invited Mr. Ngelemane to say what was in it. He asked whether Mr. Ngelemane had any idea and the answer was "no".

While good theatre it did draw the courts attention to the improbability of viewing money in an envelope in the circumstances described by the witness in his statement. Since he never firmly established his position

in the work-space despite having the opportunity to do so by use of the escape plan, exhibit 139 put to him and his admission later not seeing Mr. Mount giving envelopes to anyone else, while relying on his narration ["I only stick to my statement, that's what I see"] his cross-examination left me in no doubt that the evidence about this point was internally inconsistent and consequently I accept that his evidence was false about observing Mr. Selo accepting cash money in windowed envelopes from Mr. Mount.

It also went some way to illustrate the bias against Selo and Axiom which Lilley QC was at pains to point out. Lilley QC went on to with his enquiry about the witness's first approach to SMMS to which he replied that; "I did not see anybody- they, they ask me. That was the late Casper Huhugo". Mr. Ngelemane then stated that Mr. Mane [of SMMS] was in touch with him.

Lilley QC specifically put to the witness whether he was asked if he had evidence of bribery; evidence of Axiom paying money to people; evidence of Axiom getting blank documents signed by people or Mr. Bava or Mr. Selo getting blank documents signed. He said no to those questions. He was then asked; " why did you tell him [Mr. Mane] a story about Mr. Selo getting cash in envelopes? " Mr. Ngelemane in answer said, "He only asked me, "What is your statement".

When it was put to him that he wanted to hurt Axiom, he agreed and said, "That is correct, I put it right that I not against Selo but I'm against Axiom".

Then began a series of questions and answers which gave me little confidence in the witness's credibility. He again reverted to his narrative style.

Lilley QC: Mr. Mane had nothing to do with suggesting to you that you should tell a story about cash payments if you could, is that what you're saying?

Mr. Ngelemane: But that was the-that was my statement.

Lilley QC: Answer my question please; Mr. Mane had nothing to do with telling you to tell a story about cash payments if you could, is that what you're saying?

Mr. Ngelemane: Yes

Lilley QC: It is all your own invention; is it?

Mr. Ngelemane: Yes.

Sullivan QC: Oh.

Lilley QC: No, there is nothing wrong with that question.

Commissioner: I'll allow the question, Mr. Sullivan.

Lilley QC: It's all your own invention, is that right?

Mr. Ngelemane: That is correct.

Lilley QC: You decided to tell this story about cash in envelopes, didn't you?

Mr. Ngelemane: No.

Lilley QC: You didn't decide to tell it?

Mr. Ngelemane: No.

Lilley QC: Did you decide, of your own free will, to tell a story about cash in envelopes?

Mr. Ngelemane: That could be right.

Lilley QC: It could be right or it is right?

Mr. Ngelemane: Could be right.

Then a confusing question and answer were recorded before Mr. Lilley asked;

Lilley QC: No. I cannot understand your answer. Something could be right. It either is right or it is not right. Mr. Ngelemane so please tell me which it is.

Mr. Ngelemane: But that is what I know.

Lilley QC: Yes, when you set out to do this statement for Sumitomo you were determined to hurt Axiom as much as possible, weren't you?

Mr. Ngelemane: No.

Lilley QC: You were in financial difficulty, weren't you?

Mr. Ngelemane: No.

The denial at the end of the series, above, about the intention to hurt Axiom, is wholly inconsistent with his concessions through-out that he disliked Axiom. His denial that he was in financial difficulty was shown to be wrong. Again this narrative style in his statement, when made the subject of cross-examination, has been shown to fall down through internal and external inconsistency.

Again Lilley QC sought to show Mr. Ngelemane was wrong when speaking in his statement of working for Axiom from the 4 January 2011, suggesting that he did not start working for the company until June 2011. That was denied. Mr. Lilley then pointed to the fact that the documents annexed to his statements were dated after about the 20 May. Mr. Ngelemane did not agree. Lilley QC then took him through the various documents to show that none were dated before 20 May.

In relation to a receipt of the 8 June 2011 [p. 26] from the 7th defendants addressed to Axiom for lease moneys paid for the Kolosori land lease Lilley QC suggested that the receipt was stolen by the witness. He denied the accusation.

