

BETWEEN: RICHARD ANTHONY STEPHEN KONTOS
and GLORIA KOFFAL
Appellant

AND: GILBERT DINH
Respondents

AND BETWEEN: GILBERT DINH
Cross-Appellant

AND: RICHARD ANTHONY STEPHEN KONTOS
AND GLORIA KOFFAL
Cross-Respondents

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Nevin R. Dawson
Hon. Justice Edwin Goldsbrough*

Counsel: *Mr George Boar for the Appellant
Mr John Malcolm for the Respondent*

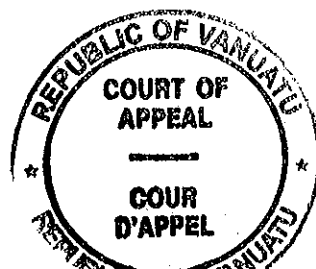
Date of hearing: 24th November 2010

Date of Judgment: 3rd December 2010

JUDGMENT

BACKGROUND

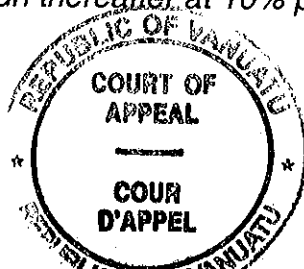
1. This appeal raises a short but significant issue.
2. By contract of 17 July 2004, the appellants agreed to buy the Blue Water Island Resort on 2 leasehold titles Nos.12/1033/007 and 12/1033/008 (the Resort) and its business from the respondent for AUD\$2,000,000. Payment was by a deposit of AUD\$250,000 and monthly instalments thereafter of \$36,000. The appellants paid the deposit and were given possession of the Resort.



3. After only 3 months, a dispute arose between the parties. The appellants stopped paying the monthly instalments. They remained in possession of the Resort. So the respondent sued them in the Supreme Court for possession of the Resort and for damages for breach of contract. It is not necessary to refer to the details of that action. It was settled on 18 September 2009 by orders made by consent by the Supreme Court.
4. The Supreme Court's Consent Orders of 18 September 2009
 - (1) required the appellants to pay AUD\$1,642,000 as the balance of the purchase price, and
 - (2) required the respondent, upon payment of that sum, to transfer the Resort unencumbered to them "or such other entity as they may choose in accordance with the detailed terms" of a Deed of settlement annexed to the orders of the Court (the Deed).
5. The Deed, which also was dated 18 September 2009, provided for payment of the agreed sum by 4.00pm on 20 November 2009, and for the respondent to provide at settlement duly executed transfers of the leases and duly executed discharges of all mortgages over the Resort. They each released the other from their respective claims and liabilities under the original sale and purchase agreement.
6. The Deed addressed what would happen if the agreed sum was not paid by the due date. Clause 5 provided:

"5. Settlement Date

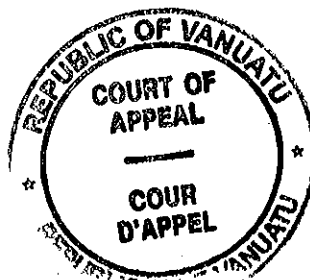
- (a) Settlement date be the 20th November 2009 on or before 4.00pm.*
- (b) In the event Kontos fails to settle on or before such date interest will run thereafter at 10% p.a. on the judgment sum.*



- (c) *Either party may give notice to settle within fifteen days thereafter.*
- (d) *In the event such settlement does not take place Than may elect to cancel this Deed in which case Kontos shall forthwith vacate the property removing only his personal possessions and the payments made totalling AUD\$358,000 will be treated as forfeit.*
- (e) *In such event (paragraph 5(d) Than may proceed against Kontos in damages at 10% interest per annum on accrual basis on the judgment sum of AUD\$1,642,000-00 from possession date namely 19 July 2004 and this agreement may be pleaded as an estoppel.*
- (f) *In the event Than fails to provide transfers, consents to transfer and releases from any mortgage or charge over the said titles Kontos may remain in possession of the property pending determination and issue proceedings for specific performance or specific performance damages and this agreement may be pleaded as an estoppel."*

7. In fact the appellants did not make payment of the agreed sum on 20 November 2009. Pursuant to Clause 5(c) of the Deed, the respondent gave to the appellants a Notice to Settle on 23 November 2010, making time of the essence for performance of the obligation to complete settlement as per the Deed, and specifying 8.00am on 10 December 2009 as the date by which the agreed sum was to be paid. It is now accepted by the appellants that the Notice to Settle of 23 November 2010 was valid and effectual. In fact it allowed 16 days to settle, excluding both 23 November 2010 and 10 December 2010.

