

**BETWEEN:** **Silver Holdings Limited**  
Claimant

**AND:** **Director of Lands**  
First Defendant  
**Allan and Tahe Pama**  
Second Defendants  
**Urelapa Limited**  
Third Defendant  
**Republic of Vanuatu**  
Fourth Defendant

*Date:* 27 June 2018, with submissions on 9 and 27 August 2018.

*Before:* Justice G.A. Andrée Wiltens

*Counsel:* Mr N. Morrison for the Claimant

Mr S. Kalsakau for First and Fourth Defendants

No appearance for Second and Third defendants

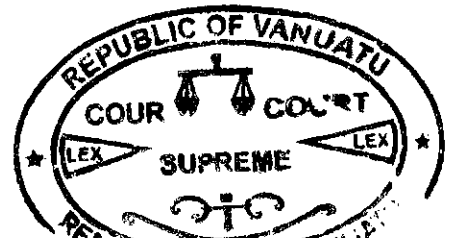
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**JUDGMENT**

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A. Introduction

1. This is a land case, involving the land known as Urelapa Island in South Santo. While there have been a number of civil cases involving this land, this particular matter involves the history and validity of two competing lease titles: one known as Lease title 04/2952/005 ("Lease 005")



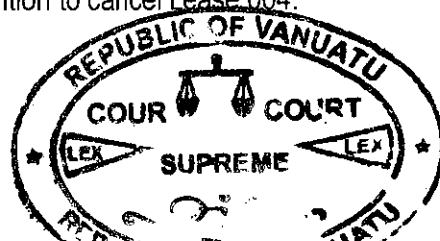
was issued to Urelapa Limited; and the other known as Lease title 04/020952/004 ("Lease 004") was issued to Silver Holdings Limited ("SHL").

2. The two particular aspects of the case which I was asked to consider were:

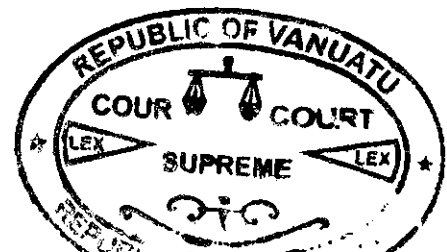
- Are the amendments to the Claim, whereby indemnity has been introduced as an additional remedy sought against the State, outside the time limitation period set out in the Limitation Act?
- Whether there were damages occasioned by the First Defendant's cancellation of Lease 004 in breach of the injunction in place preventing dealing with the title?

3. The convoluted history of the matter needs to be set out, which I attempt to now do, chronologically. I have attempted to go to source documents:

- 13 November 2006 Family Pama granted a commercial lease over the land known as Urelapa Island to SHL for consideration of VT 40 million – Lease 004. SHL became the registered lessee.
- 14 February 2010 Justice Fatiaki issued ex parte orders for restraint whereby Mr Terry Hannam, Beachclub Limited, SHL, Seascape Four Limited and the Director of Lands were jointly and severally "restrained from dealing in any manner whatsoever" in relation to a number of lease titles, including relevantly Lease 004. This followed an application by Mr Robert Herd, one of the two SHL directors, who was in dispute with his fellow director Mr Terry Hannam, and who was seeking to protect his interests.
- 2 July 2010 SHL was given notice under section 355 of the Companies Act [Cap 191] that unless cause was shown to the contrary within 3 months, SHL would be struck off the Register, as from 2 July 2010. This was due to a number of compliance issues.
- 20 July 2010 Family Pama issued a "Notice Before Forfeiture" on SHL under section 45 of the Land Leases Act, alleging a total of 7 breaches of Lease title 004, and requiring rectification within 3 months. This was faxed to Mr Herd on 30 August 2010, it was sent by post to SHL's registered office on 30 August 2010, and also served personally on Mr Hannam on 30 August 2010. It was further served on Mr Herd by registered post on 31 August 2010.
- 2 October 2010 SHL was struck off the Companies Register as no cause to the contrary had been presented, pursuant to section 335 of the Companies Act.
- 20 October 2010 Due to no rectification of the lease breaches alleged, Family Pama issued a "Determination of Lease" under section 50 of the Land Leases Act; and simultaneously sought cancellation of Lease 004. Family Pama also entered onto and took back possession of the land.
- 25 October 2010 Letter from Mr L. Tarosa (agent for the Pama Family) to Mr Herd and Mr Hannam pronouncing his intention to cancel Lease 004.



