

## F. FINDINGS

### I. Liability In Issue

#### (i) Non-compliance with Sections 5 and 21 – Claims By and Against the State Act 1996

1. On 27 February 2007, Sannel Consulting Service Inc served on the Office of the Solicitor General a letter dated 26 February 2007 addressed to the Office of the Solicitor General, giving notice of TEL's intention to make a claim against the State ("Notice of claim").
2. On 16 February 1994, TEL's 1989 TSL expired by operation of law. That is, after five years from 16 February 1989, being the date on which notice of such grant was published in the National Gazette: Sections 38 and 66C of the then Land Act (Ch 185).
3. To the extent TEL sought damages, TEL's cause of action accrued during the currency of the TEL 1989 TSL between 16 February 1989 and 16 February 1994, being the last date on which TEL was entitled to be issued with title to the TEL 1989 TSL. This was prior to the commencement of the Claims By and Against the State Act 1996 ('Claims Act') on 27 February 1997.
4. As TEL's cause of action accrued prior to the commencement of the Claims Act, TEL was required to give notice of its intention to make a claim against the State within six (6) months thereafter i.e., by 20 August 1997: Section 21(2) of the Claims Act.
5. TEL did not give notice of its intention to make a claim against the State until 27 February 2007. This was over 9 years and 5 months after the mandatory time period.

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6. Further, the Notice of claim was given without an extension of time to do so by either the Principal Legal Adviser or the National Court: Section 21 (2) (a) and (b) of the Claims By and Against the State Act 1996.

1. A number of discrepancies are also evident:

(a) The Notice of claim is not a request for extension of time to give notice. Clearly it is actual notice of intention to enforce a claim.

Without extension of time being granted by the Principal Legal Officer or the National Court, TEL was not at liberty to lodge his Section 5 notice.

(b) Any suggestion by TEL that the Notice of claim can be deemed to be a request for extension of time, is again flawed as it is addressed to the Office of the Solicitor-General when it should have been addressed to the Principal Legal Officer which is the Attorney-General: Section 3 of the Attorney-General Act 1989.

(c) TEL's position is further compounded by no letter "accepting" the Notice of claim as notice under Section 5 of the Claims By and Against the State Act 1996.

It is found that TEL's Notice of claim breached the mandatory requirements of Sections 5 and 21(2) of the Claims Act and was, therefore, invalid.

It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies.

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It is recommended John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence. It is further recommended that Neville Devete and Gaure Odu should be referred to the Departmental Head of Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties.

(ii) No merits in claim

There were significant issues of fact and law not disclosed to the National Court that substantially affected the assertions and relief sought in the Statement filed in support of the Originating Summons No. 240 of 2007.

(a) Invalid grant of TEL 1989 TSL

The grant of the TEL 1989 TSL was invalid ab initio (from the beginning) on six (6) grounds.

Firstly, part Portion 1455 (later Portion 2126) was not vacant land. NBC had existing improvements on that parcel of land subject of the TEL 1989 TSL and was, therefore, not suitable or available for a TSL: Section 66(1) of the Land Act (Chapter 185).

Secondly, the TEL 1989 TSL was not offered for lease by public tender. This was in breach of the mandatory requirements of Sections 31(2) and 66 of the Land Act (Chapter 185). At the material time, a TSL could only be exempted from advertisement for tender in the event of a disaster occurring as defined in the Disaster Management Act (Chapter 402) necessarily

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requiring the relocating of persons displaced as a result of such disaster onto the TSL. There was no evidence that such disaster had occurred justifying exemption from advertisement for tender of the TEL 1989 TSL.

12. Thirdly, despite NBC's interest in part Portion 1455, the PNG Land Board did not notify NBC by post of the date on which TEL's application for a TSL would be considered in breach of this mandatory requirement under Section 9(2) of the Land Act (C185).

13. Fourthly, despite NBC's interest in part Portion 1455, the PNG Land Board did not forward to NBC notice of the PNG Land Board's recommendations. This was in breach of the mandatory requirement under Section 9(9) of Land Act (C185).

14. Fifthly, despite ECM's registered title over Lot 9, Section 136, the PNG Land Board did not notify ECM by post of the date on which TEL's application for a TSL would be considered. This was in breach of Section 9(2) of the Land Act (C185).

15. Sixthly, despite ECM's registered title over Lot 9, Section 136, the PNG Land Board did not forward to ECM notice of the PNG Land Board's recommendations. This was in breach of the mandatory requirement under Section 9(9) of Land Act (C185).

16. Mahuru Dadi Toka, and Pepi Kimas agreed in evidence that Lot 9, Section 136 was granted in error by DLPP.

R 3 I t i s f o u n d t h a t T E L ' s 1 9 8 9 T S L w a s g r a n t e d i n e r r o r a n d i n v a l i d f r o m t h e b e g i n n i n g

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I t i s r e c o m m e n d e d t h e S t a t e c h a l l e n g e t h e N a t i o n a l C o u r t O r d e r s m a d e o n 2 7 J u n e 2 0 0 8 ( m a n d a m u s ) a n d 2 7 N o v e m b e r 2 0 0 8 ( d a m a g e s )

\ b I t i s f o u n d t h a t J o h n G o a v a , N e v i l l e D e v e t e a n d G a u r e O d u w e r e n e g l i g e n t i n n o t i d e n t i f y i n g t h e s e a n o m a l i e s .

p 3 I t i s r e c o m m e n d e d t h a t J o h n G o a v a , N e v i l l e D e v e t e a n d G a u r e O d u s h o u l d b e r e f e r r e d t o t h e L a w y e r s S t a t u t o r y C o m m i t t e e f o r u n p r o f e s s i o n a l c o n d u c t a n d i n c o m p e t e n c e

(b) ) Expired TEL 1989 TSL

17. TEL's 1989 TSL had expired on 16 February 1994 by operation of law- after five years from 16 February 1989, being the date on which notice of such grant was published in the National Gazette: Sections 38 and 66C of the Land Act (Ch 185).

18. As TEL's 1989 TSL had extinguished on 16 February 1994, there was no such right or interest existing as at 17 February 1994 capable of registration or enforcement, including orders for mandamus.

19. Therefore, when TEL filed OS No. 240 of 2007 on 3 May 2007 there was no reasonable cause of action available.

R} I t i s r e c o m m e n d e d t h e S t a t e c h a l l e n g e t h e N a t i o n a l C o u r t O r d e r s m a d e o n 27 J u n e 2008 ( m a n d a m u s ) a n d 27 N o v e m b e r 2008 ( d a m a g e s )

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f b I t i s f o u n d t h a t J o h n G o a v a , N e v i l l e D e v e t e a n d G a u r e O d u w e r e n e g l i g e n t i n n o t i d e n t i f y i n g t h e s e a n o m a l i e s a n d f a i l e d i n t h e i r d u t y t o a s s i s t t h e C o u r t .

\ b I t i s r e c o m m e n d e d t h a t J o h n G o a v a , N e v i l l e D e v e t e a n d G a u r e O d u s h o u l d b e r e f e r r e d t o t h e L a w y e r s S t a t u t o r y C o m m i t t e e f o r u n p r o f e s s i o n a l c o n d u c t a n d i n c o m p e t e n c e

(c) ) P o r t i o n 2126 N o n - e x i s t e n t 20. P o r t i o n 2126 ( f o r m e r l y p a r t P o r t i o n 1455 ) c e a s e d t o e x i s t u p o n s u b d i v i s i o n i n t o P o r t i o n s 2538 a n d 2539 p u r s u a n t t o a r e v i e w o f t h e W a i g a n i C i t y C e n t r e P l a n o n o r a b o u t 27 F e b r u a r y 2003. T h e c h a n g e i n t h e l e g a l d e s c r i p t i o n , a n d p h y s i c a l m e t e s a n d b o u n d s o f t h e s u b j e c t p a r c e l o f l a n d e x t i n g u i s h e d a n y u n r e g i s t e r e d p r o p r i e t a r y i n t e r e s t t h a t T E L m a y h a v e h a d i n P o r t i o n 2126.

21. T h e r e w a s n o l a n d d e s c r i b e d a s P o r t i o n 2126 a s a t 27 F e b r u a r y 2003, s o t h e r e w a s n o s u c h r i g h t o r i n t e r e s t c a p a b l e o f r e g i s t r a t i o n o r e n f o r c e m e n t , i n c l u d i n g o r d e r s f o r m a n d a m u s .

22. T h e r e f o r e , w h e n T E L f i l e d O S N o . 240 o f 2007 o n 3 M a y 2007 t h e r e w a s n o r e a s o n a b l e c a u s e o f a c t i o n a v a i l a b l e . H o w e v e r , t h e D e p a r t m e n t o f L a n d s & P h y s i c a l P l a n n i n g f i l e s a n d r e c o r d s w e r e n o t r e a d i l y a v a i l a b l e f o r p r o v i d i n g f u l l a n d p r o p e r i n s t r u c t i o n s t o t h e S o l i c i t o r G e n e r a l .

R} I t i s r e c o m m e n d e d t h e S t a t e c h a l l e n g e t h e N a t i o n a l C o u r t O r d e r s m a d e o n 27 J u n e 2008 ( m a n d a m u s ) a n d 27 N o v e m b e r 2008 ( d a m a g e s )

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p D I t i s r e c o m m e n d e d t h a t a n i n q u i r y b e c o n d u c t e d i n t o D e p a r t m e n t o f L a n d s & P h y s i c a l P l a n n i n g

(d) ) A c t i o n t i m e b a r r e d

23. S e c t i o n 16 o f t h e F r a u d s & L i m i t a t i o n s A c t 1988 r e q u i r e d T E L t o c o m m e n c e i t s a c t i o n w i t h i n s i x ( 6 ) y e a r s f r o m t h e d a t e o n w h i c h e a c h c a u s e o f a c t i o n a r o s e .

24. From perusal of the statement of facts pleaded by TEL to give rise to the cause of action, TEL asserted that after being granted the TEL 1989 TSL, its attempts to obtain title between 1989 and 2007 was unsuccessful.

25. The time for TEL to commence legal action for damages accrued during the currency of the TEL 1989 TSL between 16 February 1989 and 16 February 1994. Thus, the last date on which TEL's cause of action for damages accrued was on 16 February 1994. Six (6) years from that time falls on 16 February 2000. Therefore, TEL was required to commence legal proceedings for a claim in damages no later than 16 February 2000.

26. On 3 May 2007, TEL filed OS No. 240 of 2007 in the National Court. That is, over 7 years and 2 months after the time had expired for TEL to bring such an action.

27. Therefore, the court action by TEL was clearly time barred and liable to be dismissed on that basis.

R} It is recommended that the State challenge the National Court Orders made on 27 June 2008 ( mandamus) and 27 November 2008 ( damages)

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It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies and failed in their duty to assist the Court.

It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

(e) Non-service on interested parties

28. The judgment on 27 June 2008 in OS No. 240 of 2007 was given without affording the opportunity to four (4) persons with proprietary interests in parcels of land within the TEL 1989 TSL to be heard. Those persons were the:

- (a) National Broadcasting Corporation (Portion 2126);
- (b) The Evangelical Lutheran Church of Manus (Lot 9, Section 136);
- (c) The Church of Jesus Christ of Latter Day Saints (Lot 11, Section 136);
- (d) The Department of Foreign Affairs (Lot 12, Section 136).

29. Despite their clear legal interests, the interested persons were not served with the Notice of Motion for judicial review. This was in breach of Order 16 Rule 5(2) of the National Court Rules.

30. Further, TEL did not file an affidavit setting out why the interested persons were not served with the Notice of Motion for judicial review. This was in breach of Order 16 Rule 5(5) of the National Court Rules.

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Fb It is recommended that the State challenge the National Court Orders made on 27 June 2008 ( mandamus) and 27 November 2008 ( damages)

Fb It is found that John Goava, Neville Devete and Gaure Odu were negligent in not identifying these anomalies and failed in their duty to assist the Court.

fb It is recommended that John Goava, Neville Devete and Gaure Odu should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence

Rj It is further recommended that Neville Devete and Gaure Odu should be referred to the Departmental Head of Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties

(f) Non-disclosure

31. In OS No. 240 of 2007, TEL sought and obtained orders relating to a Town Sub-division Lease over Allotments 9, 11 and 12 (Consolidated), Section 136, and part Portion 1455, (Waigani City Centre) Milinch Granville, Fourmil Moresby, National Capital District (TEL 1989 TSL5). There were a number of relevant and material facts not disclosed to the Court by Mahuru Dadi Toka and John Goava in pursuit of TEL's claim in OS No. 240 of 2007.

i. . Mahuru Dadi Toka – compensation for Lot 9

32. TEL's Director, Mahuru Dadi Toka, was dishonest in TEL's pursuit of OS No. 240 of 2007 in that he did not disclose at all to his lawyer, Mr John

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Goava of Sannel Consulting Inc., that TEL was given Portion 109 (later 2251) [area of 2.8746 hectares] as compensation for Lot 9, Section 136 [area of 0.837 hectares].

Relevant excerpts of the transcript of 23 September 2009 containing Mahuru Dadi Toka's answers are reproduced hereunder:

[At page 4421]

"MR KASSMAN: After it was found that there was an error, were you compensated for that error in giving you lot 9 when all along it was owned by Evangelical Church? A: Yes, I was

compensated portion 2251. It is 109."

