IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil
Case No. 22/2682 SC/CIVL

BETWEEN: **ETMAT BAY ESTATE LIMITED**
Claimant

AND: **REPUBLIC OF VANUATU**
Defendant

AND: **JIMMY KALMARY, KALOPONG KALLY, APOCK KALLY, PIERRE CARLOT, KALOSIK ALOA, KALALU KALFEN**
Interested Parties

Date: ***5th day of December, 2023***

Before: ***Justice W. K. Hastings***

Counsel: ***Mr. M. Hurley for Claimant***
Ms. N. Robert for Defendant
Interested Parties - Self-represented

JUDGMENT

Introduction

1. This is an appeal on points of law by Etmat Bay Estate Limited (EBEL) from six determinations made by the Valuer-General in 2022. In these determinations, the Valuer-General ordered the forfeiture of leases registered in 2005 by which EBEL leased land for 75 years from the lessors who are the custom owners of the land.

2. The appellant lessee received Notices Before Forfeiture from the lessors between 22 October 2021 and 14 December 2021 in respect of the six leases, alleging non-payment of rent and premiums. The appellant lessee denied the allegations and applied to the Valuer-General for relief against forfeiture.

3. Section 46 of the Land Leases Act [cap. 163] describes the process:

> ***"46. Relief against forfeiture***
>
> *(1) A lessee or other person upon whom a notice has been served under section 45 [Notice Before Forfeiture], or against whom the lessor is proceeding, by reference to the Valuer-General or by re-entry, to enforce his right of forfeiture, may apply to the Valuer-General for relief; and the Valuer-General may grant or refuse relief, as the Valuer-General having regard to the proceedings and the conduct of the*

parties and the circumstances of the case, thinks fit, and, if he grants relief, may grant it on such terms as he thinks fit.

...

(3) This section shall have effect notwithstanding any stipulation or agreement to the contrary and whether the lease is registered or not.

4. Having found the lessee paid less than the amounts of rent and premiums recorded in the leases, the Valuer-General determined the appellant had breached the leases which, as a result, were forfeit. He decided the lessors were entitled to enforce the forfeitures.

5. The lessee appealed the Valuer-General's determinations to the Supreme Court. Although s 26 of the Valuation of Land Act [cap. 288] states that "*The determination of an objection by the Valuer-General is final*," s 27(1) provides for an appeal from a determination of the Valuer-General on a point of law:

> ***27. Right of Appeal***
>
> *(1) A person may appeal to the Supreme Court if the person believes the Valuer-General's determination of the person's objection was wrong on a point of law.*

6. The word "*law*" in s 27(1) is distinct from "*fact*" or factual findings from which no appeal is permitted. "*Law*" however includes principles of equity. In *Mariango v Nalau* [2007] VUCA 15, the Court of Appeal confirmed that equitable principles formed part of the law of Vanuatu:

> "*... the equitable principles that have application to this case including constructive trust, unjust enrichment, imported common intention or estoppel are incorporated into the law of Vanuatu by virtue of Article 95(2) of the Constitution. These equitable principles were known to the common law of England before the relevant date in the constitution of 30 July 1980.*"

An appeal on a point of law may therefore include equitable principles.

7. The grounds of appeal are that the Valuer-General made errors of law in respect of estoppel, equitable set-off, and the effect of s 47 of the Land Leases Act which provides that:

> ***"47. Variation of agreements and conditions of a lease***
>
> *(1) Subject to the provisions of this Act and any other written law, the agreements and conditions contained or implied in any registered lease may be varied, negatived or added to, by an instrument in the prescribed form executed by the lessor and lessee for the time being and registered before the expiration of the current term of the lease.*
>
> *(2) Any variation of rent under a lease shall be notified to the Director by the lessor. No variation shall have effect unless so notified and registered by the Director in the register."*

8. Although the money amounts are different in each case, and the Valuer-General determined in 2022 that no premium was owing on two of the six leases (067 Carlot who limited his allegation to unpaid rent, and 034 Kalfen), the reasoning of the Valuer-General is similar in each case. As there are no differences in the facts of each case that are material to the resolution of the legal issues raised by the appellant, I will consider the cases together. Any reference to an individual lessor will be as an example of what happened in respect of each of the leases.

9. As this is an appeal on points of law, an appellate court cannot interfere with any of the findings of fact in the determinations appealed from, but it can decide whether or not the Valuer-General's assessment of the legal significance of the found and undisputed facts was correct. It is therefore necessary to go into some detail with respect to the dealings between the parties over the last 17 years to provide context to the Valuer-General's determinations that are the subject of this appeal.

Background

10. The appellant is the registered lessee of 48 leasehold titles located at Etmat Bay. The appellant had, and continues to have, plans to build a resort there. As of 2019, the appellant lessee states that it has spent the equivalent of USD 5,000,000 on the development. This hearing concerns six of those leases.

11. Negotiations between the lessors and the lessee produced an "*agreement to lease*" signed in September 2004. A premium was to be paid for each lease. Clause 3 and the "*reference schedule*" on page 8 of the agreement to lease set out when the premium was to be paid. Ten percent of the premium was to be paid on the signing of the agreement to lease, 40 percent on completion (defined as "*execution of the Lease/Sublease by both parties and its approval by the Minister of Lands*"), and the remaining 50 percent on registration of a strata plan. In every case, the first two payments of the premium were made. Except in two cases, the third instalments have not been paid and none have fallen due for payment because no strata plan has been registered for the land subject to these leases.