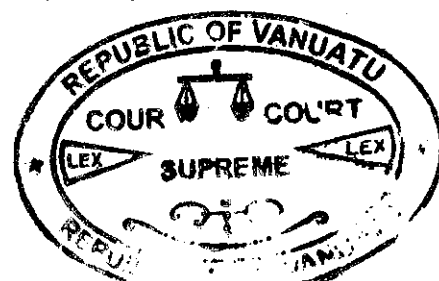
- 14 March 2011 Mr Tarosa wrote to the Director of Lands seeking to have Lease 004 cancelled due to the fact of the lease having been determined and secondly as SHL was struck off the Companies Register.
- 18 March 2011 Lease 004 was cancelled by the Director of Lands at the request of Family Pama.
- 18 March 2011 Lease 005 was issued, in respect of the very same land, by the Director of Lands.
- 19 April 2011 Pama Family executed a commercial lease in favour of Urelapa Limited, transferring Lease 005 to the company, for consideration of VT 60 million.
- 25 April 2011 Stamp Duty for Lease 005 was paid.
- 6 May 2011 Registration Duty for Lease 005 was paid.
- 20 July 2011 Lease 005 was lodged for registration. The Director of Lands withheld registration. That caused Pama Family and Urelapa Limited to issue proceedings (Civil Case No. 34 of 2011) against the Director of Lands to compel him to register.
- 18 October 2011 Mr Herd sent an email to Mr Tarosa, which included: "If the lease has been forfeited...."
- 25 October 2011 Mr Tarosa sent a letter advising SHL, it's Directors and others that Lease 004 had been determined – and he enclosed a copy of the Forfeiture determination.
- 1 November 2011 E-mail from Mr Herd to Mr Boar, in which Mr Herd records that his understanding that Lease 004 has been forfeited.
- 3 November 2011 Lease 005 was registered in the name of Urelapa Limited.
- 5 November 2011 Communication from Mr Morrison (counsel for Mr Herd) to Mr Boar (counsel for Pama Family and Urelapa Limited) and the Director of Lands dealing with the forfeiture of Lease 004.
- 11 November 2011 Justice Saksak, unaware of Justice Fatiaki's restraining order, directed the Registrar of Lands to proceed to register Lease title 005. That decision was subsequently stayed by the Court of Appeal on 18 April 2013.
- 15 November 2011 Communication from Mr Morrison to Mr Boar appending copy of caution lodged against lease 005 dated 10 November 2011.
- 15 December 2011 Date Mr Herd says he discovered Lease 004 was cancelled, as he was so told by the Minister of Finance.



- January 2012 Mr Hannam sought a "Certificate of Good Standing" from the Companies Office in respect of SHL. On 17 January 2012, all outstanding fees (approximately VT 80,000) were settled; and, due to the fact that the striking off had not been Gazetted, SHL was then restored to good standing with the Companies Office, and the requested Certificate was duly issued.
- 6 March 2012 First Statement of Claim filed – based on fraud/trick by Family Pama, and on contempt by the Minister of Lands for cancelling Lease 004 in the face of Fatiaki J's restraining order, and seeking cancellation of Lease 005 together with re-instatement of Lease 004.
- 19 October 2016 Justice Geoghegan granted summary judgment in favour of SHL, as he considered there was no possible defence to its claims, cancelling Lease 005 and re-instating Lease 004. The assessment and determination of damages was deferred – that is what the matter before me concerned, in part.
- 13 October 2017 Fatiaki J's restraining order is discharged by Geoghegan J.
- 26 October 2017 Scheduled hearing, as to assessment and determination of damages, before Geoghegan J. Instead Claimant reveals, for first time, intention to add a claim for relief under sections 101 - 103 of the Land Leases Act based on indemnity for wrongful cancellation of Lease 004. Time-tabling orders accordingly made.
- 27 October 2017 Amended Claim filed, pursuant to directions made by Geoghegan J the day before.
- 15 November 2017 Notice of Opposition filed by the State, as directed by Geoghegan J.
- 11 December 2017 Application to file further Amended Statement of Claim filed, seeking to adding the Government as the Fourth Defendant.
- 12 December 2017 Leave granted to add Fourth Defendant and file Second Amended Claim granted. Geoghegan J. made it plain he did not consider whether or not the claim against the Government was time-barred, due to the urgency of the application.