[At page 4426]

'jQ: Do you have a copy of the originating summons'? Basically I will just read, in your proceedings you filed in the National Court, you sought an order directing the Secretary for Lands and the Minister for Lands to issue title to you meaning to Toka Enterprise Limited over land described as portion 2126 and lots 9,11 and 12 of section 136 Hohola. That was one of the order you sought?

A: Yes.

j2-" And yet you had already been compensated for lot 9." [At page 4427-4429]:

'MR KASSMAN: You applied for it, you were given orders by the National Court in 2008. In the course of the hearing was it disclosed to the Court that lot 9 was in fact owned by the Evangelical Church of Manus? Was that ever disclosed to the Court?

A: I never attend to those until the last one, perhaps if my lawyer would —

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Q} Were you ever advised by your lawyer that you could not seek such an order? A: Please, I will refer to my lawyer.

Q: You were not advised as such? Did your lawyer advise you that you could not seek title to lot 9?

A: No.

Q: But you were aware that your proceedings, the proceedings by Toka Enterprises sought title to lot 9 and also sought compensation for the fact that you had not been issued title to not only lot 9 but all other parcels?

A: Yes.

jQ: You are saying you were aware of your claim. A: I am aware of my claim.

Q: So you would admit that that was an error on your part or error on the part of your lawyer in claiming title over lot 9, would you admit to that?

A: What I did was, even though as you said, you look at from your angle that I was compensated but I was just as a package; part and parcel of the land I was granted and gazetted and the whole thing goes into the Court. And it would have been — there is always ways.

Q: But you never disclosed to the Court that you had been compensated for part of the error, lot 9. You were given portion 109 which is now portion 2251. A: Are you talking from the damages angle or title?

Q: In Court, when you went into Court that was not disclosed, the fact that you were compensated already by the Department of Lands for that area. In fact, I think you were given a block of land that is much larger than what you actually lost in lot 9.

A: So what would you say if I am given a larger block than block 9? Q: You have done well.

A: Good luck to me, thankyou. Q: But that was not disclosed."

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TEL continued to assert to the DLPP its entitlement to compensation for the loss of Lot 9, Section 136. John Goava of Sannel Lawyers was not aware of this baseless assertion until the Commission informed him that TEL had already received compensation for Lot 9, Section 136.

Mahuru Dadi Toka eventually acknowledged this was wrong when pressed by Counsel Assisting, as shown in relevant excerpts of the transcript of 23 September 2009 containing his answers, which are reproduced hereunder:

[At page 4433]

"Qj You mentioned you are no longer pursuing lot 9 or compensation for lot 9. I will just show you a copy of a letter that was sent to the Department of Lands by your lawyer. It is a letter dated 26 May 2009 from Sannel Consulting Services addressed to the Department of Lands and Physical Planning, addressed to Ms Sheila Sukwianomb, legal officer. Department of Lands and Physical Planning. Mr Toka, in this – the letter is dated 26 May 2009, you are still claiming compensation for the loss of lot 9, section 136. As you can see, paragraph No 3, you are still claiming compensation for the loss of lot 9.

A: I did ask my lawyer to write this because Lands Department failed to issue titles and I had to hit them to comply with the Court decision. But when it would come to Court decision, I think it was a letter written from Kimas, Secretary that —

Qj Mr Toka, you have been compensated for the loss of lot 9. You have been given portion 109 which is now portion 2251, the Gordon industrial area block which you scry you developed and you sold. So you have been compensated for that and you are still pursuing compensation. That is wrong. You do not see that as being wrong?

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A: I am just playing the kind of a game from Lands Department to come forward with my title because —

Q: So you admit that that is wrong. A: I admit that is wrong.

j2' YOU should not do it. Chief if I could for the record have that marked as Toka —

THE CHAIRMAN: 4.

MR KASSMAN: Toka 4, thank you.



[ EXHIBIT TENDERED – TOKA 4 – LETTER FROM SANNEL CONSULTING SERVICES DATED 26 MAY 2009 ] "

ii. . Mahuru Dadi Toka – competing interests in Lot 9 \ 11 and Portion 2126

Mahuru Dadi Toka also gave evidence that despite having knowledge of the competing interests in Lots 9 & 11 of Section 136 and Portion 2126 he deliberately made no such disclosure. No reasonable explanation was given for taking this position. This is shown in relevant excerpts of the transcript of 23 September 2009 containing his answers to questions raised by the Chief Commissioner and Counsel Assisting, which are reproduced hereunder:

[At page 4430 – 4432]

"Q: Do I understand what you are saying there is that, T was allocated 9, 11, 12, part 4145 so one side got it, nobody had any right, the Land Department had no right to allocate it, let it out or sell it to anybody else." That is the basis of you making the claim?

A: Yes.

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Q: I understand that. Whether in fact it is a valid position to have is another matter. But I understand what you are saying. So you were aware then that lot 11 was also, had changed hands or was in the title to someone else at the time you filed the proceeding?

A: I am aware of that.

Q: Yes, alright.

MR KASSMAN: Was that disclosed to the Court? A: Sony?

Q: Was that disclosed to the Court? Did you advise or your lawyer advise the Court at the — A: No.

Q: At the time you commenced the action or prior to you obtaining judgment?

A: No, I did not disclose my knowledge of lot 11 had a title because I know there is a legal battle on my part on lot 11.

Q: So before orders were issued by the Court directing Lands to issue your title that you asked for and before you obtained your judgment for damages of 28 million, did you disclose to the Court or did your lawyer disclose to the Court that lot 11 was owned by the Church of Latter Day Saints? Did you disclose that?

A: No.

Q: And neither did your lawyer? A: No.

Q: But you were aware of it; you were aware of it?

A: I was aware of it. I had no intention of telling my lawyer. Q: Why was that?

A: But I know there was a great error from Lands Department and I know.

Q: But you are asking for fairness on the part of the State but you yourself are not exercising that fairness by truthfully disclosing information that is relevant for the Court's consideration. You still felt that you were not obliged to disclose that information?

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A: No.

Q: So that is both in relation to lot 9 which is owned by Church of Manus and lot 11 owned by the Church of Latter Day Saints, and also the NBC? A: Sony? Q: The NBC? A: NBC, yes.

Q: The aerial towers on 2126, that was not disclosed to the Court? A: No, that was not disclosed."

Hi. John Goava – misled by Mahuru Dadi Toka and misled Court

As a result of the foregoing John Goava of Sannel Consulting Services Inc did not assist the Court on the following:

(a) There was no cause of action as TEL's 1989 TSL had expired on 16 February 1994 by operation of law after five years from 16 February 1989.

(b) TEL had not made any application afresh for a TSL.

(c) The time for commencement of legal action by TEL for damages expired on or about 16 February 2000. OS No. 240 of 2007 was filed by TEL on 3 May 2007. That is, over 7 years and 2 months out of time.

(d) TEL was given Portion 109 (later 2251 – 2.8746) as compensation for Lot 9, Section 136 (0.8670 hectares).

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(e) The interests that National Broadcasting Corporation (Portion 2126); The Evangelical Lutheran Church of Manus (Lot 9 Section 136); The Church of Jesus Christ of Latter Day Saints (Lot 11, Section 136); and Department of Foreign Affairs (Lot 12,136) had in parcels of land within the TEL 1989 TSL.

(f) As at 27 February 2003, Portion 2126 (formerly part Portion 1455) no longer existed as it was sub-divided and described as Portions 2538 and 2539.

(g) TEL has received a total land area of 9.10 hectares from the DLPP and State, being in excess of 0.29 hectares from the original area granted under the TEL 1989 TSL (8.81 hectares),

Consequently, John Goava of Sannel Consulting Services Inc. misled the National Court in granting Orders on 7 June 2007 (Leave), 27 June 2008 (mandamus) and 27 November 2008 (damages). This concession was made by John Goava as shown in relevant excerpts of the transcript of 23 September 2009 containing his answers, which are reproduced hereunder:

[At page 4463 – 4466]

'MR KASSMAN: Yes, we do have the transcript. Mr Goava, I will just maybe just read from the transcript on the application for leave, which was conducted on 7 June 2007. At page 4 of the transcript, His Honour Justice Lay asked, 'Has there been any to your client's knowledge, have there been any competing grounds made in respect of this land?' In response, you said, 'Your Honour, according to our client he has made – there are no competing issues.' Now, I interpret to be saying, the Court asking you, is there any other competing interest, is there any other party with an interest in the land, the subject of your action, and you advise the Court that there were no competing interests.

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A: Counsel, the reason why I said that was because we were not too sure about the boundary. THE CHAIRMAN: No, but just those words. That is what you said?

A: Yes.

Q: But you said that you knew about the Tatter Day Saints, that they held the title? A: That is — Q: You knew the NBC had an interest?

A: Commissioner, to answer your question there was — when you raised the issue of title there was no title issued to NBC at that time.

j2– No, not to NBC but the title was already issued to the hatter Day Saints, was it not? A: As I said earlier I was not aware of that title over Tot 9 and Tot 11.

f): You had no knowledge of Tatter Day Saints?

A: No. So I could not assist the Court in that aspect as far as my — MR KASSMAN: Do you concede that you misled the Court?

A: I mean at that time I did not have that information so— Q: So you misled the Court?

A: But I should not say it because it is something that I did not know, how would I say the opposite.

f): Well?

A: It would be contradictory.

Qj I am suggesting that you should have said, "I cannot conclusively say your Honour, I might need to conduct a title search." That would have been in my respectful view, that would have been the appropriate course rather than saying^ 'Your Honour, they are no competing interests.'

A: Because at that point in time, my instructions as well as I was aware that there was no competing interests.

THE CHAIRMAN: But then was. There was no resolution regarding the NBC. You knew that the –you did not know about the boundaries. There was an enormous amount of information that you did have to answer that question of the Judge.

A: Chief Commissioner, in respect of Allotment 9 and 11, I never had that information regarding the new proprietorships. MR KASSMAN: That is the point I am saying. You have said that you had not obtained results of a title search in respect of lots 9 and 11. Whereas if you had, and if that had disclosed that there was no title or it was not owned by anyone else, then you would have been correct. In this instance you had not done a title search and as such you could not assist the Court one way or another. Your disclosure was misleading that is what I am putting to you. You misled the Court to believe that there was no other interest other than your client's interest in lot 9, lot 11, lot 12 and Portion 2126. You have misled the Court into believing that it was only your client that had an interest in those lands and as such the Court thought, obviously considered that it was not necessary to hear from anyone else, that it was safe to rely on your word and as such the Court proceeded to grant leave for judicial review to your client.

A: I think to use the word 'misleading', I think it is not appropriate because I had no intentions of misleading the Court at that time. Q: So it would be proper now for you to say, I was wrong? A: Given the evidence that is now before this Commission, I would say I am wrong.

Q: So I am correct in saying that, at that time you misled the Court? A: If you may, I will concede to that.

THE CHAIRMAN: What would your duty be as a lawyer now? A: I would try and correct that anomaly; discrepancy."

But it is recommended that the State challenge the National Court Orders made on 7 June 2007 (leave), 27 June 2008 (mandamus) and 27 November 2008 (damages)

Fb It is found that John Goava misled the National Court by not disclosing that his knowledge of the proprietary status of the parcels of land in question was not conclusive.

Fb It is recommended that John Goava should be referred to the Lawyers Statutory Committee for unprofessional conduct and incompetence.

pb It is found that Mahuru Dadi Toka was dishonest in failing to disclose to his lawyer and the National Court in OS No. 240 of 2007 his knowledge of the compensation TEL received in respect of Lot 9, Section 136, Hohola, NCD.

pb It is recommended that Mahuru Dadi Toka should be referred to the Royal PNG Constabulary for fraud investigation.

II. Assessment of damages 39. On or about 21 November 2007, National Court conducted an ex parte hearing on assessment of damages due to non-appearance by the Solicitor General.

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40. Further, no evidence or proper submissions were filed or made by the Solicitor General for the State parties in response to TEL's claim for damages.

41. On 27 November 2007, the National Court entered judgment in the sum of K27,784,536.00 in favour of TEL, consisting substantially of past and future economic losses spanning 14 years from 1995 to 2008.

42. The non-disclosure by Mahuru Dadi Toka, Toka Enterprises Ltd and John Goava of Sannel Lawyers of the findings discussed above were relevant to the hearing on the assessment of damages.

Fb It is recommended that the State challenge the National Court Orders made on 7 June 2007 (leave), 27 June 2008 (mandamus) and 27 November 2008 (damages)

Fb It is found that Mahuru Dadi Toka was dishonest in that he did not disclose to his lawyer and the National Court his knowledge of the compensation received in respect of Lot 9, Section 136, Hohola, NCD.

It is recommended that Mahuru Dadi Toka should be referred to the Royal PNG Constabulary for fraud investigation.

It is found that Neville Devete and Gaure Odu were negligent in not preparing adequately nor appearing at all for the hearing on a assessment of damages.