12. The leases themselves state that they commenced in January 2005. They are commercial tourism leases. Each of the lessors is a custom owner of the land concerned. The lessee in every case is EBEL. The land was leased for 75 years. Each lease records in clause 1 that the lessors received the full amount of the premium. There is no reference in each lease to the staggered premium payments set out in the agreements to lease.

13. Gary Burton is a director of EBEL. He has provided sworn statements with respect to each of the leases. Between 2006 and 2022, on Mr Burton's account, the appellant lessee received more than 450 Notices Before Forfeiture from the lessors. During that time, the lessors also requested and received from the lessee money referred to as "advance payments" so that they could meet various personal obligations. For example, on 17 August 2005, Mr Kalmary requested and received VT 100,000 for travel to the Solomon Islands. EBEL's file note stated "*VT 100,000 approved for advance payment for Jimmy Kalmary. Such amount to be deducted from balance owing on July 2005 payment.*" The balance owing on the July 2005 payment must

be a reference to the clause in the lease setting out when the annual rent of VT 57,500 was due. The advance payment of VT 100,000 would have left the lessee in credit by VT 42,500 for that year's rent. There were many more advance payments.

14. In letters dated 6 September 2006 from the lessee to the lessors, the lessee acknowledged that only the equivalent of one year's rent "*has been specifically paid by the EBEL as the Land Rent,*" attached a cheque for the equivalent of three years' rent for the balance of rent owing as at that date, and stated that future annual rent payments would be taken from the advance payments already made. Each lessor signed the letter under the statement "*I hereby acknowledge the receipt of this letter and subsequent ground rental payment and note that this payment covers in full all my ground rental entitlements under the lease arrangements between myself and Etmat Bay Estate Limited.*"

15. Between 26 January 2005 and 22 December 2008, the lessee made 19 advance payments to Mr Kalmary in the amount of VT 5,046,250, well in excess of the annual rent that fell due in that period and approaching the amount of premium left to be paid on registration of a strata plan. The other lessors are in a similar situation. None of the advance payments have been repaid.

The 2006 determinations of the Valuer-General

16. On 21 August 2006, each lessor issued a Notice Before Forfeiture to the lessee under s 45 of the Land Leases Act alleging the lessee failed to settle the remaining premium, and failed to pay the annual rent in 2005 and 2006. The Notice Before Forfeiture required the alleged breaches to be remedied within 14 days. As stated above, the lessee paid all the rent owing on 6 September 2006. Under s 43(3)(a) of the Land Leases Act, "*the right of forfeiture shall be taken to have been waived if the Lessor accepts rent which has become due since the breach of the agreement* ...". The lessors accepted the rent payments. After receiving the rent but not the remaining premium, Notices Before Forfeiture were issued in late October and early November 2006 limited to the alleged breach of failing to pay the remaining premium and the matter was referred to the Valuer-General under s 43(2) for enforcement. The lessee applied on 17 November 2006 to the Valuer-General under s 46(1) for relief against forfeiture. The Valuer-General issued determinations on 27 November 2006.

17. The Valuer-General, ruled that by accepting the rent payment, the lessors waived their right to rely on that breach. The Valuer-General also ruled that the lease had to be read in conjunction with the arrangement reached before the lease was signed, by which the remaining premium was not due until after registration of a strata plan. The Valuer-General did not explicitly refer to set-off, but he took into account payments made by the lessee that reduced the amount of premium that would be due when a strata plan was registered, and declined the lessor's application to enforce forfeiture of the lease. These determinations were not appealed.

The letter of 20 July 2009

18. On 20 July 2009, Gary Burton wrote a letter to the lessors, each paragraph of which was written in English and Bislama. In Mr Kalmary's case the letter recorded, among other things, that in May 2008, the Department of Lands, Survey and Records assessed the yearly rent at VT 10,278,

compared with the amount of VT 57,500 stated in the lease, which itself was described as a clerical error that doubled the rent that was actually negotiated. Mr Burton proposed that the rent following the five year review in late 2009 should be VT 23,000. Mr Burton also wrote that EBEL "*simply can't continue as unpaid bankers*" and that interest would be applied to the unrepaid advances from December 2004 onwards. The final premium payment would take into account the interest owed on the advances. Mr Burton asked Mr Kalmary to acknowledge a statement of account incorporating all payments, advances and associated costs up to 30 June 2009:

> *Please find attached a schedule of your lease premium statement of account incorporating all payments, advances and associated costs made up to 30th June 2009. In order to clarify our present position we request the amount shown be acknowledged to ensure that there are no disputes when the final amount owing is due for payment. We therefore ask that after perusing the statement, and are in agreeance with the content, could you please acknowledge the statement where shown.*

In Bislama, the last sentence was translated as:

> *So, mifala I askem sei yu stadi gud long stetmen, mo saenem sapos hemi stret.*

19. The letter was accompanied with a cheque for the rent for the period to 30 July 2010. Similar statements were made in letters of the same date to the other lessors. Each lessor signed the last page of letter beside the statement "*Signed as received*" rather than beside a statement that they each understood the content.