I find it difficult to accept the witness' evidence on his possession of the document since in the statement he says he was asked to prepare the document yet the document belongs to Axiom. Later the witness said it was given him. Again the internal contradictions coupled with the obvious fact that the document is not his to possess, leads me to conclude he is not truthful about this point.

The last document annexed was dated 5 December 2011 and Lilley QC suggested the dates showed that Mr. Ngelemane did not work for Axiom before June 2011. The suggestion was denied.

The witness did agree with the suggestion that anything he did before about June relating to Isabel or mining was done at the 7th defendants' request.

Lilley QC then sought to take the witness through various documents which had Axiom's postal address as PO Box 608 Honiara. An application for mineral right, exhibit 42A was shown the witness and the address for Axiom was 4 RSIPF Compound, Rifle Range, Honiara with an address for services of notices at PO Box 608, Honiara; not Post Office House. The application is dated the 29 March 2011.

The lease document dated 23 February 2011 is the lease from the 7th defendants to Axiom KB of Parcel no. 130-004-1 for Kolosori land, is stamped and has the postal address, of the Lessee, Axiom KB Limited at PO Box 608.

The witness was shown an Axiom purchase order dated 23 August 2011 with "ship to" on it which was read by the witness as; Axiom KB Limited, Solomon Post Office, PO Box 845, Honiara.

A tenancy agreement between Axiom KB Limited and Solomon Islands Postal Corporation dated 14 August 2011 for a term commencing 14 June 2011 and terminating 13 June 2012 with respect to premises at Post Office House was shown the witness although he did not accept the proposition that he could not have worked at Post Office House earlier than the 14 June 2011.

There is clear external inconsistency about this witness' evidence and that of others in relation to when the company Axiom first occupied Post Office House. In the light of the documentary evidence I do not believe Mr. Ngelemane on this point. It rather undermines his credibility when taken in context with his admission that prior to June he had done work for the 7th defendants.

The credibility goes beyond the truthfulness issue where I am satisfied that his malice towards Axiom and Mr. Mount has wholly undermined the value of his evidence in relation to the matters that I have touched on above. His denial about speaking to Mr. Andrew Mason was very telling against his truthfulness.

It also includes the objective reliability of the witness to recall events of which he has given evidence. The internal and external inconsistencies shown by his statement and the cross-examination leave me in no doubt that his evidence cannot be relied upon where he purports to recall such events and conversations. His evidence was directed to show that Axiom had been responsible for conduct which may amount to bribery or dishonest conduct. I am satisfied no such inference has been made out, rather calling the witness has left me with the distinct impression the claimants case was deficient. The claimant had relied upon this witness to show dishonest conduct in Axiom.

Comments on the proceedings

The court has been obliged to make a ruling by a particular date. The court has nevertheless addressed the principal arguments. A judge

should not be put in this position where after a trial of this length without proper support it is forced to finalise its reasons in this way.

The hearing was in the courts view unduly prolonged by the manner of its prosecution by counsel for the claimants. As I have said, counsels' choice in acting for the non-SMMS claimants in the face of material, which on any ordinary view would suggest separate representation, is a matter for comment. That material arose from the continual fresh disclosure and translations of documents previously categorised as irrelevant but which were shown to be quite illuminative about Ochi's intentions towards the local landowners. He misled them as to the effect of these proceedings as it affected them consequent upon SMMS success. A lot of that material was not before the earlier court when it granted the injunction.

The Cortez group [the 7th defendants] may be called "Young Turks" for they sought to bring their communities into the 21st century by seeking to facilitate the mining of the resource which underlies part of their land. The profit sharing would reflect the expectation impliedly shown in the law for resources belong jointly to the landowners and the State. Having heard this case it is apparent the company SMMS had not offered any profit sharing with the resource owners. It had not facilitated any negotiation with respect to access payments, rather relied on the moneys which it proffered by its SAAs. One could infer that, if after grant of a prospecting licence, mining was contemplated, negotiation with the landowners would follow the same course without any real appreciation in those landowners of their right to negotiate fair terms. I have dealt with this aspect in the Reg. 9 reasons.

Since 1992, it had been envisaged by the representatives of the tribes and clans that a fair-minded miner would consider a profit sharing which would recognise the landowners' ownership of the resource.