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It is recommended that Neville Devete and Gaure Odu should be referred to the –  
Lawyers Statutory Committee for unprofessional  
conduct and incompetence of Departmental Head of Department of Justice & Attorney  
General on a charge of being negligent or careless in the discharge of their  
duties

III. Steps taken (or not taken) by Solicitor General in defence of the claim

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As examined above, clearly there is ample evidence of serious failures on the part of the Solicitor-General, Mr Neville Devete and the action officer Mr Gaure Odu in the performance of their respective professional duties as lawyers for the State because they did not:

(a) raise the obvious flaws in TEL's Notice of claim in respect of the Claims By and Against the State Act 1996;

(b) seek instructions from the relevant DLPP officers –

(i.) prior to TEL's application for leave to apply for judicial review despite having appeared as early as 25 May 2007 for all the defendants; (ii.) between 17 August 2007 and 27 June 2008 for the  
judicial review hearing; (iii.) between 28 June 2008 and 21 November 2008 for the hearing on  
assessment of TEL's damages.

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(c) raise various discrepancies of there being no liability or grounds available for judicial review against the named defendants, including the State;

- (d) ensure the file was transferred to and conducted by another lawyer when the lawyer in carriage was on circuit or unavailable for any reason;
- (e) prepare adequately or at all for any of the hearings nor appear for the hearing on assessment of damages
- (f) providing any advice to the Secretary, DLPP and Registrar of Tides in respect of discrepancies of mandamus orders obtained by TEL and parcels available for tide to be issued to TEL
- (g) consider the prospects of challenging the National Court orders in the nature of mandamus and the subsequent award of K27 million in damages before the time limited to do so expired.
- (h) brief the Attorney General on the prospects of an appeal or setting aside the order in the nature of mandamus and the subsequent award of K27 million in damages before the time limited to do so expired.

Further, no evidence or submissions were filed in response to TEL's claim for damages.

It is recommended that Neville Devete and Gaure Odu should be referred to the:

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Lawyers Statutory Committee for unprofessional conduct and incompetence  
 Secretary, Department of Justice & Attorney General on a charge of being negligent or careless in the discharge of their duties

It is recommended that an inquiry be conducted into the Office of the Solicitor General

#### IV. Lack of Jurisdiction to issue TEL's UDL June 2009

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45. The National Court made orders for mandamus (27 June 2008) for DLPP to issue tide to parcels of land that-

- (a) no longer existed (Portion 2126);
- (b) had existing registered proprietors (Lots 9 and 11); and
- (c) had one land parcel (lot 9 – 0.8670 hectares) previously replaced by way of compensation for another larger parcel of land (Portion 2125 – 2.8746 hectares).

46. Thus, the decision by the DLPP to issue parcels of land over the same area irrespective of the change in its legal description and area was a breach of the Court Orders.

47. Further, TEL's UDL June 2009 is invalid as it was obtained in breach of the procedures under Division X of the Land Act 1996.

48. Moreover, the term of TEL's UDL June 2009 is for a term of five (5) years commencing 11 June 2009, but erroneously records the expiration date as

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51. 10 June 2104 (a term of 95 years). This was an error as acknowledged by the Secretary, DLPP, Registrar of Titles, Mahuru Dadi Toka and

It is recommended that the Registrar of Titles take all steps necessary to cancel TEL's UDL June 2009 for breach of the Court Orders made 27 June 2008 (mandamus) and Division 10 of the Land Act 1996

It is recommended that the Registrar of Titles take all steps necessary to correct the year on which TEL's UDL June 2009 will expire to read "2014"

It is recommended that an inquiry be conducted into the Department of Lands & Physical Planning

#### V. Processing of claim and Pay-out

49. There has been no payment in respect of this matter. At this stage, this aspect does not arise for consideration.

50. The Commission notes that on 11 September 2009 Neville Devete, Solicitor General has endorsed the Certificate of Judgment stating that "the State proposes to take further action in this matter and satisfaction of judgment cannot take place".

#### G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

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## Referral to the Attorney General

1. Challenge the National Court orders made on 7 June 2007 (leave); 27 June 2008 (mandamus); and 27 November 2008 (K27 million in damages) on the following basis –
  - a. TEL's notice of intention to make a claim against the State was invalid;
  - b. PNG Land Board's grant of the TEL 1989 TSL to TEL was invalid from the beginning;
  - c. TEL had no existing right to a TSL or UDL as at 16 February 1994 because its TEL 1989 TSL had expired on 16 February 1994;
  - d. There was no land described as Portion 2126 as at 27 February 2003
  - e. OS No. 240 of 2007 filed on 3 May 2007 by TEL was statutory time barred by seven (7) years and two (2) months;
  - f. NBC, ECM and LDS were three (3) persons with proprietary interests in parcels of land within the TEL 1989 TSL, but they had no knowledge of TEL's claim and were never afforded an opportunity to be heard;
  - g. TEL and its lawyer did not give disclosure of TEL receiving Portion 109 (later 2251) as compensation for Lot 9, Section 136
  
2. Appropriate investigative and disciplinary action against Neville Devete and Gaure Odu for their gross negligence in protecting the interests of the State

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Referral to the Registrar of Titles through the office of Secretary,  
Department of Lands & Physical Planning

3. Issuance of summons to TEL to deliver the instrument in respect of Urban Development Lease, Volume 34, Folio 173, over lands described as Portion 2534, 2535, 2538, 2539 & (DC/136/019) (CONS), Granville, Moresby, NCD, containing an area of 6.227 hectares (TEL UDL June 2009') to:
  - a. Amend the year of expiry to read "2014"
  - b. Cancel the TEL UDL June 2009 for being issued in error (inconsistent with Court Order made 27 June 2008 and breach of Division X of Land Act 1996)

Referrals to the Lawyers Statutory Committee

4. Neville Devete, Solicitor General for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected

5. Gaure Odu, action officer for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected

6. John Goava of Sannel Lawyers for dishonest, dishonourable, improper and unprofessional behaviour, and for failing to be competent in all his professional activities in assisting the Court

Referrals to the Royal PNG Constabulary

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7. Mahuru Dadi Toka for investigation on possible fraud

Referrals to the Prime Minister

8. Appoint a Commission of Inquiry into the Department of Lands &

Physical Planning

9. Appoint a Commission of Inquiry into the Office of Solicitor General

Consequential Legislative or other reform

10. Attorney General's Act 1989 be amended to the following effect:

- a. the Solicitor General must be a lawyer of high standing and at least with 10 years litigation experience
- b. the Solicitor General to be appointed by Judicial Legal Services Commission

11. Claims By & Against the State Act 1996 be amended to the following effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing

12. Land Act 1996, related legislation and instruments be amended to the following effect:

- a. All Urban Development Leases shall not be exempted from advertisement for application or public tender
- b. Exemption of all State land from advertisement for application or public tender shall be determined by a Land Exemption Committee consisting of the Minister, Secretary, DLPP and State Solicitor who must all agree;
- c. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:
  - i. The name of the proprietor and date of acquisition;
  - ii. Nature of interest/type of lease/license;
  - iii. Zoning status of parcel of land;
  - iv. Status of covenants and caveats registered, if any.
- d. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease

13. Public Services (Management) Act 1995, related legislation and instruments be amended to the following effect:

- a. Prescribe "serious disciplinary offence" is committed where:
  - i. State line agency named as defendant fails to provide full and proper instructions to SG

- ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
- b. On a finding of "serious disciplinary offence" –
  - i. Ground for termination
  - ii. Ineligible for appointment to any public office

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"Peter Yama

**PARTIES:**

(i) For the State:

- (a) Department of Lands & Physical Planning ("DLPP")
- (b) Department of Justice and Attorney General ("DJAG")
- (c) Department of Finance ("DoF")

(ii) Claimant:

- (i) Mr. Peter Yama

**NATURE OF CLAIM:**

Peter Yama alleged that between 1990 and 1999 the Secretary for Lands Physical Planning and The State breached their duties to him as a registered proprietor of a State lease in Madang when third parties asserted competing interests and prevented him access.

Peter Yama commenced proceedings seeking damages against the Secretary for Lands & Physical Planning and The State, which were purportedly settled by Deed of Settlement.

#### DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

In or about July 2008, the Secretary for Justice & Attorney General, Hitelai Kiele- Polume referred to this Commission the Solicitor General file (SG 392/2008) on the National Court proceedings referenced OS 371 of 2008

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involving Peter Yama -v- Gabriel Yer, Secretary for Finance; Leonard Louma, Chief of Staff, Department of Prime Minister; and The State.

OS 371 of 2008 concerned a Deed of Settlement executed on 28 November 2002 between Zacchary Gelu as Solicitor General on behalf of the State and Peter Yama. The Deed of Settlement was for the amount of K15.5 million and purported to settle an earlier proceedings WS 1315 of 2002 filed by Peter Yama against the Secretary for Lands & Physical Planning and The State in which he sought damages in the sum of K38,690,000.00.

Peter Yama collected a cheque from the Department of Finance in the sum of K7.75 million pursuant to the Deed of Settlement, and obtained orders in OS 371 of 2008 enforcing the Deed of Settlement when clearance for payment of the cheque was stopped. Those orders were appealed against in Supreme Court proceedings styled SCA 53 of 2008 in which interim stay orders have since been granted pending determination of the appeal. The Supreme Court heard the substantive appeal on Friday, 4 September 2009 and has reserved for decision. The Commission is a party (fourth appellant) in the appeal.

In the circumstances, this matter falls within Terms of Reference No. 1, 5, 8, 10,12,13 and 14.

#### D. SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

- (a) National Court Registry –
  - (i) Supplementary file referenced WS 1315 of 2002
  - (ii) Original Court file referenced OS No. 317 of 2008
- (ii) Office of Attorney General & Solicitor General –
  - (i) Original file SG 392/2008
  - (i) Evidence of –
    - (c) Dr Allan Marat, Minister for Justice & Attorney General
    - (d) Neville Devete, Acting Solicitor General
    - (e) Lias Kandi, Deputy Solicitor General (Courts)
    - (f) Hitelai Kiele-Polome, Secretary for Justice & Attorney General

(iii) Department of Lands & Physical Planning –

- (ii) Land files for –
  - o Lot 38, Section 68, Madang
  - o Lot 39, Section 68, Madang
- (i) Evidence of Pepi Kimas, Secretary

(iv) Department of Finance —

- (i) Gabriel Yer, Secretary for Finance
- (i) Melton Bogege – Senior Accountant – Accounts Payable
- (ii) Robert Saplos, Commitment Clerk – Accounts Payable
- (iii) Yeme Kaivila, Certifying Officer – Accounts Payable

(v) John Kumuro, former Acting Solicitor General

(vi) Zacchary Gelu, former Solicitor General

(vii) Francis Damem, former Attorney General

2. The relevant transcripts of proceedings are provided with this Brief.

3. The following critical witnesses were provided an opportunity to assist the Commission with its inquiries but did not do so:

(a) Department of Finance —

(i) Doriga Henry, Acting Deputy Secretary — Operations

(ii) Josephine Dinnie, Acting Assistant Secretary – Financial Controller

(iii) Pauline Nuau, Acting First Assistant Secretary – Cash Management & Expenditure Control Division

(iv) Loretta Kila, Accountant — Expenditure

(b) Peter Yama

4. The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

#### E. BRIEF FACTS

1987

1 On 8 October 1987, Section 68 Allotment 38, Madang was subdivided into two (2) separate allotments namely, Allotments 39

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and 40 upon registration by the Surveyor General of the Survey Plan No. 12/245 completed on 9 November 1970 by Allen James Brown. [Annexure "D" to Affidavit of Pepi Kimas marked "LD 1".]

1989

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2002

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On 28 June 1988, Peter Yama was registered as the proprietor of the land described as Section 68 Allotment 39, Madang in State Lease Volume 110 Folio 86. The Lease was for 99 years commencing from 27 June 1988. The improvement covenant was to a minimum value of K100,000.00 by 27 June 1989.

By letter dated 15 July 2002 to the Acting Solicitor General, Poro Lawyers gave notice of Peter Yama's intention to make a claim against the State "for damages and economic loss and breaches of Terms and Conditions of a Business Lease granted to him" in respect of Allotment 39 Section 68, Madang. That notice was based on the alleged failure of the State through the Department of Lands and Physical Planning to address the landowner issues and disturbances caused to Peter Yama by the landowners of Yabob village in respect of Section 68, Lot 39, Madang.

By letter dated 25 July 2002 to Poro Lawyers, Mr Zacchary Gelu, Solicitor General accepted their letter dated 15 July 2002 notice under Section 5 of the Claims By & Against the State Act 1996, and stated that he would seek appropriate instructions from the Department of Lands and Physical Planning.

On 9 August 2002, Poro Lawyers filed a Writ of Summons No. 1315 of 2002 endorsed with a Statement of Claim on behalf of Peter Yama.

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The State was named as the First Defendant and Pepi Kimas, Secretary for Lands & Physical Planning was named as the Second Defendant. Essentially, the claim was for liquidated damages in the sum of K38,690,000.00 for business income and economic loss suffered resulting from the Secretary, Department of Lands & Physical Planning's failure – for which the State was alleged to be vicariously liable – in resolving traditional landowner issues in respect to Section 68 Lot 38 in the town of Madang.

By letter 4 September 2002 to Poro Lawyers, the Solicitor General Zacchary Gelu stated that having (1) been served with the Writ of Summons No 1315 of 2002 on behalf of the State and the



Secretary for Lands and Physical Planning and (2) the opportunity to study the pleadings "and other relevant information and the negotiations we had\ he formed the view that the matter "can be appropriately settled out of court".