#### B. The Limitation Act

4. In his summary judgment decision Geoghegan J. recorded that SHL's claim was that fraud/trick was involved in relation to the registration of Lease 005. He considered the following aspects as impacting on that allegation:
  - The Pama Family sought forfeiture of Lease 004 under the provisions of the Land leases Act, rather than deal with their issues as specified in the lease by referring disputes/difference to the Valuer-General, as required by clause 7.1;



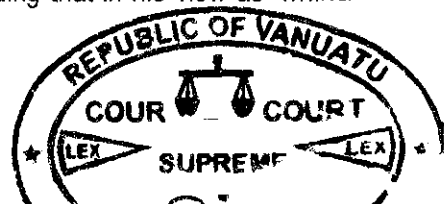
- Family Pama then followed on to seek cancellation of Lease 004 by the Minister of Lands, on the basis that SHL had been struck off the Companies Register. Geoghegan J. was clearly of the view that SGL was at all times of good standing, so far as the Companies Office was concerned.
5. The mistake/fraud identified by Geoghegan J., coupled with the continuing effect of Fatiaki J's restraining order, meant that Justice Geoghegan was satisfied that Lease 004 should not have been cancelled; and further that Lease 005 should not have been issued or later registered.
  6. However, I am unsure that strict logic and correct statutory interpretation supports that reasoning. There is clear evidence that SHL was given a notice on 2 July 2010 by the Companies Office to show cause, within 3 months, why it should not be struck off the Register. SHL did not act on that notice, and therefore on 2 October 2010 the Companies Office struck SHL off the Register by Notice in writing and under seal. To say that SHL was at all times held in good standing by the Companies Office flies in the face of those incontrovertible, and indeed unchallenged, facts.
  7. There is further evidence to show that only in early 2012 were SHL's compliance issues resolved by the payment of some VT 80,000, which then enabled the Companies Office to issue a Certificate of Good Standing dated 17 January 2012. On my analysis, SHL was not held in good standing between 2 October 2010 and 17 January 2012.
  8. It is also plain that the Striking off of SHL was never Gazetted – it should have been. There was no good reason why that did not occur. Had that next step been taken, SHL would have been dissolved, and would not have been able to regain its legal status as a registered company.
  9. The relevant section in the Companies Act [Cap 161] bears citing:

**"335. Registrar may strike defunct company off register**

- (1) Where the registrar of companies of his own knowledge, or upon information supplied by an officer or member of a company or any other person, has reasonable cause to believe that a company is not carrying on business or in operation, he may publish in the Gazette and send to the company by post, a notice that at the expiration of 3 months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.
- (2) ....
- (3) (3) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of this notice the company shall be dissolved:

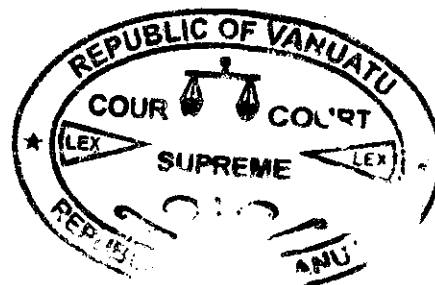
Provided that -..."

10. Neither subsection (2), nor either of the exceptions to subsection 3, have any application to the current fact situation.
11. There is some correspondence dealing with this. Mr George Andrews, the Companies Office Registrar, has written on 28 May 2015 to Mr Herd recording that in his view as "...final notice



was never published in the Official Gazette, the company remains active on the Companies Register". He also said that in his view the Company had not been dissolved. Geoghegan J. relied on this correspondence for his finding that SHL was at all times "a duly registered entity". On a strict reading of section 335 that must be correct.