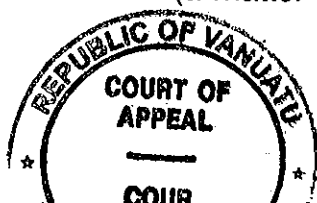
8. It will be necessary to return to the events which then followed in some detail.



9. The appellants did not propose a settlement date before 10 December 2010. On 9 December 2009 by facsimile they proposed settlement on 10 December 2009, and said they required the Resort to be transferred to a company Popcorn Ltd. Before any settlement took place, and before the appellants in fact presented payment of the agreed sum, the respondent by Notice of Cancellation of 10 December 2009 and served at about 8.15am cancelled the Deed, purporting to act under Clause 5(d) of the Deed. The respondent then promptly took steps to resume possession of the Resort.
10. That led to further proceedings in the Supreme Court. The appellants claimed orders setting aside both the Notice to Settle given on 23 November 2009 and the Notice of Cancellation given on 10 December 2009, and for specific performance of the Deed. They said they were in a position to pay the agreed sum on 10 December 2009, but could not physically attend the office of the solicitor for the respondent before they received the Notice of Cancellation because the office of that solicitor was locked and from about 7.30am they were unable to contact any representative of the respondent to attend a settlement before the Notice of Cancellation was served on them. They also asserted that, in any event, the respondent was not on that date in a position to transfer to them unencumbered titles of the Resort. The respondent's defence was simply that at all material times he was in a position to transfer unencumbered titles of the Resort, and that the appellants had not been able to pay the agreed sum by 8.00am on 10 December 2009. He also made a cross-claim for damages for breach of the Deed, calculated pursuant to clause 5(e).

THE JUDGMENT AT FIRST INSTANCE

11. That matter proceeded to trial. Judgment was delivered on 15 October 2010. The primary judge concluded that the defendant was, up to 10 December 2009, ready willing and able to settle by providing the appellants with clear and unencumbered titles to the Resort, and also was in a position to settle at and from 20 November 2009. However, the primary judge concluded that the appellants were not in a position to pay the agreed sum on 20 November 2009 (a matter they accepted) or by 8.00am



on 10 December 2009. The finding of the primary judge was that the necessary funds were not available until 11 December 2009.

12. Consequently, the primary judge dismissed the appellants' claim and gave judgment for the respondent on his cross-claim. The orders on the cross claim included-
- (a) a declaration that the respondent had validly cancelled the Deed and is not bound to sell the Resort to the appellants;
 - (b) as contemplated by Clause 5(d) of the Deed, an order that the AUD\$358,000 there referred to had been forfeited to the respondent (that sum represents the deposit of AUD\$250,000 and the three monthly instalments paid, each of AUD\$36,000);
 - (c) orders that the appellants pay the respondent:
 - (i) AUD\$12,119 for interest between 20 November 2009 and 17 December 2009 under Clause 5(b);
 - (ii) VT1,139,064 for land rentals paid by the respondent but which were payable by the appellants under Clause 8 of the Deed;
 - (iii) interests on those sums;
 - (d) an order directing the appellants to vacate the Resort within 14 days; and
 - (e) costs which were summarily assessed at VT100,000.

The primary judge specifically noted that he made no orders in respect of any entitlement to damages under Clause 5(e) of the Deed.

13. The reason for the date 17 December 2009 referred to in those orders is once the Supreme Court proceeding was instituted, first the Court made an ex parte order on 10 December 2009 staying the claimed operation of Clause 5(d) of the Deed upon the appellants paying into Court the agreed sum of AUD\$1,642,000 and interest from 21 November 2009, and



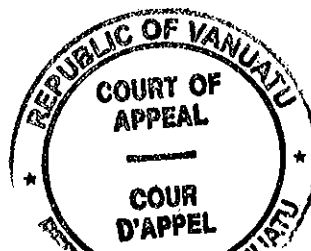
secondly after an inter partes order extended that stay on 17 December 2009. By 17 December 2009, the appellants had paid that sum into Court. Although subsequently, that sum was paid out of Court on the application of a third party, the stay order remained in place. To date, therefore, the appellants remain in possession of the Resort.

