

**IN THE HIGH COURT OF SOLOMON ISLANDS**  
***Civil Jurisdiction***

**Civil Case No. 127 of 2019**

**BETWEEN:** XHU MINDI **Claimant**  
**AND:** ATTORNEY GENERAL **Defendant**

**Date of Hearing:** 14<sup>th</sup> March 19, 12<sup>th</sup> June 2019 & 4<sup>th</sup> May 2022  
**Date of Judgment:** 4<sup>th</sup> July 2022

Haurii M for the Claimant  
Banuve S for the Defendants

**RULING ON A PRELIMINARY ISSUE OF LAW**

**KOUHOTA PJ:**

**The Claim**

This is a Claim for Judicial Review by the Claimants filed on 20<sup>th</sup> March 2019 seeking the following reliefs;

1. A declaration that the process of land resumption invoked by the Commissioner and the board over the Claimants' estate commenced by publication of notice of resumption dated 30<sup>th</sup> January 2019 by the Commissioner, is null and void ab initio. Thus, all or any act or decision (s) made pursuant to the process are;
  - (i) is null and void;
  - (ii) wrong in law and void as FTE 192-004-1722 and 1729 held by the Claimant are indefeasible under the Lands and Title Act, Cap 133
  - (iii) condition 3 of the grant (resumption) is contrary to section 8 of the Constitution (protection against deprivation of property)
  - (iv) contrary to the power to compulsory acquire in section 71(1) of the Lands and Titles Act [Cap133] and section 8 of the Constitution
  - (v) contrary to the protection afforded by the Torrens registration system and causes fear, uncertainty and insecurity to the title holders
  - (vi) null and void as what constitute public purpose remains ill defined

- (vii) on the basis of clauses (i)- (vi) and the defects stated in them, the Claimant remains the title holder of the subject parcels of land.

In essence the Claimant pleaded that the power of resumption of land exercised by the Commissioner of Lands (COL) and endorsed by the Land Board to resumed FTE 192-004-1722 and FTE 192-004-1729 is wrong in law and contrary section 71(1) of the Lands and Titles Act, [Cap 133] and section 8 of the Constitution.

**The Defendant defence and Submission.**

The learned Solicitor General in the defence filed on 18/4/19 states that;

- (i) a fixed term estate is a kind of leasehold,
- (ii) The lease grants possession of land for a term of years, specify the payment of rent and imposing certain limits on the use to which the land may be put;
- (iii) The reservation expressly gives to the landlord-here the Commissioner the right to re-enter and resume possession in certain specific events, namely the intention to use the land for specific purpose and subject to notice and certain limited compensation, the right to bring the terms to an end.

Before the matter proceeded to Chapter 15 conference, the Solicitor General made an application that a preliminary issue of law to be first determined by the court. Under Rule 12.11 of the CPR 2007, the Court may hear legal argument on preliminary issue of fact or law between the parties if it appears likely that, if the issue are resolved, the proceeding or part of the proceeding will be resolved without trial, or the cost of the proceedings or issues in dispute are likely to be substantially reduced.

In support of his application the learned Solicitor General submits that the Claimant's position is plainly incorrect in law. He submits the validity and the subsistence of the power of resumption of land in this jurisdiction has been settled by the Court of Appeal (full court) in **ANTHONY CHEE MING WONG -V- AG AND COMMISSIONER OF LANDS -CAC No. 176 of 2009.**

He submits that in this case the appellant had advanced the argument based on section 8 of the Constitution that the power of resumption was dependent of reasonable compensation being paid.

The Solicitor General submitted, in fully endorsing the subsistence and use of the power reserved to the Commissioner of Lands to resume land, the Court of Appeal clarified its features are as follows;

- (i) A fixed term estate is a kind of leasehold.
- (ii) The lease grants possession of the land for a term of years, specifying the payment of rent and imposing certain limits on the uses to which the land maybe put.
- (iii) The reservation expressly gives to the landlord – here, the Commissioner – the right to re-enter and resume possession in certain specified events, namely the intention to use

the land for public purposes and subject to notice and certain limited compensation. In short to bring the term to an end.

- (iv) When the landlord terminates the lease in accordance with the reserved power to do so, he takes nothing in the nature of an interest in land from the lessee even though it is true the lessee loses the right to occupy and use the land.
- (v) The compensation provision in clause 2 implicitly recognizes the occupant loses the improvements made on the land and must be paid for “the actual loss sustained in respect of improved land”.
- (vi) On the constitutional argument the Commissioner is not seeking to acquire any property of the appellant but simply seek to resume full possession and use of property that is his by virtue of his right to terminate the lease and accepts the obligation to compensate him for any “actual loss” he may have suffered. The appellant’s rights to possession end, but they are not obtained, taken possession of or acquired by the Commissioner.