Zacchary Gelu relied on 4 grounds in support of his position and offered K15.5m as settlement. In respect of the first ground, Zacchary Gelu found that Peter Yama had indefeasible title. As to the second ground, the State through the Minister for Lands & Physical Planning granted Peter Yama the lease "without due regard to the landowner issues which have affected your clients (sic) ability to carry out commercial activities on Lot 39 Section 68, Town of Madang"

With regard to the third ground, Zacchary Gelu noted Peter Yama's claim for "interest, damages, economic losses, future economic opportunities, stress and hardship" arising from the State's failure in ensuring that Peter Yama has "access to quiet possession of the property in order to comply with the Terms and Conditions of the Lease."

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10 In relation to the fourth ground, Zacchary Gelu stated that in light of the claim being for K38,690,000.00 he considered that the parties can negotiate and reach agreement.

11 A Deed of Settlement dated 28 November 2002 was then executed between Peter Yama and the Solicitor General, Mr Zacchary Gelu on behalf of the State, in the sum of K15.5 million ("The Deed"). The Deed recited WS 1315 of 2002, but referred to Lot 39 of Section 68, being a different portion of land to that pleaded in the said proceedings.

2008

12 By letter dated 5 May 2008 to Secretary for Finance, Poro Lawyers essentially made demand for payment of K15.5 million pursuant to the Deed of Settlement dated 28 November 2002. A copy was circulated to the Solicitor General.

13 By letter dated 29 May 2008, the Acting Solicitor General, Neville Devete, gave clearance for payment of K15.5 million pursuant to the Deed of Settlement dated 22 November 2002.

14 On 24 June 2008, Department of Finance drew a cheque no. 880355 in the sum of K7.75 million payable to Peter Yama. On the same day, Peter Yama collected the said cheque from Ms Kila, Expenditure Control Branch from the Pay Office at Vulupindi Haus on the second floor.

15 On 25 June 2008, Doriga Henry, Caretaker Secretary placed a stop payment on Cheque No.

880355 for K7.75 million payable to Peter Yama, until further notice.

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16 On 26 June 2008, Doriga Henry, Caretaker Secretary uplifted the stop payment issued on 25 June 2008 in respect of cheque number 880355 for K7.75 million payable to Peter Yama.

17 On 26 June 2008, Leonard Louma, Acting Chief of Staff, Office of Prime Minister conveyed written direction on behalf of the Minister for Finance and Treasury to put a stop payment to the cheque issued  
. to Peter Yama.

18 On 27 June 2008, Peter Yama deposited cheque number 880355 for K7.75 million into his personal account at ANZ (PNG) Ltd, but funds were not cleared by Bank of PNG due to the stop-payment on the said cheque.

19 On 2 July 2008, Peter Yama filed Originating Summons styled number 371 of 2008 in the National Court seeking Orders to declare the liability of the State under the deed of settlement, and compelling the State to pay the sum of K15.5 million.

20 The very next day after filing of the proceedings (i.e., on 3 July 2008) Peter Yama obtained an Order in the National Court compelling the State to clear the cheque in the sum of K7.75 million, forthwith.

21 The next consecutive day on 4 July 2008, after entry of the Order, payment not having been made, Peter Yama brought contempt proceedings against Gabriel Yer, Secretary for Finance for contempt of the Order for payment Those proceedings are part heard before the National Court.

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22 On 8 July 2008, the Secretary, Department of Finance; Chief of Staff, Prime Minister's Department and the State filed an appeal (SCA No. 53 of 2008) against the National Court Order of 3 July 2008. The Supreme Court stayed that Order, the contempt proceedings and OS 371 of 2008 in the National Court since 9 July 2008 pending determination of the appeal.

23 On 26 August 2008, the Chief Commissioner was joined as the Fourth Appellant in SCA 53 of 2008.

24 On 24 October 2008, the State filed Originating Summons styled 658 of 2008 challenging the validity of the Deed of Settlement dated 28 November 2002. This action is pending determination.

2009

25 The Supreme Court heard the substantive appeal on Friday, 4 September 2009 and has reserved for decision. The Commission is a party (fourth appellant) in the appeal.

## FINDINGS

### I. Liability In Issue

#### (i) Non-compliance with Sections 5 and 21 – Claims By and Against t h e S t a t e Act 1996

1 Poro Lawyers wrote a letter dated 15 July 2002 addressed to the Acting Solicitor General, Mr John Kumora, giving notice of Peter Yama's intention to make a claim against .the State (Notice of claim').

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Upon examination of the Notice of claim the Commission notes Peter Yama gave "notice of his intention to sue the State for damages and economic loss and breaches of Terms and Conditions of a Business Lease granted to him" in respect of property described as Lot 39, Section 68, Madang.

Peter Yama's claim was against the State and the Secretary, Department of Lands and Physical Planning. He was required by Section 5 of the Claims By & Against the State Act 1996 (Claims Act) to give notice of his claim to either the Attorney-General or the Solicitor-General. He gave notice in writing on or about 15 July 2002 by hand-delivering the Notice of claim setting out the nature of his claim to the secretary to the Office of Solicitor-General. Therefore, he complied with Sections 5(1) and 5(3) of the Claims Act.

As to the cause of action, the Notice of claim is not immediately clear. The Notice of claim essentially states that Peter Yama has suffered economic loss and damages from non-compliance with the terms and conditions of the lease as a result of the Department of Lands & Physical Planning's failure to address and resolve the land owner issues despite Peter Yama's requests to that Department to do so. The only condition of the lease referred to was the covenant obligating Peter Yama to erect improvement to a minimum value of K100,000.00. At best the claim, it seems, was in the nature of breach of contract: see Section 5(2)(b) of the Claims Act.

No further period for giving notice of intention to make a claim has been allowed by the Principal Legal Adviser or the National Court (see Sections 5(2)(c) and 21(2)(a) and (b)). Therefore, the question is whether he gave notice of his intention to make a claim within six

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months after the occurrence out of which the claim arose (if the occurrence took place after the coming into operation of the Act) or within six months after the coming into operation of the Act (if the occurrence took place before the Act coming into operation).

6 The only date referred to in the Notice of claim is 27 June 1988, being the commencement of the lease. To that extent, Peter Yama should have given notice of his intention to make a claim against the State by 20 August 1997 pursuant to Section 21(2) of the Claims Act. He did not give notice until five years and nine months after that, in May 2003.

7 Peter Yama's Notice of claim breached the Claims Act and was, therefore, invalid. He failed to comply with a mandatory procedural requirement.

8 By reference to the statement of claim in WS 1315 of 2002 for purposes of giving notice under the Claims Act, there are three alleged instances that gave rise to Peter Yama's cause of action, the first in 1990, the second in 1992 and the third in 1999. Peter Yama had six months from those "dates" to give notice under the Claims Act.

9 In relation to the first and second instances, they accrued prior to the commencement of the Claims Act. Thus, Peter Yama had to give notice no later than 20 August 1997, being six months after commencement of the Claims Act on 20 February 1997: Section 21(2) of the Claims Act.

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10 Peter Yama did not give notice of his intention to make a claim against the State until 15 July 2002. This was over 4 years and 11 months after the mandatory time period.

11 For the third instance in 1999, Peter Yama needed to give notice of his intention to make a claim against the State by (at the latest) a date in the year 2000. Peter Yama failed in this regard and was out of time by at least eight (8) years.

12 Most importantly, what Peter Yama needed was extension of time to give notice. This is required by Section 5(2)(c) of the Claims Act, which provides

"a notice under this section shall be given within such further period as the Principal Legal Advisor or the Court before which the action is instituted, on sufficient cause being shown, allows."

13 A number of discrepancies are evident:

(a) The Notice of claim is not a request for extension of time to give notice. Clearly it is actual notice of intention to enforce a claim. Without extension of time being granted by the Attorney General or the National Court, Peter Yama could not lodge a valid notice of his intention to make a claim against the State.

(b) Further, any suggestion by Peter Yama that the Notice of claim can be deemed to be a request for extension of time is again flawed as it is addressed to the Acting Solicitor-General when it should have been addressed to the Principal Legal Adviser,

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which is the Attorney-General (section 3 Attorney-General Act 1989).

(c) Peter Yama's position is further compounded by the fact that the letter from the Acting Solicitor General "accepting" his Notice of claim:

(i) does not grant an extension of time; and further

(ii) was signed by Zacchary Gelu as the Solicitor-General when it should have been issued by the Attorney-General as Principal Legal Adviser.

14 The Solicitor General, Zacchary Gelu, wrote a letter dated 25 July 2002 to Poro Lawyers in which he acknowledged receipt of their Notice Letter and stated "the notice is accepted to enable your client to proceed. I will seek appropriate instructions from the Department of Lands & Physical Planning. We note in passing Zacchary Gelu never sought nor obtained instructions from the Department of Lands & Physical Planning. That issue is further analyzed later in detail.

(ii) No cause of action

15. The Statement of Claim endorsed to the Writ of Summons No. 1315 of 2002 pleaded Allotment 38 however, as at the date of filing of the Writ, Mr Kimas has confirmed that there was:

(a) no allotment 38 at all (it had been subdivided to form Allotments 39 and 40)

(b) no allotment 38 owned by Peter Yama.

16. The statement of claim as pleaded does not disclose a cause of action as against the Secretary for Lands & Physical Planning and or The State. It is patently clear that the remedies available in law are for Peter Yama (as the tide owner) to assert his title and claim orders (among others) for eviction, trespass and the like, and restrain any further harassment or impediment to his legal right to undisturbed occupation and development of his land. Further, to the extent that the pleadings related to the alleged breaches by the Secretary for Lands & Physical Planning there is no specific reference to the relevant clauses of the Lease or the provisions of any legislation.

17. In addition, Peter Yama alleges the Land Titles Commission issued a restraining order. We note the Land Titles Commission has no such jurisdiction only the Land Court. Further, the area of land seems generalized which is unusual.

18. If anything, Peter Yama's cause of action is purely against the "customary landowners" whom he alleges prevented him from access to his land.

(iii) Action time barred

19. The statement of facts pleaded to give rise to Peter Yama's causes of action render his action time-barred. Section 16 of the Frauds & Limitations Act 1988 required Peter Yama to commence his action within six (6) years from the date his cause of action arose.

20. Peter Yama states that after being issued title to Allotment 38 on 28 November 1988, he attempted to move in and develop his land but was prevented from doing so by disgruntled traditional landowners on two occasions, firstly in the year 1990 (time for commencement of

legal action expired 1996) and again in the year 1992 (time for commencement of legal action expired 1998).

21. Peter Yama then alleges that some seven (7) years later in 1999, restraining orders were taken out against him by a named tribe. No actual dates are stated. In our view, this third instance is designed to circumvent the 6 year time limitation as the Writ was filed on 9 August 2002.

(iv) Lease Rental Arrears

22. At the time of filing of the Writ of Summons (9 August 2002), Peter Yama had a sum of K41,214.86 in outstanding annual rentals to the State in respect of his lease over Section 68 Lot 39, Madang.

23. The outstanding arrears would have been relevant for purposes of pleading a cross-claim and even a ground for setting in motion the forfeiture provisions under section 122 of the Land Act

1996.

24. As at 2008, Peter Yama's arrears stand at K61,014.86, which equates to approximately 18 years of unpaid rent i.e., since 1990.

(v) Stale Writ

25. The Secretary for Lands & Physical Planning Mr Pepi Kimas, who is named as the Second Defendant in National Court proceedings WS 1315 of 2002, has given evidence orally and in writing by his letter of 1 August 2008 that the records in his Office confirm that the Office of Secretary for Lands & Physical Planning was never served with a sealed copy of the Writ of Summons.

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26. Further, Mr Kimas has no recollection whatsoever of the said proceedings or of being personally served with the Writ. In addition, he only came to know of the existence of the proceedings through a letter dated 16th July 2008 from the Chief Commissioner.

27. In this regard, we note that there is no affidavit deposing to service of the originating process in the WS 1315 of 2002 supplementary Court file. Consequently, the Writ of Summons became stale as of 9 August 2004.

28. In these circumstances, it is our strong view that liability should have been disputed by the State on that basis in WS 1315 of 2002.

## II. Assessment of damages

29. As the matter was settled out of Court, the Court did not make findings on the amount of damages to award Peter Yama. Nevertheless, the issue on the out of court settlement and the related processes is examined further under clause 4 below.

## III. Steps taken (or not taken) by Solicitor General in defence of the claim

(i) Zacchaty Gelu

30. Clearly, there is ample evidence of serious failures on the part of the Solicitor- \ General, Zacchary Gelu, in the performance of his professional duties as lawyer for the State because: (a) there was no liability on the part of the State or the Secretary, Department of Lands & Physical Planning, as we have found above; and

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(b) there was no actual or proper assessment of damages, if any, to justify K15.5 million as the settlement figure.

31. Zacchary Gelu breached his duty of care to his clients (Secretary for Lands & Physical Planning and the State) as a lawyer. He failed to perform (or properly perform) due diligence as to the claim by Peter Yama by not seeking instructions from the Secretary, Department of Lands & Physical Planning when the purported Notice of claim was initially given, and then again upon service of the originating process until execution of the Deed of Settlement dated 28 November 2002.