20. In his sworn statement dated 27 April 2022, Michael Jessop, a former director of EBEL, wrote that "*each lessor told me he clearly understood and agreed everything in the EBEL letter dated 20 July 2009.*" He deposed that "*it is false of each Custom Land Owner lessor to say in their Notice Before Forfeiture dated 22 October 2021 that when they signed the EBEL letter dated 20 July 2009 they did so only to acknowledge it but not to accept what was in the letter.*" He wrote "*from July 2009 through July 2018 [when he stopped working with EBEL] no Lessor ever questioned me or queried me as to the annual ground rental payments which were all paid in accordance with the agreement of 20 July 2009.*" At para 21 of his sworn statement he wrote:

> *I physically met with Kalmary and was present with Kalmary when he signed the letter dated 20 July 2009. Kalmary read the letter in my presence and I answered queries raised by him before he signed that letter. I asked Kalmary if he understood everything in that letter and agreed to everything in that letter. Kalmary told me before he signed the letter that he understood everything in the letter dated 20 July 2009 and agreed with everything in that letter. I asked Kalmary separately if he understood what the letter said about the rent reduction and lease Premium advance payments and interest to be paid. He said to me he understood and agreed and fully supported the EBEL Etmat Project and he was understandably concerned about past and ongoing problems facing the site development and moving forward to the benefit of all the Erakor people. Similar conversations were had by me with all the Custom Land Owner lessors at the time of their signing of the EBEL letters dated 20 July 2009. It is my strong belief that each lessor fully understood the contents of that agreement and, by signing, concurred with our agreed way forward. (My emphasis)*

21. In his undated unsworn statement, Joe Sel, at the relevant time an employee of the Lands Records Office, wrote that he is very familiar with the development proposed by EBEL. He stated that he was at the meetings with the lessors and Mike Jessop in 2009. He said that he and Mr Jessop discussed the status of the project and that "*it was agreed by all the Lessors whom I met that they understood substantial advance payments of premium had been made and that in the circumstances further advance Premium payments needed to stop.*" He said the lessors were concerned "*that they were not in a financial position to repay the advance Premium payments made by EBEL to them as the advance monies paid by EBEL had been expended and distributed to family members.*" He said "*all the lessors I met with ... agreed that EBEL was entitled to offset future rentals.*"

22. Jack Kallon states in his sworn statement dated 14 June 2022 that he has dealt with all Etmat Bay custom land owner lessors on behalf of EBEL since early 2005. He stated that he signed each statement of account annexed to the letter of 20 July 2009 and that each lessor signed that he agreed that the statement of account was correct. He said he has met with each lessor many times since July 2009, and "*never once has any lessor made any complaint about or disputed the reduced rent payable to them by EBEL.*"

The 2018 Development Agreement and Undertaking

23. In August 2018, each lessor signed a Development Agreement and Undertaking. The lessors signed similar agreements in July 2016 and July 2017. The 2018 Development Agreement and Undertaking contained the following clauses:

> "13. *I agree that at all times both the lease premium and rent under the Lease have been paid on time by Etmat and in full and that no lease premium or rent under the lease is outstanding.*
>
> *14. I agree that the land rental stated in Item 3 is for the year to 31st July 2018 and has been paid in full.*
>
> *15. I agree that no amount is due and payable under the lease at the date of the Agreement and Undertaking.*
>
> *16. I agree that land rental for the forthcoming five year period post 31st July 2018 will be increased to [in Mr Kalmary's case, VT 26,000 per annum being an increase of twelve and a half percent of the previous five year term]."*

Each lessor signed on the last page the Development Agreement and Undertaking containing these clauses.

24. In February 2019, the lessors served Notices Before Forfeiture on the lessee alleging a failure to pay rent and premium. In July 2019, Mr Burton wrote again to the lessors and set out what he said had been agreed in August 2018 and the amount with interest he said the lessee had paid in advance payments of the premium that would become due when the strata plan was registered. Mr Burton wrote that if the lessors continued to attempt to terminate the lease then the lessee would seek a refund of the advance payments. If the refund was not forthcoming, then

Mr Burton wrote that EBEL would offset future rent payments against the prepaid premium "*which means that no further rent will be due and payable for a substantial number of years.*" On 30 August 2019, Mr Burton wrote to Mr Kalmary to advise that the rental payment of VT 26,000 for the period ending 31 July 2020 would be offset against the amount owed to EBEL for the advance payments. Mr Burton also advised that EBEL would take legal action to recover the full amount of the advance payments plus interest if they were not repaid by 4 October 2019. There is no evidence on this Court file that legal action was taken or what happened to the 2019 notices of forfeiture.

The 2022 determinations of the Valuer-General

25. On 1 May 2022, Mr Burton wrote to the Valuer-General after receiving Notices Before Forfeiture on 14 December 2021 alleging failure to pay the full premium and failure to pay rent. With respect to premium, he wrote:

> *"All due premium has been paid. The balance of premium was agreed to be payable when a strata plan was registered over the leased land. That has not occurred.*
>
> *Instead, EBEL has made large payments of advance and not due premium to these Custom Land Owner lessors and others at Etmat Bay at their request to help them and their families when they have been in financial trouble. They each in writing promised to repay those advance payments with interest but have failed to do that.*
>
> *Because they could not repay these amounts, they agreed that those unpaid amounts plus the promised interest plus expenses they forced EBEL to incur would be offset against their future rent. That offset has been happening and they have accepted that without comment or complaint."*

With respect to rent he wrote:

> *"Their claim that rent is unpaid is also wrong. There have been a number of written agreements between EBEL and the Custom Land Owners to change the rent amount. They agreed with that each time. The rent has been paid in accordance with those agreements and, again, they have accepted those agreed, changed rent payments without comment or complaint.*
>
> *Each of them has signed letters and Agreements stating that the rent is paid up to date and agreeing the future rent. The claims of rent arrears in their current Forfeiture Notices are shown to be clearly false when tested against the statements in those letters and Agreements."*