He submits that Paragraph (vi) highlighted above is a complete answer to the Claimant’s primary grievance that the power of resumption is contrary to the acquisition process for land for public purposes laid out in section 71(1) of the Act and the protective cover provided by section 8 of the Constitution (compulsory acquisition). The Court of Appeal in **WONG** have clarified and settled the issue as set out below,

- (a) Whilst the Claimant has the right of possession over FTE 192-004-1722 and 192-004-1729 the COL, when exercising the reserved right to resume these parcels of land for the purposes, is exercising his right of property that is his, to resume full possession and use over them.
- (b) The Commissioner of Lands when resuming the subject lands takes nothing in the nature of an interest in land from the Claimant. The lands have always been owned by the Commissioner of Lands.
- (c) The Claimants primary right, is a right of possession, not ownership. If she has made any improvements on the land then she must be paid for the actual loss, sustained, in respect of improved land, when the subject lands are resumed.
- (d) It is apparent from a perusal of the terms of the claim that the Claimant does not have an arguable case in that his position that the power of resumption contravenes section 71(1) of the Lands and Titles Act and section 8 of the Constitution is contrary to the law in this jurisdiction as settled by the Court of Appeal in **Anthony Ming Wong –v- AG & COL – CAC No. 176 of 2009**.

Counsel submit that with respect, this Court is bound by the Court of Appeal ruling in **Wong** under the *stare decisis* principle as articulated by this Court in case such as **in re the estate of Felix Panjubo** [2002] SBHC 98 (per **Kabui J**)

*“the decision of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction...”*

Counsel Mr. Banuve submit that on both these grounds, firstly the mistake or misapprehension of law and secondly, the limits placed on this Court by the *stare decisis* principle the Court cannot hear this claim and rather have it dismissed forthwith.

I agree with the learned Solicitor General submission that the features of a Fixed Term Estates were clearly outline in the **Anthony Chee Ming Wong case** and the issue of resumption was clarified. However, the arguments in **Anthony Chee Ming Wong case** was on compulsory acquisition under section 8 of the Constitution.

In the present case I am of the view the pleadings and arguments now advanced by the Claimant that resumption of her Fixed Term Estates under clause 3 of the grant instrument contravenes section 71 of the LTA was not raised in the Anthony Chee Ming Wong case and was not fully argued before the Court of Appeal hence the Court of Appeal did not determined the provisions of Part V division 2, particularly sections 71 and 72 of the Lands and Titles Act.

#### **The Preliminary issue of Law.**

The Defendant had asked the Court to determine a preliminary issue of law. The determination therefore is made outside of the process of a Judicial Review under rule 15.3.18 hence the Court is obliged to make a final deamination on the preliminary issue of law, which essentially means the rights or position of the parties' inevitability will also be determined.

The preliminary issue of law the Court was asked to determine as I understand is, *that the claimant's position is clearly incorrect in law as the issues of law pleaded by the claimant have been clarified and settled in the case of Anthony Ming Wong –v- AG & COL –CAC No. 176 of 2009*. The clarifications are stated in the defense filed by the Solicitor General and his submission outline above.

To determine whether the Claimant's position is incorrect in law or not it is appropriate to examine the actions taken by the Commissioner of Lands in resuming the Claimant's Fixed Term Estates.

#### **The Notices of Resumption.**

I had perused the two notices issued by the Commissioner of Lands to the Claimant. The two notices were contained in two letters bearing the Ministry of Lands, Housing and survey Letter Head. The two notices were in respect of two different parcels of land, PN 191-004-1722 and PN 192-004-1729 both dated 30<sup>th</sup> January 2019 and addressed to Ms. Mindi Zhu. It is appropriate to set out the full contents of the letters which carry the notices. Both letters bear the heading, "**Lands and Title Act (Cap 133) Notice of Resumption**". Apart from the parcels numbers the notices bear the same words. The first notice read as follows;

*Dear Ms. Zhu,*

*I refer to the grant of Fixed Term Estate over Parcel 192-004-1729 (FTE) dated 1<sup>st</sup> December 2017 ("the Grant).*

*In accordance with clause 3 of the Grant Conditions and clause 10 of the 1<sup>st</sup> schedule of the grant (Commissioner of Lands) has the right, on giving one month notice in writing to the Grantee (you) to take back such portion of the land that may be needed for public purpose.*

*The Land is required for compliance with Aviation Rules regarding aviation safety and security.*

*I am hereby giving you one month notice that FTE is to be resumed for public purposes. You are required to do all things necessary to allow the Grantor to take back possession of the land. Compensation will only be paid for actual loss sustained in respect of improved land otherwise compensation is not payable if the land has not been develop.*

*Thank you for your cooperation in this regard.*

*Yours Sincerely,*

*Allan McNeil  
Commissioner of Lands (Acting)  
Cc: Permanent Secretary, MCA  
ATTORNEY General, Attorney Generals Chambers  
Registrar of Titles, Registrar Generals Office,  
Chair, Land Board.*

The wording of second notice was the same as the first except for the parcel number.