32. As a result, Zacchary Gelu failed to take all steps necessary to defend the State and the Secretary, Department of Lands & Physical Planning by NOT:-

(a) seeking any instructions from-

- (i) Secretary, DLPP;
- (ii) Registrar of Titles;
- (iii) Attorney General;
- (iv) Land Titles Commission;

(b) conducting any due diligence, including searches or making relevant inquiries with the above offices;

(c) filing a notice of intention to defend;

(d) filing a defence for the State parties on the following merits:

- (i) Lack of mandatory notice under Section 5 of the Claim Act-
- (ii) Peter Yama's claim did not disclose a reasonable cause of action against the State nor Secretary, DLPP, as his claim

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was against the landowners for committing the unlawful acts complained of;

(iii) Peter Yama did not have a claim because-

o he was not the proprietor of Lot 38 Section 68 Madang; o no such lot existed since 1987;

(iv) Peter Yama's claim was time barred by Frauds & limitations Act 1988;

(v) At the time of filing of his claim, Peter Yama had a sum of K41,214.86 in outstanding annual rentals owed to the State in respect of Section 68 Lot 39, Madang

(vi) " Peter Yama had not complied with the improvement covenant of the State lease in respect of



Section 68 Lot 39, Madang

(vii) The outstanding arrears would have been relevant for purposes of bringing a cross-claim against Peter Yama and even a ground for setting in motion the forfeiture provisions under section 122 of the LjindAct 1996

filing an appropriate application to dismiss the entire claim for-

(i) lack of notice under Section 5 of the Claims Act

(ii) disclosing no reasonable cause of action against The State and Secretary, DLPP

(iii) being time barred under Section 16 of the Frauds & Umitations Act 1988;

providing any advice to the State parties on the veracity of Peter Yama's claim and any recommendations on the way forward to defend the claim;

seeking any independent advice on the professional reports and material relied upon by Peter Yama in support of his claim; and

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(h) providing any advice to the Secretary, DLPP to take steps to seek forfeiture of Peter Yama's tide in respect of Lot 39, Section 68, Madang.

( i i ) Neville Devete & Laias Kandi

31. Both Neville Devete and Laias Kandi conceded that their clearance letter dated 29 May 2009 issued to the Department of Finance for payment of the Deed of Settlement dated 28 November 2002 was given in error for the reasons set out above.

#### IV. Settlement

32. As a result of the finding that liability should have been disputed based on the foregoing reasons, it follows in our view that this case was not an appropriate matter for settlement out of Court.

I Furthermore, Zacchary Gelu as Solicitor General clearly failed in his

/ professional duty to seek and obtain instructions from the Secretary,

I Department of Lands & Physical Planning in order to properly

evaluate the relative strengths and weaknesses of Peter Yama's claim and the State's defence before entering into any settlement negotiations with Peter Yama.

33. In addition, no such instructions were provided by DLPP to Zacchary Gelu to commit the State by signing the Deed of Release.

34. Moreover, the Commission has not sighted any quantum submissions made by or on behalf of Peter Yama to the Solicitor General.

1 35. In the circumstances, the 4 grounds relied upon by Zacchary Gelu in offering settlement was baseless and patently flawed.

36. In respect of the execution of the Deed of Settlement dated 28 November 2002, the Commission notes that there was lack of compliance with:

(a) Section 61 of the Public Finances ( Management) Act 1995 contracts involving the payment of an amount exceeding K100,000 require the approval of the Minister for Finance. No approval was sought nor obtained from the Minister for Finance through the Secretary for Finance prior to the signing of the Deed by Zacchary Gelu.

(b) NEC Decision NG 07 22 August 2002 , Clause 10 – The National executive Council at its meeting on 22 August 2002 (some 4 months prior to signing of the Deed of Settlement) – " directed that there be no more out of court settlements by any State body or authority, including by the Attorney-General and Solicitor-General, without the approval of the NEC, acting on advice of CACC."

37. The Secretary to NEC, Department of Prime Minister, Ms Winnie Kiap, gave oral evidence that no approval was sought nor obtained in accordance with that NEC Decision. Therefore, no such approval was given prior to the signing of the Deed by Zacchary Gelu.

#### V. Processing of claim and Pay-out

38. Based on the Department of Finance Internal Audit and Compliance Division Report dated 11 August 2008, produced to the Commission by the Secretary for Finance, Gabriel Yer, we note the following procedures were not followed:

No clearance letter from Attorney General as required by NEC Decision 21/2006, Item 7(e)®. Instead, clearance letter dated 29 May 2008 by Acting Solicitor General (Mr Devete) to the Secretary for Finance, which states on page 5 that he enclosed Peter Yama's notice under Section 5 of the Claims Act dated 15 July 2002. This is clearly an error.

The purported clearance letter was hand delivered to Department of Finance's Cash Management and Expenditure Control Branch on 30th May 2008. However, that letter did not have a "batch number" and was registered as having been delivered to the Secretary for Finance's office three days earlier, 26 May 2008. This is inconsistent with the established processes and controls put in place by both departments. Any legal clearance made on court orders or any claim against the State is given batch numbers as a control mechanism.

The FF3 and FF4 were signed well after the cheque (number 88055 in the amount of

IC7,750,000.00 payable to Peter Yama) was printed on 24 June 2008. The cheque was raised without signatures of Commitment Clerk, Section 32 Officer, Certifying Officer, Examiner, and Financial Delegate on the FF3 and FF4.

The Section 32 Officer "approved" the expenditure in breach of NEC Decision No. 150/2003, Items 4 and 6, and NEC Decision No. 21/2006, Item 5(b) & (e)(ii).

The cheque was collected on the same day (24 June 2008) by Peter Yama from the Department of Finance and not the Solicitor General based on verbal instructions from Mr Kaindi

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of Solicitor General's office. There are no financial instructions that deal with collection of cheques. However, internal control systems in place by Cash Management and Expenditure Control Division and Office of the Solicitor General is that all cheques are to be collected by representative of Solicitor General.

(vi) Peter Yama's claim was processed expeditiously with special interest by Department of Finance and possibly the Solicitor General's Office.

(vii) The cheque payment was made out of legally available funds.

## G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

1. Continue pursuing current action (OS 658 of 2008) against Peter Yama challenging the legality of the Deed of Settlement dated 28 November 2002 on the following basis:-

(a) Peter Yama's notice of intention to make a claim against the State was invalid;

(b) There was no land described as Lot 38 as at 8 October 1987 as pleaded in WS 1315 of 2002

(c) Peter Yama's cause of action is purely against the "customary landowners" whom he alleges prevented him from access to his land

(d) Part of the claim in WS 1315 of 2002 filed on 9 August 2002 by Peter Yama was statutory time barred by four (4) years

(e) the Writ of Summons No. 1315 of 2002 became stale as of 9 August 2004 as against the Secretary, DLPP due to non-service at all

(f) lack of Ministerial approval prior to executing the Deed under Section 61 of the Public Finance (Management) Act 1995, and by reason of the Supreme Court decision in Fly River Provincial Government v Pioneer Health Services (2003) SC705 and followed in NCD Commission v Yama Security Services Fid (2005) SC835

2. Immediate commencement of civil action against Peter Yama to recover K61,014.86 in outstanding annual land rentals

3. Appropriate investigative and disciplinary action against Messrs Kandi and Devete for their gross negligence in erroneously clearing Peter Yama's claim for payment

Referral to the Minister for Department of Lands & Physical Planning through office of the Secretary

4. In respect of Section 68 Lot 39 Madang, issuance of a forfeiture notice to Peter Yama on the grounds that:

(a) the improvement covenant imposed by the Land Act 1996 has not been fulfilled

(b) as at 2008, the annual land rental K61,014.86 remains outstanding, due and unpaid for a period of well in excess of six months

Referrals to the Lawyers Statutory Committee

5. Zacchary Gelu for unprofessional conduct and failing to be competent in all his professional activities in ensuring the State interests were protected

6. Neville Devete of Solicitor General's office for failing to be competent in all his professional activities in ensuring the State interests were protected

7. Lais P Kandi of Solicitor General's office for failing to be competent in all his professional activities in ensuring the State interests were protected

Referrals to the Royal PNG Constabulary

8. Zacchary Gelu for settling Peter Yama's unlawful claim

9. Peter Yama for making his unlawful claim

10. Neville Devete of Solicitor General's office for clearing an unlawful claim

11. Lais P Kandi of Solicitor General's office for clearing an unlawful claim

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Referrals to the Secretary, Department of Finance

12. Take appropriate disciplinary action against the officers identified in the Department of Finance Internal Audit and Compliance Division Report dated 11 August 2008 for gross negligence in protecting the interests of the State

Consequential Legislative or other reform

13. Attorney General's Act 1989 be amended to the following effect:

a. the Solicitor General can only act on the written instructions of the State departments, agencies or instrumentalities concerned, unless in urgent cases where oral instructions would suffice provided written instructions are subsequently given within a reasonable time to retrospectively confirm the verbal instructions previously given

b. the Attorney General granted with the exclusive power to settle cases out of court with prior approval from the State departments, agencies or instrumentalities concerned and National Executive Council

c. the Attorney General shall execute all deeds for settlement on behalf of the State and the

Solicitor General shall witness his signature, failing which the deed is unenforceable

d. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court

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e. Solicitor General maintain register of all such settlements

Financial Instructions made under the Public Finance (Management) Act 1995 be amended to the following effect:

a. legal clearance for all court related claims for payment shall be in writing from Office of Attorney General upon recommendation by Solicitor General

b. the payment of court related claims by Department of Finance shall be based on the production of original clearance letter, which shall—

(i) where court order for payment –

o emanate from person occupying office of Attorney General  
o bear SG file reference number o recommend payment

(ii) where deed of settlement for payment –

o original duly signed Deed of Settlement bearing respective signatures of Attorney General on behalf of the State and the Solicitor General as his witness o emanate from person occupying office of Attorney General  
o bear SG file reference number  
o contains National Court order sanctioning/approving settlement o recommend payment

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Finance Form 3 be revised to-

- i. incorporate as an attachment the internal pre-audit verification report
- ii. cover, when necessary, withholding of tax assessed for remittance to IRC in respect of all claims submitted for payment

all cheques for payment of court related claims to be forwarded to Office of Solicitor General for collection in the following circumstances :-

where no lawyer on record – collection by the claimant in person provided appropriate identification is produced, such as passport, drivers licence or original statutory declaration;  
where lawyer on record – collection by lawyer on record.

Solicitor General maintain a register of all —

- i. Clearance letters issued to Department of Finance
- ii. Cheques received from Department of Finance pursuant to clearance letter
- iii. Cheques collected from his office by claimant or claimant's lawyer

Secretary for Finance maintain a register of all —

- i. Clearance letters received from Solicitor General
- ii. Cheques sent to Solicitor General pursuant to clearance letter

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15. Claims By & Against the State Act 1996 be amended to the following effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing
- e. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court

~Land Act 1996, related legislation and instruments be amended to the following effect:

- a. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:

- i. The name of the proprietor and date of acquisition;
- ii. Nature of interest/type of lease/license;
- iii. Zoning status of parcel of land;
- iv. Status of covenants and caveats registered, if any.

b. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease

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Public Services (Management) Act 1995, related legislation and instruments be amended to the following effect:

a. Prescribe "serious disciplinary offence" is committed where:

- i. State line agency named as defendant fails to provide full and proper instructions to SG
- ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties

b. On a finding of "serious disciplinary offence" —

- i. Ground for termination
- ii. Ineligible for appointment to any public office



(c) Andrew Maid

A. PARTIES:

(i) For the State:

1. Department of Lands & Physical Planning ('DLPP')
2. Department of Justice and Attorney General (DJAG)
3. Department of Finance ('DoF')

(ii) Claimant:

(a) Andrew Maid

B. NATURE OF CLAIM:

1. Andrew Maid alleged the PNG Land Board Chairman; Secretary, DLPP; Registrar of Tides and the State ("State parties") wrongfully cancelled his land title in breach of his constitutional rights and their statutory duties.
2. Andrew Maid commenced National Court proceedings against the State parties seeking restoration of his land title, or damages in the alternative. The claim was purportedly settled by Deed of Release.

C. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE

1. Andrew Maid lodged separate courts claim in 2001 against the State parties for alleged wrongful cancellation of his land title on 10 August 2000. No determination was made by the National Court as to liability and damages. The claims were purportedly settled by Deed of Release dated 11 October

2002 in the sum of K4.1 million executed between Andrew Maid and the State through Zacchary Gelu, Solicitor General ('Deed').

2. The Department of Finance issued 16 cheques totaling K5,193,538.00 in respect of this matter between 25 January 2003 and 30 June 2005, falling within the period under inquiry 2000 to 1st July 2006.