26. The Valuer-General heard these matters on 27 June 2022.

27. Mr Burton wrote to the Valuer-General on behalf of the lessee on 27 June 2022 after the hearing. He pointed out that registration of rent variations was the obligation of the lessor and that "*an innocent lessee such as EBEL should not be penalised because of a breach of the law by the lessor.*" He also wrote that the lessors have accepted the changed rents for 13 years without complaint "*as agreed on the basis of a binding contract between them.*"

28. The Valuer-General issued his determinations of 26 July 2022. He noted that he had to determine whether two alleged breaches of the leases had occurred: underpayment of premium and underpayment of rent. He found that no variation of the original leases had been registered and that by virtue of s 47(2) of the Land Lease Act, the variations were of no effect. He stated at para 16(e) (with respect to the Kalmary lease, but similar paragraphs appear in all the determinations):

> *"Therefore, if no variation, the contract rent of VT 57,500 should be valid. The offset made from the premium paid should be null and void."*

And at para 16(i):

> *"The offset made from the land rent is illegal and the respondent's behavior is like pocketing the applicant based on the letters and agreement that were never registered as variation on the lease."*

29. He made the following determinations with respect to the annual rent and premiums paid on each lease:

406 the lessee paid VT 23,000 instead of VT 57,500 rent per annum from 2016 to 2018, no rent from 2019 to 2021; and paid VT 11,940,000 premium, leaving VT 2,060,000 premium owing.

061 the lessee paid VT 31,000 instead of VT 38,830 rent per annum from 2016 to 2018, no rent from 2019 to 2021; and paid VT 10,200,000 premium, leaving VT 1,800,000 premium owing.

062 the lessee paid VT 63,000 instead of VT 78,830 rent per annum from 2016 to 2018, no rent from 2019 to 2021; and paid VT 12,000,000 premium, leaving VT 3,000,000 premium owing.

067 the lessee paid VT 91,000 instead of VT 113,540 rent per annum from 2016 to 2018, no rent from 2019 to 2021; and paid the full premium of VT 12,000,000, leaving no premium owing.

006 the lessee paid VT 18,000 rent instead of VT 22,650 from 2016 to 2018, no rent from 2019 to 2021; and paid VT 8,500,000 premium, leaving VT 1,500,000 premium owing.

034 the lessee paid VT 105,000 rent instead of VT 131,290 from 2016 to 2018, no rent from 2019 to 2021; and paid the full premium of VT 15,000,000, leaving no premium owing.

30. As a result of these findings the Valuer-General determined the leases were forfeit.

31. The notice of appeal was filed on 26 September 2022.

32. The following table briefly summarises, for each of the leases that are the subject of this appeal, the lessor and date of registration, the premium and annual rent that were agreed in 2005, the

advance payments excluding legal fees set out by Mr Burton in his sworn statements, and the proportion that those advance payments represent in terms of the rent figures set out in the leases, and of the premiums due on registration of the strata plans, as of the date of this appeal, taking into account the above findings with respect to premiums and rent made by the Valuer-General in 2022:

Lease	Lessor	Date of registration	Premium	Annual rent	Advance payments	As equivalent years rent	As proportion of remaining 50% premium due when strata plan registered
406	Kalmary	20 May 2005	VT14,000,000	VT57,500	VT5,046,250	87 years	72%
061	Kally	1 June 2005	VT12,000,000	VT38,830	VT4,250,000	109 years	70%
062	Apock	1 June 2005	VT15,000,000	VT78,830	VT5,390,000	68 years	71%
067	Carlot	20 May 2005	VT12,000,000	VT113,540	VT5,332,000	47 years	None remaining
006	Aloa	27 May 2005	VT10,000,000	VT22,650	VT3,655,000	161 years	-243%
034	Kalfen	20 May 2005	VT15,000,000	VT131,290	VT5,790,000	44 years	None remaining

Submissions

The appellant lessee

33. The appellant lessee submits the Valuer-General made four errors of law.

34. The first is with respect to the premiums. Mr Hurley submitted the lessee is entitled to demand refund of the advance payments because the strata plans have not been registered and 50 percent of the premium is therefore not yet due. Having not appealed the Valuer-General's 2006 determination, Mr Hurley submitted the lessors are estopped from relying on the same allegations.

35. The second is with respect to the rents. Mr Hurley submitted the lessee has the right to equitable set off for future rents by reason of its prepayment of lease premiums. Again, Mr Hurley submitted that having not appealed the Valuer-General's 2006 determination, the lessors are estopped from relying on the same allegations with respect to rent.

36. The first two grounds of appeal are essentially the same. Although there is no appeal from the Valuer-General's factual findings with respect to underpayment of rent and premiums, Mr Hurley submitted the Valuer-General should not have made those findings in the first place. He submitted the lessors were estopped from relying on the same allegations, which the Valuer-General resolved in favour of the lessee in 2006, in the Notices Before Forfeiture that led to the current determination under appeal. I will therefore consider them together under the discussion of estoppel.