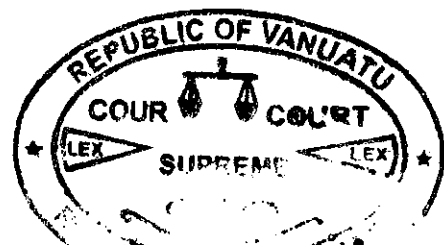
12. However, earlier, on 13 January 2012, Mr Andrews e-mailed Mr Hannam saying: "Officially, Silver Holdings Limited has not been struck off because our notice has not been gazetted...". He repeated that sentiment in an e-mail to Mr Morrison on 17 January 2012, saying: "The company was struck off the register on the 2<sup>nd</sup> October 2010. This is to inform you that the striking off of the above company was not gazetted and hence the strike off was not effective."
13. I note that Justice Harrop, at a much earlier time in the life of this case, saw the position in a similar light. I refer to a Minute of his dated 3 July 2015 wherein he refers, without demur, to Mr Andrew's sworn statements of 2 and 24 June 2015 to that effect.
14. Section 335 (3), to me reads as involving two separate and quite distinct procedures. Firstly, if the allegation of good cause to strike off is not defeated, then the Registrar may strike the company off the Register for insufficiency of evidence that the company is carrying on business or remains in operation. Secondly, once the striking off has been Gazetted, that is the end of the company – it is by law dissolved, and incapable of resurrection.
15. It seems to me that whether or not the striking off was Gazetted had only one consequence, namely that the Company's legal existence has not been dissolved. The lack of Gazetting enabled the Company to regain good standing and to resume operation in law. The lack of Gazetting did not impact on the Company's standing with the Companies Office – it was not in good standing, it had been struck off the Register and needed to take certain steps to rectify that.
16. In this case SHL was struck off between 2 October 2010 and 17 January 2012 – exactly the time that Family Pama were asking the Minister of Lands to cancel Lease 004 due to two things, namely that SHL had been struck off and also because they had forfeited the lease under the Land Leases Act provisions.
17. I question, whether seen in that light, the determination that the lease was cancelled through fraud or mistake can be maintained? I do, of course, accept, as does the First Defendant, that cancellation was in breach of the injunction.
18. However, my current task is to examine whether or not SHL's current claim as against the Fourth Defendant is time-barred.
19. On one view, the Limitation Act time commences to run pursuant to section 3 from 18 March 2017 – that being the date Lease 004 was cancelled. However, pursuant to section 14, if the claim is based on fraud or mistake, then the time commences to run from the time of actual knowledge or from the date the claimant could, with reasonable diligence, have known that the fraud or mistake occurred.



20. Mr Herd's evidence is that he only came to know on 15 December 2011; and therefore the amendments to the Claim are just within time. He was cross-examined as to that. He maintained that the caution instructed to be filed against Lease 005 as "we were being prudent", "just in case" – because he did not definitively know what the position was with Lease 004 as the file was missing at the Department of Lands, and all his enquiries proved to not be helpful in ascertaining the position. I considered it as undermining of Mr Herd's credibility and reliability that his instructions and cautionary remonstrations in his correspondence did not mention such sentiments – I can glean no doubts or uncertainty in his wording of that correspondence. The extent of his inquiries did not impress me as being "reasonably diligent" or urgent – there is but limited communication with the lessors, their solicitor, and their agent. Vanuatu is a small community – news travels far and wide very quickly, as evidenced by the fact that the Minister of Finance was able to ascertain the position and advise Me Herd accordingly.
21. The only way by which a caution could be lodged, is if Mr Herd (acting as Director of SHL) could demonstrate actual interest in the land – after all not just anyone can register a caution. That factor makes it rather plain that Mr Herd knew that Lease 005 related to the same land, or at least part of the same land as Lease 004 – despite his protestations to the contrary.
22. Mr Herd was first on notice that there might be something amiss by, at the very latest, 18 October 2011 – when he wrote to Mr Taroza about "if the lease has been forfeited...". That is assuming that the 20 July 2010 Notice Before Forfeiture did not find its way to SHL; the 20 October 2010 Determination of Lease did not find its way to SHL or either Director; and thirdly that Mr Taroza's letter of 25 October 2010 did not find its way to either of SHL's Directors. It is difficult to believe that three such significant pieces of correspondence all failed to find their addressee.
23. I am satisfied that Mr Herd was certainly on notice by 10 November 2011, by when he had instructed Mr Morrison to prepare and lodge the caution against Lease 005.
24. When should Mr Herd have known that Lease 004 was cancelled? Lease 005 was issued on 18 March 2011; it was stamped on 25 April 2011, registration duty paid on 6 May 2011, and lodged for registration on 20 July 2011. Registration was withheld, which led to a Supreme Court claim, as a result of which Justice Saksak instructed registration to occur on 11 November 2011. All this information was available in late October/early November 2011, by when Mr Herd was well and truly on notice that there might be issues regarding SHL's lease. By 15 November 2011, Mr Herd had instructed Mr Morrison for lodge the caution against lease 005. By then he should have known, even if, inconceivably he did not actually know.
25. On either analysis, SHL is not able to claim indemnity from the state – that claim is filed outside the limitation period. The claim against the Fourth Defendant is therefore dismissed, with costs. If costs cannot be agreed, they will have to be taxed.