THE APPEAL AND CROSS-APPEAL

14. This is an appeal from the final orders made on 15 October 2010. The appellants want those orders to be set aside, and the matter remitted to the Supreme Court for rehearing.
15. The respondent has cross appealed from two of the final orders. First, he says he should have been awarded damages of AUD\$912,147, being interest at 10% per annum on the agreed sum from 19 July 2004 to 10 December 2009, pursuant to Clause 5(e) of the Deed. Secondly, he complains that the costs awarded are unreasonably low.

CONSIDERATION OF THE APPEAL

16. There were 6 grounds of appeal. Counsel for the appellants treated grounds 2 and 3, together and grounds 4 and 5 together, so in fact 4 matters were pursued on behalf of the appellants. We shall consider them separately.
17. The first ground of appeal complained that the primary judge, in the light of his findings, had erred in directing the appellants to vacate the Resort within 14 days of the judgment. The submission was that, in the circumstances, such a short time was "unreasonable and practically impossible" as the appellants had paid the deposit and three instalments, had operated the Resort for some 7 years, had engaged employees for the Resort, had made (unspecified) improvements to the Resort, and had forward bookings for the Resort for some months. It was, however, accepted on the hearing of the appeal, that the primary judge had not been

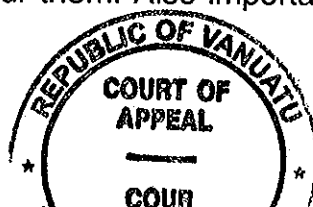


given evidence of the forward bookings or of the improvements, and had not been asked to make findings on those matters.

18. Counsel for the appellants could not point to any authority to support the contention. That is not surprising. The primary judge was asked to decide two issues (after certain issues were no longer pursued):
- (1) did the appellants offer to, and were they in a position to, pay the agreed sum of AUD\$1,652,000 to the respondent by 8.00am on 10 December 2009; and
 - (2) was the respondent up to, and including, that time in a position to provide the appellants with clear titles to the Resort upon payment of that sum.

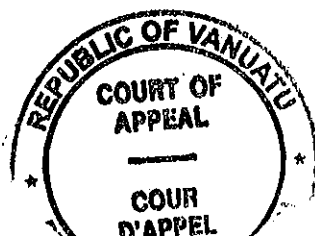
The primary judge was not asked to construe the Deed so that, if the answers to those two questions were adverse to the appellants, Clause 5(d) of the Deed where it required the appellants to “forthwith vacate” the Resort meant that the appellants should have some months to do so.

19. Consequently, even if “forthwith vacate” means “vacate within a reasonable time (of some months)”, the primary judge did not err in the way claimed because that issue was not pleaded, was not covered by evidence, and was not the subject of submissions.
20. In any event, accepting the words “forthwith vacate” do not mean instantly, but in their context mean as soon as practicable, the primary judge by allowing 14 days for the appellants to vacate the Resort is not shown to have erred in allowing that time. There was no evidence to suggest some longer time was necessary. The appellants had no right to a longer time because of the forward bookings of the Resort. They could not extend the time to a matter of months (counsel for the appellants, in submissions, suggested to March 2011) by their own acts. In addition, if the forward bookings are appropriately commercial, there is no reason why the respondent will not honour them. Also importantly, by the stay order of 17



December 2009, the appellants have remained in possession of the Resort and have continued to operate it for excess of 11 months after it was found that they were no longer entitled to do so, that is from 10 December 2009. The other matters raised on behalf of the appellants on this argument, concern their payment of AUD\$358,000 and their asserted improvements to the Resort. They are matters of which they and the respondent were aware and would have taken into account when they agreed to the Deed on 18 September 2009. They therefore provide no contextual reason for construing the words "forthwith vacate" in Clause 5(d) of the Deed as allowing for other than the minimum time practically required for the appellants to vacate the Resort.