37. The third ground of appeal is that the Valuer-General erred in his interpretation of s 47(2). He submitted s 47(2) imposes an obligation on the lessor to notify the Director of Lands of any variation of rent, that it has no application to the written agreement with respect to premiums, and that the lessor's failure to comply with s 47(2) does not preclude the lessee from relying on its written agreement. Mr Hurley submitted that the Valuer-General's interpretation of s 47(2) is

an unjust deprivation of property contrary to Article 5(1)(j) of the Constitution that results in the unjust enrichment of the lessors.

38. The fourth ground of appeal is the Valuer-General's rejection of equitable set-off. Mr Hurley submitted that the Court of Appeal in *Fujitsu (NZ) Ltd v International Business Solutions Ltd* [1998] VUCA 13 confirmed that equitable set-off is part of the law of Vanuatu. He submitted that the lessee's advances to the lessors and non-payment of annual rent are sufficiently closely connected under the terms of the leases that it would be unconscionable to allow the lessors to insist on their legal right of payment of annual rent under the terms of the lease without first accommodating EBEL's countervailing legal right regarding the advances of premiums paid.

39. Mr Hurley submitted that if the Court finds that any one of his submissions has merit, then the appropriate course of action would be to revoke the Valuer-General's determinations under s 28 (1)(a) of the Valuation of Land Act [cap. 288].

The respondent lessors

40. Ms Robert for the respondents submitted first, with respect to underpayment of premiums, that the Valuer-General was correct to forfeit leases 406, 061, 062 and 006 because the premiums have not been paid. She submitted the lessee cannot rely on its agreements with the lessors because none were registered pursuant to s 47 of the Land Leases Act [cap. 163].

41. Second, Ms Robert submitted with respect to underpaid rent that the Valuer-General was correct to forfeit all six of the leases for the same reason.

42. Third, Ms Robert submitted that the Valuer-General was correct to forfeit the leases because neither s 47 nor s 39 of the Land Leases Act [cap. 163] was complied with.

43. Finally, Ms Robert submitted that the agreements between the lessee and the lessors with respect to the set-offs are contractual matters over which the Valuer-General has no jurisdiction under ss 3 and 4 of the Valuation of Land Act [cap. 288]. The respondents submitted that in any event, the Valuer-General was correct to forfeit the leases because the agreements which the lessee relied on to assert the offset of rent against advance payments of premium did not comply with ss 39 and 47 of the Land Leases Act [cap. 163].

44. Ms Robert submitted that as a result the appeal should be dismissed.

Discussion

45. Section 39 of the Land Leases Act [cap. 163] was not pleaded and will not therefore be considered. In any event, it is a permissive provision which provides that the rent "*may be reviewed in accordance with the provisions of this section*" if either the lessee or the lessor chooses to initiate a review under that section. That did not happen in this case.

46. There is a danger that the many actions, transactions, payments that have taken place and agreements that have been made in the years between the two determinations of the Valuer-

General overwhelm the essence of this case, which is how the many "*advance payments*" by the lessee affect the legal relationship between the lessee and the lessors, and whether the Valuer-General determined the effect on that relationship in his 2006 determination which the lessors did not appeal.

47. I will therefore consider first, whether the lessors were estopped from making allegations in the 2021 Notices Before Forfeiture in respect of rent and premiums because the Valuer-General had determined those allegations in favour of the lessee in 2006. I will then consider the fourth ground of appeal, whether the Valuer-General erred in finding that the lessee was not entitled to set off the advance payments against rent and premiums. Last, I will consider the third ground of appeal, whether the Valuer-General erred in his interpretation of s 47 of the Land Leases Act.

The first and second grounds of appeal: estoppel

48. Mr Hurley's submission is that because the lessors did not appeal the Valuer-General's 2006 determinations, they are now estopped in these proceedings from relying on the same allegations in the Notices Before Forfeiture that led to the earlier determinations.

49. I do not consider it is necessary to delve too deeply into the many variations of equitable and common law estoppel, but if pressed, it seems to me this ground of appeal is based on issue estoppel. Before an issue estoppel can arise, the issue must have been identified and resolved against the party said to be estopped. In *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37, Tipping J of the New Zealand Court of Appeal stated:

> *Issue estoppel is concerned with the prior resolution of issues rather than causes of action. In the same paragraph of Halsbury as that referred to above [16 Halsbury's Laws of England (4th ed), (Estoppel), para 977], it is said that issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Cross on Evidence (4th NZ ed), 1989 discusses issue estoppel at para 12.8 on p 315. The learned author cites the judgment of Lord Denning MR in Fidelitas Shipping Co Ltd v V/O Exportchleb [1965] 2 All ER 4, 8:*
>
> > *"Within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again."*

50. If this ground of appeal were to be categorised as estoppel by judgment or *res judicata* I would have no difficulty in finding the determinations of the Valuer-General to be judgments for the purpose of equitable estoppel. The label however matters less than the principle:

> *"...the rules governing estoppel are based upon the principles that a party should not be permitted unjustly to depart from an assumption which he has caused another party to adopt or accept for the purpose of their legal relations and that the purpose of*

preventing such a departure is to avoid or prevent a detriment to the party who, by adhering to the assumption, has acted or abstained from acting and thus changed his position.

Meagher, Gummow, Lehane, Equity Doctrines & Remedies (3rd ed., Butterworths), 409."