3. In the circumstances, this matter falls within Terms of Reference No. 1, 5, 6, 7, 8, 9,10,11,12,13 and 14.

## SOURCES OF INFORMATION AND DOCUMENTATION

1. The brief comprises information obtained from all persons considered by the Commission as having an interest in the inquiry into this matter, in particular:-

(a) National Court —

(i) Transcription Services Certified Transcripts for — o 21 August 2002–Justice Davani  
o 11 September 2002–Justice Kandakasi o 13 September 2002 – Justice Kandakasi

(ii) Evidence of–

o Ian Augerea, Registrar

(b) Office of Attorney General & Solicitor General –

(iii) Original file SG681/01

(iv) Evidence of — Zacchary Gelu, former Solicitor General John Kumura, former Acting Solicitor General Francis Damem, former Attorney General

(c) Department of Lands & Physical Planning –

(i) Land files —

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o Zoning of Section 122, Hohola, NCD

o State Lease Volume 23, Folio 182 over lot 12 Section 122, Hohola, NCD

o Minutes of purported PNG Land Board Meeting No. 2017

(ii) Evidence of –

o Pepi Kimas, Secretary

o Raga Kavana, Registrar of Titles

o Maurice Alaluku, former Secretary

O Daniel Katakumb, Acting Director, Land Administration Division

(d) Government Printing Office —

(i) Evidence of—

o Ken Kaiah, Government Printer

o Samson Luka, Senior Publication Officer

(e) Claimant —

(ii) Evidence of –

o Hon. Andrew Maid, MP

o Peter Pena, lawyer, Peter Pena & Associates

o Jeffrey Abone, lawyer, Parkil Lawyers

2. The relevant transcripts of proceedings are provided with this Brief.

3. The critical evidence given by each of these witnesses is discussed where relevant in the course of the findings (F) of this Brief.

#### CHRONOLOGY OF EVENTS

1992

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1. On 23 January 1992, David Rutana, Para Management Agency and Andrew Maid agreed Mr Maid put up a tradestore next to Mr Rutana's property, on the vacant cut-off or reserve land.

1993

2. On 7 January 1993, a Memorandum of Agreement was entered into between Andrew Maid as Piunawuin Trading and J.N. & D.O. Rutana for-

(a) Erection of tuckshop

(b) "on the land as part and port of adjournment to Section 71, Allotment 1, Henao Drive, Gordon"

(c) Subject to review after 5 years from 1 January 1993

(d) "this agreement shall not be revoked under any circumstances without consent of the said parts"

1996

3. On 14 February 1996, NCDC granted Andrew Maid Licence to Trade No. 13288-

(a) Section 71, Lot 4, Gordon, NCD

(b) From 14 February 1996 to 13 June 1997

(c) IC100 for licence fee, receipt no. 333091 dated 8 January 1996

(d) (Mr Maid occupied reserved land adjacent to Sec 71, Lot 1, Geauta Drive, Gordon, NCD - If so, illegal as reserved land)

4. On 11 July 1996, Kumaraswamy Arasaratnam, City Manager, NCDC wrote to PNT Pty Ltd, attention Andrew "Mond" -

(a) Noted his expression of interest in Section 122, Lot 4, Geauta Drive, Gordon

(b) no objection to application

(c) shown by Mr "Mond "copy of plan subdividing Section 122 and, presumably, open to public tender

On 9 August 1996, Peter Vavine, Senior Physical Planner was instructed by Acting Regional Physical Planner to inspect Section 71, Lot 1 Gordon, NCD to confirm whether trade store and fence would affect the Poreporena road development

On 15 August 1996, Andrew Maid lodged an application for business (commercial) lease over Section 71, Lot 4, Gordon, NCD and paid prescribed application fee of K100

On 20 August 1996, Peter Vavine wrote to the Acting Regional Physical Planner reporting on the inspection of Section 71, Lot 1, Gordon, NCD that-

(a) the trade store would not be affected by the realignment of the drain

(b) only the fence would be affected

(c) recommended that Mr Maid —

(i) remain on Lot 1 and formally apply for Lot 4 through the normal process;

(ii) relocate to Lot 4, if the store is to be removed immediately, until such time he is allocated the land in the normal way; or

(iii) remain on Lot 1, if the store is not affected, for not more than 1 Vz years to settle his loan and he is allocated Lot 4 during that period

On 23 August 1996, Kumaraswamy Arasaratnam, City Manager, NCDC wrote to Chairman, NCD Physical Planning Board, attention Gabi Boutau, Physical Planner –

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(a) further supporting letter and made a representation of being informed by Andrew Maid of his urgent request to tender for Section 122, Lot 4, Gordon, NCD because part of Roads and Drainage Reserve he occupies has to be cleared for main drain construction in 1 week

(b) of having no objection to application for commercial lease of Lot 4 being rezoned from recreational to commercial

9. On 3 September 1996, Andrew Maid was granted License No. 11/96 by John A Painap, OBE, Delegate of Minister for Lands & Physical Planning –

(a) Commencing from 3 October 1996 for a period of 6 months (lapse on 6 April 1997)

(b) For temporary occupation of Section 122, Lot 4, Gordon (Hohola) for trading purposes due to Geauta Drive expansion affecting the original site

(c) Subject to following conditions–

K120 licence fee

Licence does not confer upon the licensee any right of ownership

10. On 6 September 1996, John Painap, Secretary for Lands –

(a) granted temporary approval to Andrew Maid to relocate his shop onto Section 122, Lot 4 (now lot 12) Gordon in view of deadline given by Curtain Bros; and

(b) directed Andrew Maid to lodge application for occupancy over said piece of land (Lot 12)

11. On 2 October 1996, Andrew Maid paid K120 for temporary License No. 11/96 over Section 122, Lot 4, Hohola, NCD

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On 1 September 1997, Andrew Maid was granted License No. 20/97 (Southern) by a Delegate of Minister for Lands & Physical Planning –

- (a) Over Section 122, Lot 12 Hohola (New)(Gordon) formerly Section 122, Lot 4 (Gordon) Hohola, NCD
- (b) Commencing from 1 September 1997
- (c) For temporary occupancy for trading due to Geauta Drive expansion affecting the original site
- (d) . Subject to following conditions –
  - (i) Payment of K240 licence fee;
  - (ii) Land Board hearing on applications for Section 122, Lot 12, Hohola (Gordon) NCD formerly Lot 4;
  - (iii) Forfeiture of Lots 10, 6 & 7, Section 122 currently fenced by Filipino Association Inc;
  - (iv) Granting of leases over Lot 10, 6 & 7, Section 122 Hohola (Gordon) NCD;
  - (v) Licence will cease after formal direct granting of lease by the Minister/PNGLB either before or after the expiration of the current 6 months licence period; and
  - (vi) Licence does not confer upon the licensee any right of ownership

On 3 September 1997, paid K240 for temporary licence fee granted by DLPP over Section 122, Lot 4, Hohola, NCD

On 20 December 1997, Andrew Maid, Manager/Owner, Piu Nauwin Trading Pty Ltd wrote to Hon. Viviso Seravo, MP, Minister for Lands

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- ( Referring to conditions attached to Licence No. 20.97 over Sec 122, Lot 12, Hohola (Gordon)
- ( Seeking exemption on Sec 122, Lots 6, 7 and 10

1998

15. On 28 January 1998, John Tokunai, First Secretary, Ministry of Lands responded to Andrew Maid's letter dated 20 December 1997 –

- (a) apologised for delay in responding
- (b) stated Hon. Viviso Seravo, Minister for Lands on 19 January 1998 granted approval for exemption from advertisement for Section 122, Lots 6, 7 and 10 Hohola (Gordon) NCD

16. On 19 March 1998, Andrew Maid paid K240 for renewal of temporary licence granted by DLPP over Section 122, Lot 12, Hohola, NCD

17. On 6 April 1998, Licence No. 15/98 (Renewal) was granted to Andrew Maid by a Delegate of the Minister for Lands and Physical Planning —
- (a) Over Section 122, Lot 12 (4), Hohola (Gordon)
  - (b) Commencing from 18 March 1998 for a 12 month period (18 March 1999)
  - (c) For feasibility studies, ID surveys, fence erection for relocation of business from Geauta Drive affected by the Freeway Construction
  - (d) Subject to the following conditions –
    - (i) Payment of K240 licence fee
    - (ii) Allow access to land to conduct feasibility studies
    - (iii) Engage surveyor to identify land boundary
    - (iv) Erection of proper steel fence around the perimeter

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- (v) Licence will cease after formal direct granting of lease by the Minister and PNG Land Board either before or after the expiration of the current 12 months licence period
- (vi) Licence does not confer upon the licensee any right of ownership

18. On 20 December 1998, Andrew Maid, Manager/Owner, Piu Nauwin Trading Pty Ltd wrote to Hon. Viviso Seravo, MP, Minister for Lands

- (a) Referring to conditions attached to Licence No. 20.97 over 'Section 122, Lot 12, Hohola (Gordon)
- (b) Seeking exemption on Section 122, Lots 6, 7 and 10.

1999

19. On 26 January 1999, Andrew Maid lodged application for commercial lease for —

- (a) Section 122, Lot 12 (Gordon) Hohola, NCD
- (b) a proposed supermarket, including shopping centre, bottle shop, kai bar etc

20. On 26 January 1999, Andrew Maid paid K240 as application fee for commercial lease over Section 122, Lot 12, Hohola, NCD (receipt no. 55963)

21. On 4 February 1999, Andrew Maid paid K40 as fencing fee (NCDC Receipt No. 401209)

22. On 10 February 1999, NCD Building Authority Permit No F004/99 was granted to Andrew Maid to build security fence on Section 122, Lot 12, Gordon, NCD.

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23. On 23 February 1999, Certificate of Deemed Planning Permission No. CDP 04 – 44/99 was issued to Andrew Maid for fencing on Section 122, Lot 12, Hohola, NCD

24. On 6 April 1999 Licence No. 15/98 (Renewal) was granted to Andrew Maid by Morris Alaluku, Secretary for Lands –

- (a) Over Sec 122, Lot 12 (4), Hohola (Gordons)
- (b) Commencing from 11 January 1999 for a 12 month period (11 January 2000)
- (c) For feasibility studies, ID surveys and fencing
- (d) Subject to the following conditions –
  - (i) Payment of K240 licence fee
  - (ii) Allow access to land for feasibility study, ID surveys and fencing
  - (iii) Engage surveyor to identify land boundary
  - (iv) Erection of proper steel fence around the perimeter
  - (v) Licence will cease after formal direct granting of lease by the Minister and PNG Land Board either before or after the expiration of the current 12 months licence period
  - (vi) Licence does not confer upon the licensee any right of ownership

25. On 15 November 1999, Notice of Exemption from Advertisement –

- (a) Signed by Dr Fabian Pok, PhD, MP, Minister for Lands
- (b) Issued to Mr Maid under Section 69(2) of the Land Act 1996
- (c) Over Section 122, Lot 12, Hohola (Gordon), NCD
- (d) Stating that Andrew Maid has a licence over this portion of land. He in fact has met all the requirements/conditions of the Licence to date and spent substantial amount of money to fence the area hence is operating a tuck shop business until the lease is formalised

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26. On 10 December 1999, purported Handwritten PNG Land Board Meeting Minutes No. 2017 –

- (a) Item no. 25
- (b) Recommendations that a 99 year commercial lease in favour of Andrew Maid with a covenant of 3 years and K100,000 of improvements on site
- (c) Footnote L 12 S 122, Hohola exempted by Govt
- (d) Approved
- (e) Signed by Chairman, Ralph Guise and Mrs Morea Taboro
- (f) Not signed by Deputy Chairman, Mr Tom Horik; Joseph Hau; James Tengen; Michael Maka

27. Undated Land Board Meeting No. 2017 recommendations —

- (a) Item 25, DC/122/012 – Andrew Maid
- (b) Recommendations: Board recommends lease to Andrew Maid subject to 6 conditions, including –
  - (i) Survey;
  - (ii) Lease shall be used bona fide for a business (commercial) purpose;
  - (iii) Lease shall be a term of 99 years.
- (c) Foot note: a development covenant valued at K100,000 was noted
- (d) Approved by the Board (No names or details of members)

2000

28. On 28 January 2000, purported National Gazette No. G9 Land Board Meeting No. 2017 (a) at

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(b) Andrew Maid successful applicant of L.F. DC/122/012 – a business (commercial) lease over Lot 12, Sec 122, Hohola, NCD

(c) Dated 25 January 2000

(d) Signed by R. Guise, Chairman, PNG Land Board

(e) (Only Secretary can publish names of successful applicants: s74 of Land Act 1996)

29. On 4 February 2000, Gabriel Donump, Director Provincial Service (Land Admin) wrote to Mr K. Kaiah, Government Printer, attention Samson –

(a) Referring to earlier telephone conversation with Mr Samson

(b) Urgent request to immediately withdraw the gazettal notice under heading of "Land Board No. 2017 items 1–37 and Successful Applicants for State Lease and particulars of land leased" believed to be improperly brought by Chairman of Land Board

(c) Land Board Meeting never convened, accordingly no land board recommendations or grants made over the parcels or portions of land referred to in the notice

(d) Unprofessional and illegal action of the chairman and requests withdrawal of notice from printing and refer it back to Lands Department

(e) Attaching Corrigendum for publication withdrawing such notice published in the National Gazette No.G9 of 28 January 2000.