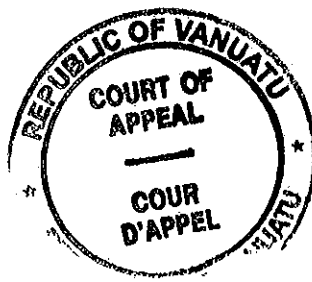
21. For those reasons, we reject the first ground of appeal. The respondent did not submit, on the other hand, that the 14 day vacation period was inappropriate. As the appellants in fact remain in possession of the Resort in the circumstances referred to above, we will vary the order of the primary judge to direct that the appellants' vacate the resort by 17 December 2010, a period of 14 days from the date of this judgment.
22. The second and third grounds of appeal attack the finding of the primary judge that the appellants were not in a position to settle under the Deed by tendering the agreed sum of AUD\$1,642,000 by 9.00am on 10 December 2009.
23. In our view, that attack must fail. It is clear from all the evidence that the appellants were not in a position to tender to the respondent that sum until some time on 11 December 2009, notwithstanding the assertion of their legal representative to the contrary.
24. Counsel for the appellants referred to, and relied on, the evidence of Nina Ferraro to support the contention. It does not do so. Ms Ferraro represented a financier which had apparently agreed to provide AUD\$1,800,000 to the appellants to settle on the Deed. On 8 December 2009 she communicated with the respondent's legal representatives both



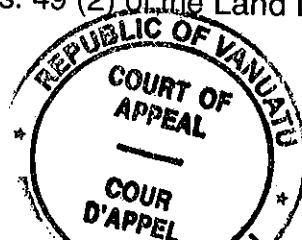
orally and by facsimile, and requested an extension of time to settle. It was not given. She arrived in Port-Vila on 9 December 2009, and gave to the legal representatives of the appellants a company cheque for the proposed advance. She endeavoured the next morning to have the cheque cleared quickly. However, she said that the cheque could not be cleared quickly so she arranged a telegraphic transfer of funds to Vanuatu. That only happened on 11 December 2009, so that it was not until then that the funds were available to the appellants. They were paid into Court as a condition of the ex parte stay order shortly after 11 December 2009.

25. The material before the Court shows that the appellants by their legal representative told the respondent on 20 November 2009 that they could not settle on that date. The respondent had indicated on 11 November 2009 that he would settle on 20 November 2009 but the appellant could not do so. Then the respondent indicated, after that date, by letters of 2, 4 and 7 December 2009 that he was in a position to settle at any time from 20 November 2009 and prior to 8.00am 10 December 2009, and requested the appellants to inform him when they were in a position to settle. He gave explicit notice he would act under the Deed to terminate their occupation of the Resort if they did not do so. There is no communication from the appellants that they were ready to, and wished to, settle prior to 8.00am on 10 December 2009. On 9 December 2009, they said that funds would be deposited into the trust account of their legal representatives on 10 December 2009 with a view to settling then (when those funds were cleared). That was too late.

26. The evidence not only supports the findings of the primary judge, but it is all one way. The appellants could not settle by 8.00am on 10 December 2009. It was not sufficient to say on 9 December 2009 that the funds would be available in their legal representatives' trust account the following day, and so they were then "ready to settle". They were not. In those circumstances, the fact that some of the legal representatives of the respondent were not available in the early morning of 10 December 2009 is not to the point.



27. The third matter argued concerned the respondent's readiness to settle on the Deed on or after 20 November 2009 and up to 10 December 2009. That is because, it was argued, the respondent could not give clear titles to the leases at any material time since because there was registered on each of the titles a Deed of Surrender of Lease so that the appellants could not be assured of getting clear titles at settlement.
28. By correspondence of 12 and 19 November 2009 the legal representatives of the appellants expressed concern that there was registered on the titles of the Resort a mortgage to Westpac Banking Corporation granted by the respondent. The respondent provided them with copies of the transfers of the leases, and an executed discharge of the mortgage over the two leases, and of the consent of the Minister of Lands as lessor to the executed transfers of the two leases. The originals were to be produced and exchanged at settlement. Clearly the respondent was in a position to provide transfers of the lease free of the mortgage at settlement. In addition, the respondent to avoid any issue, arranged for the mortgage to be discharged prior to 10 December 2009.
29. Subsequently, the appellants raised concerns about Deeds of Surrender of each of the leases over the Resort, each dated 27 May 2004 and each "registered" on 14 April 2005, between the then Minister of Lands and the respondent. They requested that those Deeds of Surrender of leases should be cancelled or revoked or withdrawn. It appears that they feared that, otherwise, the respondent would have no real interest under the leases to transfer to them.
30. The primary judge found, on the whole of the evidence including that of the Director of Lands, and his review of the lease register itself, that the two instruments about which the appellants were concerned were not in fact registered and did not encumber the leases. The primary judge also found that those two Deeds of Surrender were ineffectual, as they could not be enforced having regard to s. 49 (2) of the Land Leases Act [CAP. 163].