51. Tipping J expressed the same principle in a different way in *Joseph Lynch*:

> *"The purpose behind cause of action estoppel and issue estoppel is that litigants should not be twice vexed by the same claim or point and it is in the public interest that there be an end to litigation: see NZ Social Credit Political League v O'Brien [1984] 1 NZLR 84 (CA) at p 95 per Somers J, Gregoriadis v CIR [1986] 1 NZLR 110 (CA) at p 114 per Richardson J and at p 118 per Somers J and also Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] AC 853; [1966] 2 All ER 536, at p 946 per Lord Upjohn."*

52. In both the 2006 and 2022 determinations, the parties were the same. Both sets of determinations concerned the same lease documents and considered the effect of the advance payments on the parties' obligations to each other. The lessors made the same allegations that the lessee underpaid rent and premiums in both sets of the Notices Before Forfeiture. Each Valuer-General considered those allegations, and each appears to have come to a different conclusion. On the face of it, the lessee appears to have been "*twice vexed by the same claim or point*" in Tipping J's words, and it is in the public interest that there be an end to litigation that has already finally decided the claim or point. The only factual difference between the 2006 and 2022 determinations is that a great many more advance payments have been made, but these are facts that are immaterial to the equitable principle that a person is estopped from relitigating an issue between the parties that has been finally decided.

53. It is however necessary to consider the detail of the 2006 determinations to determine if indeed these issues with respect to rent and premiums were "*raised and distinctly determined between the parties*" in Lord Denning's words in 2006.

The 2006 determinations

Premium

54. Each lease recorded in clause 1 that the lessors received the full amount of the premium. This was not true. The lessors had received half the agreed premium. No lease contained a reference to the staggered premium payments set out in the agreements to lease. The Valuer-General in 2006 accepted the then counsel for the appellant's submission that the words of the lease as registered had to be read in conjunction with the terms of payment set out in the agreement to lease. When read that way, the Valuer-General determined that the lessor effectively loaned the full amount of the premium to the lessee, which the lessee would repay to the lessor according to the terms agreed to in the agreement to lease. On this reading, the lessee therefore remained indebted to each lessor until the full amount of the premium was paid, in each case, that being when a strata plan was registered. Until that event happened, or the lessee paid the debt earlier, the lessee owed the lessor a debt of half the amount of premium stated in the lease. Each time

the lessee made an advance payment to a lessor, the lessee's indebtedness to the lessor would reduce by that amount. In that sense, it could not be said that the lessee could demand repayment of the advance payments made to the lessors. The advance payments did not make the lessors indebted to the lessee; they merely reduced the lessee's indebtedness to the lessors.

55. The Valuer-General dealt with the advance payments as payments against premium. In Mr Kalfen's case for example, the Valuer-General said "*With only Vt2,250,000 to be settled, it is clear that the Lessor has received more than he was entitled to under the agreement despite what the agreement stated in paragraph 3.*" Clause 3 of the agreement to lease refers to premium. The Valuer-General's comment that the lessor received more than he was entitled to refers to the staggered payments set out in the agreement to lease which meant the lessee did not have to pay any amount of the 50 percent remaining of the premium until registration of the strata plan. As a result, the Valuer-General determined that the lessee did not breach the lease by not paying the entire premium which was recorded in the lease as having been received by the lessor. The Valuer-General's reasoning in 2006 is significant in that he used the agreement to lease as an aid to interpreting the lease, and he credited the advance payments to premium not yet due.

Rent

56. Each lease also recorded the annual rent in clause 3. The rent was to be paid in advance by 30 July each year. None of the rent variations was registered. The Valuer-General determined that by not paying rent in the amount stated in the lease by the date it was due to be paid in the lease, "*This lease condition was indeed breached by the lessee.*" The only thing that saved the lease from forfeiture was that the lessor accepted late payment of rent. That meant that under s 43(3)(a) of the Land Leases Act, "*the right of forfeiture shall be taken to have been waived*" and the lessor could no longer rely on the breach.

57. The Valuer-General in 2006 also determined that the lessor, in claiming outstanding premium and liquidated damages, "*affirms the lease*". As a result of finding no premium was owed, the Lessor accepting late payment of rent thereby waiving his right to forfeiture, and the Lessor affirming the lease, the Valuer-General declined the application by the lessors to enforce their rights of forfeiture of the leases.

58. When the lessors filed Notices Before Forfeiture again in 2021, 15 years had passed since the Valuer-General's earlier determination, and, as set out above, many more advance payments had been made by the lessee to the lessors. The lessors alleged breaches of the lease through non-payment of rent and incomplete premium payments. The Valuer-General recorded that the lessee submitted the advance payments "*offset future rent payment that prepaid premium which means that no further rent will be due and payable for a substantial number of years.*" The lessee submitted "*the rent has been paid and offset against the amount the applicant owed Etmat Estate.*"

59. The Valuer-General in 2022 made no reference to the 2006 determinations of his predecessor. With respect to the rent, he used the figures in the leases because no variations had ever been registered. He said since no variation had been registered by the lessor, the lessee "*should not*

claim that the applicant [lessor] fails to complete the variation. This should be treated as a consensus agreement of both parties to enjoy on the lease, instead of the [lessee] making all this agreements to self-benefit." He concluded, "*if no variation, the contract rent ... should be valid. The offset made from the premium paid should be null and void.*" He repeated his conclusion in different words:

> *The offset made from the land rent is illegal and the respondent's [lessee's] behavior is like pocketing the applicant based on the letters and agreement that were never registered as variation on the lease."*

60. The Valuer-General assessed different amounts of premium owing to each lessor (in two cases, Carlot and Kalfen, there was none owing), and treated each amount owing as a breach of the obligation in clause 1 of the lease which asserts the lessor has received the whole premium.