This was made plain in the earlier proceedings involving SMMS in 2007/8 when on the evidence the BLA stood effectively as

representatives for the landowners of all three parcels of land including San Jorge Jejevo and Takata.

The risk to SMMS was faced in 2007/8 and recognised, I am sure by Mr. Abe, the Director. By conceding that litigation would not further SMMS's interests then, he was impliedly recognising the reluctance of the landowners to treat with SMMS while it maintained its stance about profit sharing.

The prospect of a tender would largely obviate the risk of choice between miners who may seek licence to prospect on the land. For if successful in the tender process, SMMS could expect to be given a letter of intent in the Ministers discretion to grant SMMS a prospecting licence and while the LOI was in force, no other miner could apply for a prospecting licence. That LOI in this case was for 12 months. It previously was for 3 months in the earlier proceedings and not extended.

The landowners' choice during the period of the LOI was to accept or refuse the terms offered by SMMS since the company would have the right to approach them to seek access to their land. No other miner could apply for a prospecting licence while the letter of intent was current. But a miner in these circumstances could still treat with landowners. A miner was only unable to apply for a prospecting licence.

The Young Turks had education and position, not just in their tribe but in the wider community through their work experience background. They held a meeting at the Iron Bottom Sound Hotel in 2008 and determined to seek another miner willing to share profits. After time they reached agreement with Axiom. They sought and obtained registration as statutory representatives of the customary landowning groups whose proxy they held and acknowledged. They formed an association through which they hoped to distribute "profits" in time to the tribes and clans in which they stood as trustees.

They granted a lease to Axiom to further their purpose.

The earlier history sets out to some extent the steps these parties took to achieve the same ends. Both seek if prospecting proves up the resource, to mine. Both expect to benefit the landowners and occupiers

of the land affected. But the extent of the benefits will vary from each according to the agreements reached prior to commencement of mining.

The Young Turks have sought to reach that agreement now, while SMMS has neither engaged with landowners in that process nor need it do so, at this time. But the Young Turks have been painted by SMMS as having stolen land. This case has gone to show that had been contrived for SMMS's purpose in these proceedings.

In fact the Young Turks have been unable to advance their agreement with Axiom for the eventual benefit of their tribes and clans which no doubt are thoroughly confused by this litigation.

SMMS has relied on the fact of the Award of the International tender as the basis for its various claims for relief. The facts leading to the Tender and those afterwards, these defendants say disentitle the claimants to such relief. These reasons attempt to explain when speaking of "country risk" in a business sense that the risk also reflects on the manner in which a company treats with the landowners in this case and can be mitigated by a proper appreciation of customary *mores* and respect for those peoples. Such mitigation may be dependent on the subservience of egos to the greater good.

Mr. Abe when he left the court after giving evidence, I am sure appreciated the risk the company ran in these proceedings. The company had earlier failed in attempts to extend letters of intent affecting Kolosori land. This time would prove crucial to its chance to mine and depended on its relationship with the landowners. I am hopeful the commercial imperatives, both as they affect the company and the State, will enoble SMMS to advance its interests when it has a full appreciation of what has gone before by a reading of my reasons.

It was suggested by Axiom that SMMS had taken a liberty by invoking the assistance of the Japanese Government through its foreign representatives' involvement with the government of the Solomon Islands and particular officers including the Prime Minister. Where that has taken place I am sure the Japanese consular representatives have acted in full knowledge and awareness of the commercial nature of SMMS business and the sovereign powers of the SI government. There is no doubt those representatives will continue to honourably represent their countries interest in the Solomon Islands although it should be pointed out that the Japanese government has an indirect interest in SMMS through JOCMEC. It consequently behoves the company, SMMS to reconsider its relationship with the government of the Solomon Islands and its people for by my findings it is apparent the company has acted with obliquity.

The capacity building which the Regional Assistance Mission to the Solomon Islands and other aid agencies bring, reflects the accepted need by the government of the Solomon Islands for such assistance. The criticism of Justice Chetwynd in these proceedings earlier, giving rise to the injunction in force, impliedly recognises that need although his express criticism related to the apparent sudden action by the Lands Department which was so out of character in his opinion as to raise the spectre of bribery. None is now alleged in the claimants' case and none has been shown. The acts of the Young Turks in forcing the Lands Office to deal with the matter may be attributed to their frustration by such apparent lethargy by the department officers [for the proceedings were seen by the acting Commissioner Ms. Maelanga as in need of finalization] and the Young Turks to further their and their tribes wish to mine, a wish shared by the non-SMMS claimants if their SAA's are anything to go by. As I have said in these reasons a court should be chary to attribute blameworthy conduct when it has not had the benefit of all the evidence and argument. I should say the judicial organisation stands in continued need of such assistance too.