31. Consequently, he concluded that the respondent was in a position to give clear and unencumbered titles to the leases over the Resort, by transfer of the two leases with the consent of the lessor following the discharge of the mortgage. That conclusion was consistent with a letter to that effect given by an officer of the Department of Lands by letter of 7 December 2009, subject to discharge of the mortgages, the leases could be transferred by the respondent at settlement.
32. In his written and oral submissions for the appellants, counsel concentrated only on the existence of the mortgage. For the reasons we have given, which reflect those of the primary judge, we consider that the respondent was at all material times able to provide a clear title to the Resort by transferring the leases unencumbered at settlement. Because the grounds of appeal also refer to the Deeds of Surrender of the leases, we have also reviewed the evidence relating to them. We do not consider that the conclusions of the primary judge relating to them were wrong.
33. Accordingly, that matter raised on the appeal must also fail.
34. Finally, the appellants contended that the primary judge erred by failing to have regard to the issues and evidence filed in the earlier Supreme Court proceedings which, on 18 September 2009, were settled by the consent orders and the Deed. Those matters relate to the disputes between the appellants and the respondent which arose in about 2004.
35. To state the proposition in that way is to show that it is not correct. The primary judge was called upon to decide the issues, as defined in the pleadings and then as refined by submissions, about whether, under the Deed, the respondent had properly brought to an end the appellants' rights to occupy the Resort. The primary judge did that. He had regard to the evidence adduced by the parties on those issues. Indeed, it would have been incorrect for the judge to go beyond that evidence to decide those issues. Counsel for the appellants could not point to any way in which that

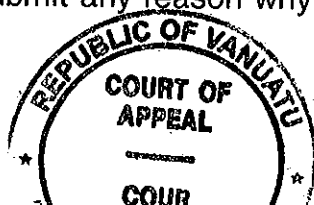


extraneous material was presented to the primary judge in the proceeding he was called upon to decide, or that counsel had asked that he consider it.

36. For those reasons, the appeal must fail. As we indicated, we shall vary the orders of the primary judge to provide for the appellants to vacate the Resort by 17 December 2010.

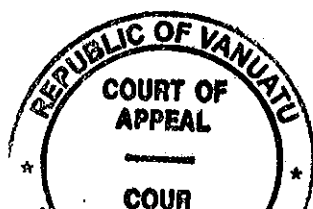
CONSIDERATION OF CROSS-APPEAL

37. The respondent cross-appealed on two grounds, as noted in [15] above.
38. Clause 5(e) of the Deed is quite explicit. It was part of the agreement between the respondent and the appellants reached on 18 September 2009 that, if the appellants did not pay the agreed sum of AUD\$1,642,000 in accordance with its terms, the appellants would pay interest on that sum (which is equivalent to the outstanding balance of the original purchase price) from 19 July 2004. It is not necessary to understand why the parties agreed to that term of the Deed. Presumably it was negotiated because the respondent since 2004 has had neither the use of the agreed purchase price nor the use of the Resort, and on the other hand the appellants have had the use of the Resort but have paid only the original deposit and 3 monthly instalments. At all events, clause 5(e) represents part of an arms length commercial arrangement reached with the benefit of legal advice at the time the earlier Supreme Court action was to come to hearing.
39. It is also clear that the issue was raised on the pleadings and identified in the agreed statement of facts and issues presented to the primary judge.
40. As noted, the primary judge indicated that he did not make an award under that clause of the Deed. It may be that he anticipated that could be done later. That is not explained. In our view, it was appropriate for that issue to be addressed by the primary judge. Counsel for the appellants did not really contend otherwise. Although he submitted that the making of an award on the counterclaim to cover that clause of the Deed was discretionary, he did not submit any reason why the Court should not give



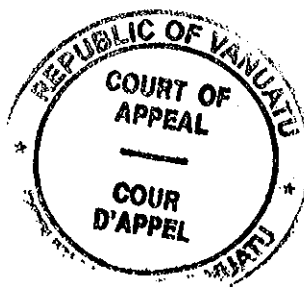
effect to the parties' commercial agreement. Counsel for the appellants also made no submission that clause 5(e) of the Deed was otherwise unenforceable. The clause is clear. It involves simply a matter of arithmetic.