61. Having found breaches in respect of non-payment of rent in all cases, and breaches in respect of premium payments in four cases, the Valuer-General ordered the lease forfeited.

62. Not referring to the 2006 determinations of his predecessor, the Valuer-General in 2022 came to a different conclusion on the same issue with respect to the allegedly incomplete premium payments.

63. With respect to non-payment of rent, the Valuer-General in 2006 determined this was a breach of the lease, but that the lessors waived their right to rely on it by accepting late payments of overdue rent. In 2022, the Valuer-General made no finding that the lessors accepted late payment of rent, and found the lessee in breach of the leases as a result. The Valuer-General in 2022 reached the same conclusion with respect to rent, that non-payment was a breach of the leases, as the Valuer-General did in 2006.

64. What is different in 2022 is that the lessee raised the issue of set-off which was not explicitly raised in 2006. The comment in 2006 that "*the Lessor has received more than he was entitled to*" refers to payments of premium not due until registration of strata plan. In respect of rent, there would have been fewer advance payments in 2006 than there were in 2022, but nowhere does the Valuer-General in 2006 appear to accept that those payments were applied, or could be applied, to rent. Indeed, the Valuer-General said in 2006 that non-payment of rent would have been a breach of the lease if the lessors had not accepted late payment of rent, after acknowledging that the lessors had received more than they were entitled to.

Conclusions on the first and second grounds of appeal: estoppel

65. I accept that by not appealing the 2006 determinations (which were final in respect of factual findings, the only appeal available being on a point of law), the lessors created a situation in which the lessee assumed that the legal effect of the advance payments on its obligations to pay rent and premiums to the lessors had been finally determined. The lessee appears to have gone to considerable lengths, including translating documents into Bislama and using middlemen, to ensure the lessors understood how the advance payments affected rent and premiums, and they signified that understanding. This carries an overtone of cultural dissonance. I am concerned

that these measures were interpreted by the Valuer-General and perhaps by some of the lessors as "*ambushes*" I have uncovered no evidence that shows to what extent the lessors were independently advised, but on the other hand the lessors ought to have known the advance payments were not gifts or *ex gratia* payments, and that there had to be some sort of legal structure around them.

66. In reliance on that assumption, the lessee continued to progress its investment and plans to develop the land, albeit at a much slower pace that anyone might have anticipated, and continued to make advance payments to the lessors when requested. One of the detriments to the lessee as a result of this reliance was the opportunity cost of not being able to invest that money more profitably elsewhere in the intervening years.

67. On this analysis, the appellant's submissions with respect to estoppel are correct in respect of premium because that issue was decided by the Valuer-General in 2006. I find that the lessors were estopped from raising the same issue, on the same material facts and with respect to the same leases, against the lessee in 2022 because that issue was finally determined between the parties by the Valuer-General in 2006. The lessors should not have raised the issue again in their Notices Before Forfeiture, and the Valuer-General should not have considered the issue was alive and needed resolution. There is a public interest that there be an end to litigation on this issue.

68. The Valuer-General's determination in 2006 that non-payment of rent was a breach of the lease is technically *obiter dicta* because as a result of the lessors accepting late payment, the Valuer-General did not have to decide whether non-payment or underpayment of rent breached the lease and did not have to decide how the advance payments affected the lessee's obligation to pay rent. As the effect of non-payment or underpayment of the rent was not part of the *ratio* of the 2006 determination, and the issue of offset was not raised until 2022, the lessors were not estopped from raising the rent issue before the Valuer-General in 2022. This means that the rent issue falls to be determined in my consideration of the third ground of appeal, equitable set-off.

69. This ground of appeal, that the Valuer-General erred in not finding the lessors were estopped from alleging incomplete premium payments breached the lease, must therefore succeed.

The fourth ground of appeal: set-off

70. Mr Hurley submitted that the lessee's advances to the lessors and non-payment of annual rent are sufficiently closely connected under the terms of the leases that it would be unconscionable to allow the lessors to insist on their legal right of payment of annual rent under the terms of the lease without first accommodating EBEL's countervailing legal right regarding the advances of premiums paid.

71. In *Rawson v Samuel* (1841) Cr & Ph 161 at 178, 41 ER 451 at 458, Lord Cottenham LC said equitable set-off "*exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against the adversary's demand. Where mere existence of*

cross-demands is not sufficient." In *Grant v NZMC Ltd* [1989] 1 NZLR 8 at 11, 12-13, Somers J defined what more than a cross-demand is required to succeed on a claim for equitable set-off:

> *"Equity would restrain an action or execution of judgment at law or allow a set-off where it would be inequitable or unconscionable to allow the plaintiff to proceed without bringing to account some claim by the defendant which was sufficiently linked to that made by the plaintiff ... The defendant may set-off a cross claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract."*

72. Somers J's comment presumes a claim and a cross-claim. The vehicle for determining the issue in this case, an application for relief against forfeiture, is different, but the principle is sufficiently broadly stated in both *Rawson* and *Grant* that the difference does not matter. What matters is that the applicant must be able to identify a sufficiently close connection between the alleged non-payment or underpayment of rent and the advance payments that it would be inequitable or unconscionable to allow the lessors to proceed to forfeiture without taking into account the lessee's advance payments.