30. On 5 April 2000 Andrew Maid paid K360 to Department of Lands (receipt no. 81312) for renewal of licence fee and royalty payments over Section 122, Lot 12, Hohola, NCD

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31. On 6 April 2000, licence No. 15/98 (Renewal) was granted to Andrew Maid by Guao K Zurenuoc, Secretary for Lands —

(a) Over Section 122, Lot 12 (4), Hohola (Gordon)

(b) Commencing from 10 April 2000 for a 12 month period (10 April 2001)

(c) For feasibility studies and engineering designs

(d) Subject to the following conditions —

(i) Payment of K360 licence fee

(ii) Allow access to land for carrying feasibility study and engineering design

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- (iii) Licence does not confer upon the licensee any rights of ownership
- (iv) Licence is non-transferable or assignable
- (v) Licence shall cease upon formal grant of the lease by the Land Board

32. On 25 April 2000 Notice under s. 75 of Land Act 1996 signed by Guo R. Zurenuoc, Secretary for Lands & Physical Planning –

- (a) Was issued to Andrew Maid as successful applicant
- (b) Over Lot 12, Section 122, Hohola (Gordon)
- (c) In National Gazette dated 28 January 2000
- (d) Payment of K4,830 being amount due on proposed lease

33. On 27 April 2000 –

- (a) Notice of Acceptance of a Lease by a Successful Applicant signed by Andrew Maid
- (b) Department of Lands receipt no. 82787 of K50 from Andrew Maid for survey fees as per LG and LAF over Lot 12, Section 122, Hohola, NCD

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(C) Department of Land receipt no. 82789 of K4,630 from Andrew Maid for land transaction from 20 January 2000 to 31 December 2000 as per LG & LAF

34. On 18 May 2000 the State through delegate of Minister for Lands granted a business (commercial) lease to Andrew Maid for –

- (a) 99 years commencing from 27 January 28 January 2000 to 27 January 2099
- (b) Section 122, Lot 12, Hohola, NCD

35. On 22 May 2000 Andrew Maid registered as proprietor of State Lease Volume 23, Folio 182 over Section 122, Lot 12, Hohola, NCD.

36. On 8 August 2000 a Statement was issued by Guao K. Zurenuoc, OBE, Secretary for Lands that –

- (a) Section 122 Lot 12 is zoned for public institution/public purpose and not for commercial purpose
- (b) Andrew Maid's relocation from Lot 1, Sec 71 to Lot 12, Section 122 was to enable him to sell off his stock and vacate
- (c) The Land Board Meeting recommending Andrew Maid as the successful applicant never convened, was illegal and therefore rendering Andrew Maid's State lease null and void
- (d) the Registrar of Titles strike out/cancel the title over Lot 12, Section 122, Hohola (Gordon) registered as Volume 23 Folio 182

37. On 10 August 2000, an entry was made by Registrar of Titles, Karo Lavi, in the register of Tides Journal No. S.24356, cancelling State lease Volume 23 Folio 182 under Section 161 of Land Registration Act.

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38. On 28 September 2000, a Notice of Determination of an Application for Planning Permission was issued –

(a) To Lamana Development Ltd C/- AKT Associates

(b) From Bernard Kipit, Chairman, NCD Physical Planning Board

(c) For re-subdivision and Change of zone from public institutional and adjoining land as per content of Plan No. NCD-ZON-O16

39. On 27 December 2000 NCD Physical Planning Board wrote to Lamana Developments Ltd C/- AKT Associates Ltd –

(a) Referring to Application for proposed re-subdivision and rezoning and erection of a motel/lodge complex at Section 122, Lot 12, Hohola and adjoining land, considered by NCD Physical Planning Board at its meeting no. 09/00 on 28 September 2000

(b) Successfully granted planning permission over Section 122, Lot 12, Hohola and adjoining land

40. On 28 December 2000 National Gazette No.G167 published ~

(a) Pages 3, 4

(b) Notification of Zoning of Physical Planning Area

(c) Re-subdivision and change of zone from public institutional to commercial, public utilities to commercial, and public institutional to public utilities

(d) Dated 28 September 2000 at meeting no. 9/2000 of NCD Physical Planning Board

(e) B. Kipit, Chairman

(f) On 10 August 2000, an entry was made in the register of Titles Journal No. S.24356 – cancelling State lease Volume 23 Folio 182 under Section 161 of band "Registration Act

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2001

41. By letter dated 17 April 2001, Raga Kavana, Registrar of Tides informed Andrew Maid of cancellation of Registration of Lease pursuant to s. 161 of Land Registration Act in respect of Lot 12, Section 122, Hohola, NCD

42. On 7 May 2001, Andrew Maid received Registrar of Titles' letter dated 17 April 2001.

43. On 18 May 2001, National Gazette No.G65 published –

(a) Tender No. 336/2001

(b) Business (Commercial) Motel and Hotel Lease

(c) Lot 12, Section 122 (Gordon) Hohola

44. On 13 July 2001, Peter Pena & Associates commenced OS No. 426 of 2001 for Andrew Maid against Ango Wangatau, Chairman PNG Lands Board; Guao Zurenuoc, Secretary for L&PP; Raga Kavana, Registrar of Tides; and the State. Andrew Maid sought the following relief:

/. "The Defendants, together, and in particular the First Defendant, be restrained from having the

- property (Section 122 Allotment 12 Hohola, NCD) listed on the Land Boards list of matters for hearing, or any hearing, pursuant to public tender.
2. The Defendants be restrained from conducting any further dealings in or relation to the Land in question.
  3. The injunction shall remain in force and effect until the substantive proceedings which the Plaintiff is in the process of instituting by way of the Writ of Summons against the Defendants is determined in facility.
  4. Costs of these proceedings."

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45. On 17 July 2001 Tender Application lodged by Lamana Lodge Ltd-
- (a) Advertisement No. 336/2001
  - (b) Signed and dated 17 July 2001

46. On 17 July 2001 AKT Associates paid K100 to Department of Lands (receipt no. 105577) as application fee for business/commercial lease (Tender NO. 336/2001) on behalf of Lamana Lodge Ltd

47. On 26 July 2001, Peter Pena & Associates filed Orders of Kandakasi, J of 25 July 2001 in the following terms -

"1. The Defendants, together, and in particular the First Defendant is restrained from having the property (Section 122 Allotment 12 Hohola, NCD) listed on the Tand Boards list of matters for hearing, or any hearing pursuant to public tender.

"2. The Defendants are restrained from conducting any further dealings in or in relation to the Tand in question unless otherwise ordered. "3. The Interim injunction shall remain in force and effect until the substantive proceedings which the Plaintiff is in the process of instituting by way of the Writ of Summons against the Defendants is determined in finality. "4.

"Costs of the proceedings.

"5. "Parties shall be at liberty on 3 days notice to the other party to apply for variation lifting or otherwise of these orders."

48. By letter dated 19 September 2000 addressed to the Attorney General (Francis Damem) and copied to the Solicitor General, Peter Pena & Associates (Joel Alu) purported to give notice of Andrew Maid's intention to make a claim against the State in the following terms: " NOTICE OF INTENTION TO MAKE A CLAIM - ANDREWMAID - V- THE STATE

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We refer to the above matter and advised that we have instructions to sue the State and the

Department of lands for breach of Constitutional Rights and deprivation of ownership of property known as State lease Volume 23, Folio 182, Section 122, lot 12, Hohola, NCD, which land our client Mr. Andrew Maid was registered proprietor, (State lease Holder). However the Minister for lands unlawfully cancelled his Title. We hereby give Notice pursuant to the Claims by and Against the State Act no. 52 of 1996 of our client's Intention to sue"

49. On 24 October 2001, Peter Pena & Associates filed WS No 1534 of 2001 for Andrew Maid against Ango Wangatau, Chairman PNG Lands Board; Guao Zurenuoc, Secretary for L&PP; Raga Kavana, Registrar of Titles; and the State. Andrew Maid sought the following relief:

1. "Damages pursuant to section 58 of the Constitution for breach of basic constitutional rights;
2. K5,901,189.00 in damages for:
  - (i) the land known as State lease Volume 23 Folio 182, Section 122, lot 12, Hohola;
  - (ii) for loss of business and profits;
  - (iii) loss of funds expended on the land including land rents and renewal of licence.
3. Interest
4. Costs"

50. On 1 November 2001, Maladinas Lawyers filed a Notice of Intention to Defend dated 31 October 2001 for DLPP.

51. By letter dated 13 November 2001 to Peter Pena & Associates, John Kawi, Solicitor General rejected letter of 19 September 2001 as notice under Section 5 of the Claims Act because the letter was received on

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52. 30 October 2001 together with WS No. 1534 of 2001 therefore originating process is rendered void requiring rectification immediately prior to taking any further steps in prosecuting Andrew Maid's claim.

53. By letter dated 6 December 2001 to the Solicitor General, Peter Pena & Associates responded to Solicitor General letter of 13 November 2001–

- (a) asserting service of notice by letter dated 19 September 2001 was effected on Attorney General, copies of which were faxed to Attorney General and circulated to the Solicitor General via mail;
- (b) alternatively, was giving notice under Section 5 of the Claims Act by enclosing letter dated 19 September 2001 and sought Solicitor General's position on any issues on mode of service

54. On 22 November 2001, Peter Pena & Associates filed an Amended Writ of Summons No. 1534 of 2001. Andrew Maid sought the following relief:

- (a) 11 damages pursuant to section 58 of the Constitution for breach of basic constitutional rights;
- (b) K5,901,189.00 in damages for:
  - the land known as State Lease Volume 23 Folio 182, Section 122, Lot 12, Hohola;
  - for loss of business and profits;
  - loss of funds expended on the Land including Land rents and renewal of licence.
- (c) In the alternative. the Title to the property known as State Lease Volume 23 Folio 182. Section 122, Lot 12. Hohola. be re-instated to the Plaintiff together with loss of business and profits from the land after the Plaintiffs claim in paragraph (b)

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- (d) Interest
- (e) Cost?

2002

55. On 21 May 2002 Peter Pena & Associates submitted a Without Prejudice Quantum Submission to the Solicitor General.

56. On 21 August 2002, Justice Davani made Orders –

- (a) Joining Lamana Lodge Ltd as a party/fifth defendant
- (b) Directed Mr Jeffrey Abone, Peter Pena & Associates to file affidavit attaching copy of letter giving notice under Section 5 of the Claims Act By & Against the State Act 1996 ('Claims Act')
- (c) Adjourning the matter to 11 September 2002

57. On 23 August 2002, Jeffrey Abone, Peter Pena & Associates filed an affidavit attaching letter dated 19 September 2001 (purporting to giving notice), 13 November 2001 (rejecting purported notice) and 6 December 2001 (asserting initial notice given by fax, which was enclosed giving notice again), and deposed in his belief that the mandatory notice requirements were met by Andrew Maid.

58. On 11 September 2002, Justice Kandakasi –

- (a) Did not determine the issue of mandatory notice under Section 5 of the Claims Act, despite Jeffrey Abone informing the Court about Justice Davani's the previous direction of 21 August 2002;
- (b) Adjourned the matter to 13 September 2002 for parties to:  
"have a discussion and find out where the clients' position are and what happened. Then if you are not able to settle you will come back.. .You use today and tomorrow to go into discussions and conference mode and find

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out where your rights and positions are. If you are not able to reach some final agreement on that then you come back to court and tell me why you are not able to. I will give a hearing on that basis. Rather than talking about default judgment and all of that I would rather deal with the substantive matter that way."

59. On 13 September 2002, Justice Kandakasi directed Jeffrey Abone, Peter Pena & Associates to take out appropriate draft for his Honour endorsement in the following terms:

"I will decline to make any derision on the application for default judgment, instead direct that the State and the plaintiff and the defendant, that is the State seriously negotiate towards the indicated possible solution of return of the title to the plaintiff and included then in that amount should be appropriate amount of damages if any that was caused by the State's cancellation of the plaintiffs title. And that that has to be quantified and has to be agreed upon, if not comes back to court for assessment on damages."

60. On 19 September 2002, Peter Pena & Associates filed Orders of Kandakasi, J of 13 September 2002 in the following terms –

- "1. The Plaintiff and the First, Second, Third and Fourth Defendants are directed to forthwith resolve this matter with the Plaintiff in terms of-
- (a) Reinstate the Title of the property described as " Volume 23 Fo l i o 182 . Se c t i o n 122 Hoho l a" to the Plaintiff.
  - (b) Settle and pay to the Plaintiff damages incurred and suffered as a result of the decision to unlawfully terminate the Plaintiff's title to the subjectproperty;
- "2. The Fifth Defendant shall not interfere with the settlement process in Order 1 above.

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- "3. The Plaintiff be at liberty to negotiate the sale of the subject property with the Fifth Defendant on commercial terms.
- "4. Costs is awarded to the Plaintiff5

61. On 25 September 2002, Registrar of Titles, Raga Kavana, made an entry of cancellation of "Journal No. S.24356pursuant to National Court Order WS 1534 of2001 – JournalNo.S.29723".

62. On 11 October 2002, Deed of Release was executed between Andrew Maid and State through Solicitor General, Zacchary Gelu for the State "without any admission of liability in the following terms:

- 'The State parties and MAUD agree that actions constituted in W.S. 1534 of 2001 and O.S. No. 426 of2001 be settled in terms as ordered by the National Court and in particular.
- (a) The title of the land known as Section 122, Allotment 12, Volume 23, Folio 182, Hohola, National Capital District be reinstated to MALD by the State.
  - (b) Damages in the total sum of K4,000,000.00 be paid to MALD as full andfinalpayment.
  - (c) MALD V costs be limited to K100,000.00 only.
  - (d) Statutory Interest only be paid by the State on any outstanding amount."