41. In our view the primary judge should have made an order on the counterclaim of the respondent that the respondent have judgment against the appellants under clause 5 (e) of the Deed for AUD\$912,147. We have not taken the extra step of adjusting that interest calculation for the short period between the institution of the cross-appeal and this judgment.
42. Finally, the respondent's cross-appeal against the order for costs in his favour. He contended that the costs awarded were far too low. He accepted that the primary judge had published reasons when making his orders, and that there may have been an opportunity at that time to raise the question as to the adequacy of the costs ordered. Counsel for the appellants made no submission on this ground of the cross-claim.
43. In our view, it is appropriate to revisit the costs order. That is simply because the Court proposes to make an order that the respondent is entitled to judgment on the cross-appeal under clause 5(e) of the Deed as discussed in [38] to [41] above.
44. It was the respondent's submission that it was preferable for the costs to be reassessed, on a lump sum basis, rather than for the costs to be taxed. He submitted that the Court should take some guidance from the approach of the Court of Appeal in **Hurley v. Law Council** [2000] VUCA 10. That is of course only of limited assistance. Nevertheless there is some real benefit after a complex trial for the costs to be fixed. Counsel for the respondent also acknowledged that the costs so fixed would necessarily be quite conservative, especially as there was not presented any document giving any indication of what costs might be awarded on taxation, or of the amount of legal work involved beyond the facts that the pleadings identified the amounts in issue, that the respondent filed a defence and counterclaim, undertook pre-trial preparation including witness statements, and was



represented at a three day trial. On that very limited information, it is necessary to be quite conservative. Having regard to those matters, we are satisfied that on taxation the respondent's costs in resisting the appellants' claim and in prosecuting his counterclaim would not be less than VT500,000.

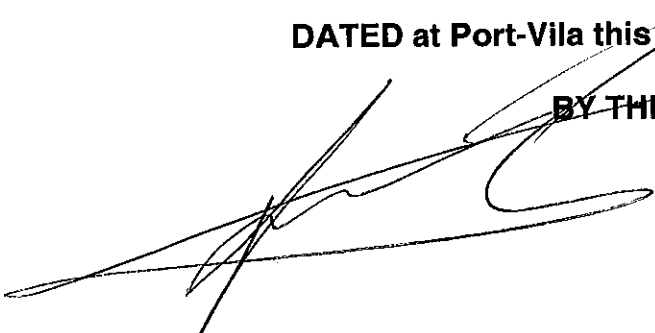
45. Accordingly, we propose to order that that sum be substituted for the sum awarded for costs by the primary judge.
46. It is desirable to make a few minor changes to the orders made by the primary judge in the light of these reasons.
47. The orders of the Court are:
 - (1) The appeal is dismissed;
 - (2) The cross-appeal is allowed;
 - (3) In place of the orders made by the primary judge on 15 October 2010 at [68] subparagraphs (a), (f) and (g) and [69] of his reasons, the following orders be made;
 - (a) A declaration that Gilbert Dinh on 10 December 2009 validly terminated the rights of Richard Anthony Kontos and Gloria Koffal under Orders 1 and 2 made on 18 September 2009 by the Supreme Court in Supreme Court Civil Case No. 238 of 2004 and under the Deed dated 18 September 2009 being Schedule A to those Orders, being the rights to purchase the leasehold properties namely Titles Number 12/1033/007 and 12/1033/008 comprising what is commonly known as Blue Water Island Resort, Efate upon the terms specified;
 - (f) An order that Anthony Kontos and Gloria Koffal vacate the said leasehold titles by 17 December 2010;



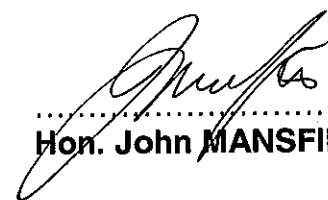
- (g) An order that Anthony Kontos and Gloria Koffal pay to Gilbert Dinh the sum of AUD\$912,147, being interest payable under and calculated in accordance with clause 5(e) of the said Deed;
 - (h) An order that Anthony Kontos and Gloria Koffal pay to Gilbert Dinh costs of the proceedings in the said Supreme Court Civil Case assessed at VT500,000, including costs of defending the claim and of prosecuting his counterclaim; and
- (4) The appellants must also pay to the respondent the costs of this appeal and cross-appeal.

DATED at Port-Vila this 3rd day of December 2010

BY THE COURT




.....
Hon. Vincent LUNABEK CJ



.....
Hon. John MANSFIELD J



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Hon. Oliver SAKSAK J



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Hon. Nevin R. DAWSON J



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Hon. Edwin GOLDSBROUGH J