73. The table at paragraph 32 shows the amounts paid by the lessee in advance payments to the lessors are the equivalent of between 44 and 161 years rent, depending on the lease. This is not a case of an unrelated cross-claim. The advance payments are intimately connected by the relationship between the lessee and the lessors to the leases that are the subject of these forfeiture proceedings. The Valuer-General erred in law when he said "*the offset made from the land rent is illegal.*" There is sufficient interdependence between the advance payments and the rent "*that judgment on one cannot be fairly given without regard to the other.*" In this case that means that the basis on which the Valuer-General ordered forfeiture of the leases, the non-payment or underpayment of rent, could not fairly be given without regard to the advance payments which are the equivalent to many years future rent, regardless of whether that rent is the amount stated in the original leases or the amounts amended by agreements made between the lessee and the lessors over the years.

74. This ground of appeal, that the Valuer-General erred in determining that rent payments could not be set-off against the advance payments, must also succeed.

The third ground of appeal: s 47(2) of the Land Leases Act

75. Having succeeded on more than one ground of appeal, I do not need to resolve whether the Valuer-General interpreted s 47 correctly when he decided only to have regard to the leases as registered, and to ignore subsequent variations because they were not registered. What follows therefore is *obiter dicta*. Ms Robert's submissions with respect to each ground of appeal however relied extensively on the Valuer-General's interpretation of s 47, which she submitted was correct. Indeed, s 47(2) states explicitly that no variation of rent under a lease shall have effect unless notified by the lessor and registered by the Director. Ms Robert submitted that the Valuer-

General was correct to decide the lessee could not rely on agreements with the lessors with respect to variations in rent and premiums because those agreements were not registered, and that those agreements were contractual matters which he had no jurisdiction to hear under ss 3 and 4 of the Valuation of Land Act.

76. Ms Robert's submissions with respect to the Valuer-General's lack of jurisdiction to consider contractual arrangements with respect to rent that have not been registered have some attraction. Section 47(2) is carved out of the more general terms in s 47(1) and is plainly phrased: "*no variation shall have effect*". It is the only variation that is said not to have effect unless it is notified and registered. Ms Robert submitted the Valuer-General was entitled not to take into account any written arrangement purporting to vary rent if it was not registered.

77. The Valuer-General in 2006 did not appear to share Ms Robert's view of his jurisdiction. He explicitly went beyond the lease and considered the unregistered agreements to lease to interpret the leases that were registered. Sections 3, 4 and 5 of the Valuation of Land Act define the Valuer-General's role and functions as a land referee and state his jurisdiction to include "*any matter referred to the Valuer-General by any party to a lease of land relating to the interpretation of a provision in the lease.*" This would include unregistered agreements if they were of use in interpreting clauses in a registered lease.

78. I will comment in passing that s 47(2) is oddly drafted. It imposes an obligation on the lessor to notify the Director of any variation of rent under the lease, but it does not impose a similar obligation on the lessee. Parliament could not have intended the Act to be so one-sided in favour of lessors who it seems have an obligation to notify variations of rent, but as a result of there being no consequence for not notifying variations, may choose not to notify variations of rent not in their favour. As there is nothing in the provision preventing the lessee registering an agreed rent decrease, the provision ought to be interpreted to permit a lessee to do so, in order to obtain the benefit of a rent variation in its favour, just as a lessor is explicitly able to do so in order to obtain the benefit of a rent variation in its favour.

79. In any event, given the amount of advance payments, the lessee did not need to rely on the unregistered rent variation agreements to submit that its liability for the unpaid rent pleaded in the Notices Before Forfeiture could be offset by the advance payments. It seems to me this submission is a non sequitur. Section 47 on its face only concerns *registration* of lease variations. It is made subject to "*the provisions of this Act and any other written law.*" It does not purport to affect or prohibit causes of action based on common law or equitable principles such as set-off. In *ANZ Bank (Vanuatu) Limited v Belmonte Investments Limited* [2015] VUSC 40, Fatiaki J considered the effect that non-registration of mortgage had on its enforceability. His Lordship held at para 20 that "*Failure to register a mortgage however does <u>not</u> render it invalid <u>nor</u> does it extinguish the nature of the mortgagee's equitable interest in the mortgaged land.*" (Fatiaki J's emphasis). He said at para 23 that an unregistered mortgage "gives rise to contractual obligations and equitable interests" but until it is registered, is unenforceable as security under ss 58 and 59 of the Land Leases Act. By analogy, the same reasoning would apply to preserve the lessee's contractual rights at common law and its rights to equitable remedies in situations where a lessor seeks to enforce forfeiture of a lease. The Valuer-General

should have taken those rights into account when considering whether to enforce the forfeiture of the leases.

80. To the extent the Valuer-General interpreted s 47(2) as preventing him from giving effect to unregistered written rent variations, this ground of appeal is dismissed. To the extent the Valuer-General ruled that rent could not be offset by the advance payments because no variation to the contract rent was registered, this ground of appeal must succeed.

Result

81. The appeals against the Valuer-General's determinations dated 26 July 2022 in respect of leasehold title numbers 12/0913/406, 12/0914/061, 12/0914/067, 12/0932/062, 12/0931/006 and 12/0932/034 are allowed.

82. The decisions of the Valuer-General to enforce the forfeiture of those leases are revoked pursuant to s 28(1)(a) of the Valuation of Land Act.

83. The parties are reminded that s 29(2) of the Valuation of Land Act gives 30 days to institute an appeal from this decision.

Costs

84. Costs are awarded to the appellant to be taxed if not agreed.

DATED at Port Vila this 5th day of December, 2023.

BY THE COURT

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Justice W. K. Hastings