C. Damages

26. Mr Herd was cross-examined regarding this aspect of the matter as well. The position put to him was that the injunction was as effective as against him and as any other. Mr Herd did not accept that – he claimed proprietary ownership of the order, as he had applied for it, and he could remove it as and when he liked.



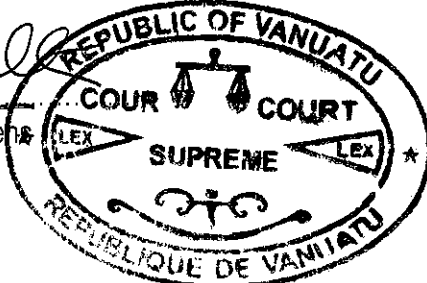
27. While Mr Herd's attitude left something to be desired, there was truth in some of what he had to say – he did have the ability to apply to set aside Justice Fatiaki's orders, and it would be hard to imagine that there would or could be any resistance except by of from Mr Hannam. More than, the orders were not registered against the title, so anyone searching the title would need to acquire knowledge of the existence of the orders from another source. In those circumstances, SHL's ability to deal with the ownership of the land was unaffected by the injunction. What did affect SHL's ability to deal with the title was the incorrect cancellation of Lease 004.
28. On the material I was asked to consider I am not in a position to consider the "lost opportunities" SHL might be able to point to – or how to quantify them.
29. I accept SHL's submissions that rectification of Lease 004 has not restored SHL to the same position it would have been in, had Lease 004 not been cancelled. The re-instated lease is for a shorter period; and the First Defendant is not in a position to extend the period of the lease – that is for the lessors.
30. I am satisfied that damages have accrued as a result of the incorrect cancellation by the First Defendant – at the very least in terms of the shortened life of the lease. There is no dispute that the First Defendant was a party to the case in respect of which Fatiaki J. made his orders and was at all times fully aware of them. Costs are to follow the event. If there is no agreement between counsel, they are to be taxed.

D. Other

31. I understood the parties did not require orders as to quantum of damages from me – that a formula had been worked out by the parties. I note however, that Mr Morrison has provided some submissions addressing this aspect, as has Mr Kalsakau. If my understanding is incorrect, a memorandum to that effect should be presented, pointing to where I might find evidence relating to relevant considerations.
32. I have also barely commented on the Second and Third Defendants. If any issues remain in respect of them, an appropriate memorandum can be filed.

Dated at Port Vila this 21st day of September 2018  
BY THE COURT

*Gardner Ull*  
Justice G.A. Andrée Wilten

The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written in an arc at the top, and "REPUBLIQUE DE VANUATU" at the bottom. Inside the circle, the words "COUR" and "COURT" are on either side of the scale, and "SUPREME" is written below it. Two small triangles containing the word "LEX" are positioned on the left and right sides of the seal.