The parties had agreed at the directions hearing that the trial would take eight weeks. The conduct of the claimant's case has taken the trial into almost twelve months. I have been overly forgiving towards the claimant's senior counsel to avoid if possible, any cause for complaint on the basis of impatience and consequent bias against his clients. Counsel for these two defendants has been just as critical of my condescension. There is no doubt that the conduct of their proceedings has rested with the claimants although I have sought expedition.

The trial has been brought as one seeking judicial review of executive and administrative acts of the particular defendants while these two defendants, Axiom and the 7th defendants have been brought to court as well. The judicial review sought related principally to the acts of the Minister of Mines cancellation of the Award of a Tender and letter of intent to issue a prospecting licence following the notification by the Minister of success and the Commissioner of Lands and Registrar's acts in vesting and registering the perpetual estate in the names of the 7th defendants. The registration of a lease to Axiom and a prospecting licence in Axioms favour in apparent conflict to one earlier given SMMS were also issues. The evidence has been voluminous and the arguments have followed every labyrinth.

I have sought to address the principle arguments as my reasons show. Where argument has not been addressed it follows that I consider it need not have been addressed since other reasons show it to be unnecessary. I have not touched on matters affecting the boundary descriptions of the parcels making up the registered land parcel. No expert evidence was brought since it was not a principle fact in issue for the claimants say the land should be seen as customary land. I have found otherwise but should say the land has not been stolen as the 1st claimants would have it. The registered parcel may need to be looked at to ensure it has been properly described. That may be left to the Registrar of Titles.

Findings.

Jurisdiction to order judicial review is discretionary.

The non-SMMS claimant's claim to judicial review is refused. They have not satisfied me that they have standing in terms of R 3.42 to join in these proceedings and no standing in terms of 15.3.18[d] of the Rules.

SMMS Claim to judicial review is refused, for the proceedings have been shown to be an abuse of the court's process and in any event, SMMS has not exhibited *umberrima fides* so as to justify exercise of the courts discretion in its favour.

It follow that Claims 1-21 are refused. Insofar as Claim 11A purports to rely on an agreement pleaded in para. 97A of the Statement of Case, I find no agreement has arisen on the facts.

Orders sought in the cross-claimants further amended cross-claim [248] are refused.

The injunctive orders of the 16 September 2011 are discharged since they have no basis in law.

As a consequence the undertaking as to damages by the 1st claimant is extant.

I make the following orders in relation to the 6th defendant's cross-claim[249] ;

paragraph 13, a continuing permanent injunction restraining the 1st claimant in terms set out in that paragraph pursuant to the courts' inherent powers;

paragraph 15, a continuing permanent injunction restraining the 1st claimant in terms set out in that paragraph;

paragraph 18, a declaration that the purported award of the International Tender in accordance with ss.20,21 of the MM Act and the Mimes and Minerals {Amendment] Regulations 2010 to the 1st claimants is invalid;

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[248] 22 in the consolidated pleadings.
[249] 24 in the consolidated pleadings

paragraphs 17, 22, the declarations claimed are refused;

paragraph 24[a], a declaration that regs. 5 and 9 of the Regulations made under the MM Act are invalid and unlawful;

paragraph 23, a declaration in terms of the paragraph that the 1st claimant failed to comply with the terms of the tender document and the terms of the award and the tender bid for the reasons given, and was invalidated for that it never complied with s.s. 20,21 of the MM Act and the [Amendment] Regulations, 2010.

and [b] a declaration that the issuance of the Axiom LOI and the Axiom PL are valid and lawful in terms of the MM Act.

The claim by the 6th claimant is struck with costs to the 6th and 7th defendants.

I hand down my reasons.

I will stand the matter over to have minutes of orders prepared and will hear parties on costs.

The exhibits shall be returned if not already.

By the Commissioner.