### **Resumption of the Claimants Estates**

It is obvious from the notices that the Commissioner purportedly resumed the land comprising the two estates for a public purpose. It is also clear the Commissioner of Lands relied on clause 3 of the grant instrument to resume the Fixed Term Estates.

The question though is, whether the Lands and Title Act, Cap 133 (LTA) or any other written law conferred on the Commissioner of Lands the right to resume Fixed Term Estates for public purposes.

### **Claimant's Pleadings and Submission.**

Mr Haurii submitted the Claimant is claiming protection under the Land and Titles Act opposing the action of the commissioner in invoking clause 3 of the grant instrument to resume her FTE was contrary to the indefeasible principle. Counsel Haurii's submission essentially is that we have adopted the Torren Title system and as such the Claimant's title to the fix term estates is indefeasible and thus the resumption of the fix term estates contravenes section 71(1) of the Lands and Title Act and section 8 of the Constitution.

The question whether the Commissioner can resumed Fixed Term Estates for public purposes by invoking the reservation in clause 3 of the grant instrument was not an issue before the Court in the two cases, **Levers Solomons Ltd V Attorney General [2013] SBCA 11 SICOA 24 of 20** and **Anthony Chee Ming Wong-v- Attorney General & Commissioner of Lands Civil Appeal case No 3 of 2019**, cited by counsel in their submissions. I am of the view, that even if the Court of

Appeal had confirmed in the cases cited above that the Commissioner can invoke clause 3 of the grant to resume a Fixed Term Estate, the situations in which the Commission can invoke the reservation in clause 3 to resume Fixed Term Estates for a public purpose was not argued before the Court of Appeal.

Based on the Claimant's pleadings and the submission of counsel for the Claimants I think the facts and issues in two cases cited above can be distinguished from the facts and issues in the present case. As alluded to earlier the issue of the Commissioner invoking clause 3 of the grant instrument to resume a Fixed Term Estate for a public purpose was not specifically argued in the two Court of Appeal cases cited by counsels.

**Acquiring land or Resuming Estates for public purposes.**

When land is required for a public purpose, the Lands and Titles Act, Cap 133, specifically made provisions for that under Part V, division 2 of Lands and Title Act, sections 71 to 85. Part V, division 2 applies whether the land needed for a public purpose is a customary land or registered land. In the present case since the land is a registered land the relevant provision is section 72 of the LTA.

Section 71 (1) states "*Whenever it appears to the Minister that any land is required for any public purpose, he may make a declaration to that effect and require the same to be published in such a manner as he shall think fit*"

Section 72 of LTA states "*Where any land specified in the declaration is registered land, the Commissioner shall serve on every owner shown by the land register to be affected thereby a notice in the prescribe form stating and drawing attention to the matters which are to be stated or which attention is to be drawn in or by notice posted pursuant to section 71(3)*"

In view of section 71 and 72 of the LTA, while I agree with the submission of the Solicitor General that the ownership of the land and the perpetual estate always remain with the COL and that he may bring to an end a grant of any fix term estate, I am of the view that the commissioner may only legally do so if the right to do so was conferred on him by the Lands and Title Act or any other written law. I had gone through the Part X of the Lands and Title Act but found no provision that conferred any such right on the Commissioner to resume land for a public purpose. In the present case it is obvious the Commissioner relied on clause 3 of the grant instrument.

I however, considered the reservation in the grant instrument is not a right conferred on the Commissioner or authorised by the LTA or other written law. Thus even if the reservation in clause 3 of the grant instrument is a feature of Common law associated with grants of Fixed Term Estates or a personal contract between the grantor and the grantee they are subject to the specific provisions of Part V, division 2 of the LTA which specifically deals with situations where the government wish to acquire land for public purposes.

In light of the specific provision of Part V division 2 of the Act I accept the submission of counsel Haurii that the reservation in 3 clause of the grant instrument is not a right granted under the Act

or any other written law hence contravenes Part V division 2 of the LTA, particularly sections 71 and 72 of the LTA.

On the materials before the Court it is clear the purpose for which the Commissioner resumed the Claimants Fixed Term Estates was for a public purpose and he did so under the reservation in clause 3 of the form 2, the grant instrument. The form 2 was made pursuant to section 122 of the Lands and Titles Regulation, Cap 93. In the Revised Edition 1996 the equivalent is section 134 of the LTA, Cap 133. Form 2 however has not been revised and still refer to section 122 of the Lands and Titles Regulation, Cap 93. In any event section 134 of the LTA does not conferred any right on the Commissioner of Lands to resume land for public purposes or authorized the use of clause 3 reservation in the grant instrument to resume land for a public purpose.

In this this respect I find that clause 3 of the grant instrument is contrary to the specific provisions of Part V division 2 of the Lands and Title Act thus if used by the Commissioner to resumed the Claimant's FTE is without legal basis hence the Claimants position cannot be said to be incorrect in law. Cost for the Claimant to be taxed if not agreed.

THE COURT



Hon. Justice Emmanuel Kothota  
Puisne Judge