2005

63. On 15 December 2005, Andrew Maid transferred State Lease Volume 23 Folio 182 over Section 122, Lot 12, Hohola, NCD to Progress Auto Machinery Ltd.

64. On 15 December 2005, State Lease Volume 23 Folio 182 over Section 122, Lot 12, Hohola, NCD was mortgaged to Westpac Bank PNG Ltd.

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## FINDINGS I. Liability In Issue

### (a) Non-compliance with Section 5 of Claims By and Against the State Act 1996 ('Claims Act')

Andrew Maid became aware on 7 May 2001 that his tide had been cancelled by the Registrar of Tides on 10 August 2000. Thus, his cause of action accrued on 7 May 2001 requiring him to give notice of his intention to make a claim against the State no later than 7 November 2001.

Andrew Maid and Peter Pena & Associates asserted that the letter dated 19 September 2001 addressed to the Attorney General and copied to the Solicitor General ("Notice of claim"), complied with Section 5 of the Claims Act.

### (b) Inappropriate person given notice

The requirement to give notice to the appropriate person and the method of serving the notice are mandatory: *Bokin v The Independent State of Papua New Guinea* (2001) N2111, Damnij.

The former Attorney General, Francis Damem, could not "specifically recall" receiving the Notice of claim. The Solicitor General file contained the Notice of claim but there was no notation or mark to indicate service on the former Attorney General. The Affidavit of Service by Jeffrey Abone sworn and filed on 23 August 2002 in WS No. 1534 of 2001 merely deposed to his belief that service of the Notice of claim was effected on the Attorney General by the previous lawyer in carriage of the matter, Mr Joel Alu.

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In any event, the Attorney General is not the appropriate person to whom such notice is required to be given. In this regard, the Notice of claim was defective for being served on the Office of the Attorney General.

(c) Notice not served before filing of originating process It is settled law that a notice of an intention to make a claim is a condition precedent to issuing a writ of summons. Notice under Section 5 must be given first – before the writ is issued – even if the writ is issued within 6 months after the date of the occurrence out of which the claim arises: *Tohian and the State v Tau Liu* (1998) SC566, Supreme Court, Kapi DC], Sheehan J, Jalina ]?

The Solicitor General was one of two (2) appropriate persons authorized to receive the Notice of claim but it was still defective. The Notice of claim was received by the Solicitor General on 30 October 2001 together with the originating process, WS No. 1534 of 2001. The Notice of claim was

invalid in this regard.

(d) Insufficient details

The notice must give sufficient details of the intended claim, e.g. date, time and place of occurrence. If insufficient details are given, even a notice in writing will not comply with Section 5: *Hewali v Police Force and The State* (2002) N2233, National Court, Kandakasi J.

No date of cancellation was mentioned in the Notice of claim to determine when Andrew Maid's cause of action arose. To that extent, the Notice of claim was defective as well.

Andrew Maid's position is further compounded by no letter "accepting" the Notice of claim as notice under Section 5 of the Claims Act.

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(e) No merits in claim

11. There were significant issues of fact and law not disclosed to the National Court that substantially affected the assertions and relief sought in O.S. No. 426 of 2001 and WS No. 1534 of 2001.

12. Raga Kavana, Registrar of Titles – para 4 wrongly pleaded Land Registration Act, 1981 (should be Ch. 191)

(f) Invalid grant of lease

13. The grant of the State Lease over Lot 12, Section 122, Hohola, NCD was invalid ab initio (from the beginning) on four (4) grounds.

14. Firstly, there was no application made by Andrew Maid to exempt Lot 12, Section 122, Hohola (Gordon), NCD from advertisement or public tender. Andrew Maid's application for exemption from advertisement was in respect of Lots 6, 7, and 10, Section 122, Hohola (Gordon), NCD. The exemption by the Minister for Lands on 15 November 1999 in respect of Lot 12, Section 122, Hohola (Gordon), NCD was therefore invalid.

15. Secondly, the purported PNG Land Board Meeting No. 2017 in which Andrew Maid was recommended as the successful applicant in respect of Lot 12, Section 122, Hohola, NCD under item 25 was illegal. This was revealed by the Acting Director, Land Administration Division, DLPP (Daniel Katakumb) in response to Summons No. 344 in the following terms:

"PNG Land Board of Meeting 2017

- It was never convened a Meeting and there was no indication of day, time, location relating to the sitting and deliberation and decisions of the PNG Land Board Meeting Minutes.

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- The Land Board Meeting Minutes were never been prepared by Officers of Land Administration.
- The Property Files were not thoroughly check listed for PNG Land Board consideration.
- No checklist were provided by the Land Allocation Officer of each Region.
- It was a self centred Board by the then late Chairman, Mr Ralph Guise"

Thirdly, the purported National Gazette No. G9 dated 28 January 2000 recommending Andrew Maid as the successful applicant of a Business (Commercial) Lease over Allotment 12, Section 122, Hohola, City of Port Moresby, NCD was merely typeset or draft for publication. This is shown in relevant excerpts of the transcript of 16 April 2009 containing the Government Printer, Ken Kaiah's, answers to questions raised by the Commission, which are reproduced hereunder:

[At pages 3041 – 3042]

'MR GERORO: Yes, thank you Mr Kaiah. Mr Kaiah, I refer you to paragraph 2 of your statement, particularly sub paragraph (a)(ii) of the 21st page where you say, "Sir, on Gazette No G9, you will note that there is no record of section 122 and allotment 12 published", and you referred us to exhibit 1. Exhibit 1 is ga^ettal notice No G9 Port Moresby Thursday 3 February 2000. So you basically stated that there is no reference to a ga^ettal of a property described as section 122 and allotment 12.

THE CHAIRMAN: Was there any Land Board meetings, is it? MR GERORO: That is in relation to—  
THE CHAIRMAN: G9 2000, 12 February does not recall any land Board matters at all, is that correct?

MR GERORO: Is that is correct?

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A: That is correct.

j2; Mr Kaiah, if I can refer you to a document which I showed to you. It appears to be a ga^ettal notice, No G9, Tort Moresby, Friday 28 January 2000. It is two pages, dated 25 January 2000 and it is signed by R Guise, Chairman, PNG Land Board. The G9 is dated 28 January 2000. In this particular document, it is relation to a Land Board meeting, No 2017. There are a number of items there and I will referyou particularly to page No 2 which relates to item number 25. It says there, at page 2, LFDC/122/012A.ndrew Maid, a business commercial lease over Allotment 12, Section 122, Hohola, City of Port Moresby, National Capital District. You will note on thefirst page it says, that the Land Board meeting, in respect of all those items, listing the successful applicants for State leases and particulars of the land lease of which Mr Maid is gazetted as having being a successful applicant. If you can comment on this particular document that I havejust shown you?

A: Thank you, Sir, with this particular ga^ettal notice G9,1 believe it was in a draft stage when the copy probably must have given out to client or whoever. But there were correspondence that we received from Lands Department saying that there was a letter that we received on 4 February 2000 saying that there was no meeting held and therefore, this instrument to be withdrawn. So it was erasedfrom the actual gazette 9 therefore the final gazette G9 that was published on 3 February is the correct one; it is the correct gazette.

Q: Sorry, Chief Commissioner for the record the document that I have shown to Mr Kaiah, that is the ga^ettal— it was only a draft copy of the ga^ettal dated 28 January 2000, No G9 was produced

by Mr Maid in a statement in response to a summons. So that is how we obtained this document, and have summonsed Mr Kaiah to comment on these documents. So Mr Kaiah, this is merely a draft copy?

A: A draft copy.

Q: For all purposes it was never gazetted or published to the National Gazette?

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A: No.

MR GERORO: You confirm that? A: Confirm, yes."

17. Fourth, the Chairman, Ralph Guise (dec'd) was not the Secretary for Lands & Physical Planning and therefore the purported gazettal notice G9 dated 28 January 2000 publishing the successful grant of leases, including Andrew Maid's grant, is null and void: Section 74 of the Land Act 1996.

18. Whilst Peter Pena generally assisted the Commission with evidence, he was quite evasive in giving a full and frank disclosure of his knowledge and issues concerning the purported grant of the lease to Andrew Maid in the illegal Land Board Meeting No. 2017.

(g) Lack of pleading in Statement & Amended Statement of Claim

19. The pleadings filed in WS No. 1534 of 2001 by Peter Pena & Associates for Andrew Maid do not sufficiently plead the alleged breaches committed by the State parties. There are no specific references to the relevant clauses of the lease or the provisions of any legislation alleged to have been breached. The only reference made is to Section 58 of the Constitution based on an alleged breach of Andrew Maid's proprietary rights. The legal basis of the proprietary rights asserted is not disclosed. In the ordinary course, Andrew Maid would not have been at liberty to lead evidence and claim damages for want of particulars had the State objected to these anomalies.

II. Assessment of damages

20. As the matter was settled out of Court, the Court did not make findings on the amount of damages to award Andrew Maid.

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21. There is no record in the Solicitor General file indicating the bases for approving and settling Andrew Maid's damages at K4,000,000 plus cost of K100,000 as stated in the Deed of Release

dated 11 October 2002. Further, the reinstatement of title to Andrew Maid could not possibly have entitled him to damages of K4 million. At best, Andrew Maid would only be entitled to any damages incurred as a result of the cancellation of the title up to the point of return of the title.

22. Peter Pena & Associates lodged with the Solicitor General on behalf of Andrew Maid a Without Quantum Prejudice Submission dated 21 May 2002. A summary extract of the Quantum Submission by main headings is outlined below:

?

Damages

Assessments (K)

Supporting Document

a)

Damages for breach of Constitutional Rights (Sect. 58)

1,500,000

Quote of Constitution– Section 58

b)

Damages for loss of land and improvements

1,346,500

Valuation from Tack Realty (Unknown to IPA)

c)

Damages for loss of business and profits

5,901,189

Cashflow from Ram Business Consultants

d)

Loss of funds expended to secure and hold title

27,280

License fees, land rental fees and Architectural fees

e)

Costs

57,240

Legal fees, Accountant fees & Valuation fees

f)

Interest

0

–

g)

Aggravated Damages

200,000

Quote of Common Law

h)

Exemplary Damages

200,000

Quote of Common Law

?

Total

9,232,209

23. The quantum submission was attached with relevant supporting attachments including alleged breaches related to the Constitution. Some of the monetary damages assessed were quite excessive. Also the quantum submission included damages for loss of land and improvements only (b) and yet the said land was re-instated.

24. The Cash-flow projection prepared by Ram Business Consultants which was part of the Quantum Submission had serious flaws. The following are worth noting;

(a) The cash-flow is flawed and unacceptable to be regarded as an accurate Cash flow especially in terms of operating a supermarket in a city environment. The following relevant costs associate with operating a supermarket were not factored into the cash flow –

- (i) Cost of goods sold (COGS)
- (ii) Staff remuneration
- (iii) Costs of utilities
- (iv) Security costs
- (v) Capital expenditure

25. The above list is not exhaustive but to show that the cash flow projection prepared by Ram Business Consultants completely ignored obvious /relevant costs associated with such investment.

26. The cash-flow did not consider the loss for year 1, especially during construction period where most start-up business at inception would incur loss. The cash-flow projection prepared by Ram Business Consultants projected a net profit after tax of K1.12 million in year one. There are no compelling factors to believe that such a projection was realistic as many relevant costs were not factored into this projection.

There is no basis on the revenue of K2.0million projected in year one and thereafter increased by 7.5%.

The Net Present Value (NPV) calculated using 12% with 10 years' income was K5,901,189. This figure is completely inaccurate when compared to our calculation based on the same assumption Ram Business Consultants used. According to our calculation, the NPV is K1,241.539. Ram Business Consultants deliberately inflated the NPV by K4,659,650 for reasons known only to themselves. Further, we do not understand the basis of using a 10 year period in the NPV calculation.

A non-cash item in respect of depreciation of K300,000 was also added back to the cash flow to inflate the profit by K300,000.

There is also the issue whether the bank would loan them the K3 million as there was no evidence to show that the bank would have approved the K3 million loan stated in the cash-flow. Further, Andrew Maid and his company, Piu Mauwin Trading, did not own any tangible assets which would be mortgaged to obtain that significant loan. In commercial terms, no bank or financial institution would have loaned such an amount without any known security to cover the loan in case of default.

The interest rate of 22% on a loan of K3 million does not have any basis. There is no correspondence from the lender or a general rate prevailing at the time from any commercial lender to support this rate.

From the review of the cash flow projection prepared by Ram Business Consultants we conclude that the Cash-flow projection was specifically engineered in a way to inflate the yearly income projection including NPV so that damages claim would be high. The Ram Consultants Report was based on mere trading assumptions supplied by Andrew Maid, not on proper business records and tax returns.

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33. As to the costs of K100,000.00, this amount was not submitted in the Quantum Submissions nor was there a bill of costs in taxable form submitted to the Solicitor General.

III. Steps taken (or not taken) by Solicitor General in defence of the claim

34. Clearly, there is ample evidence of serious failures on the part of the Solicitor- General, Zacchary Gelu, in the performance of his professional duties as lawyer for the State because:

- (a) there was no liability on the part of the State or the Secretary, Department of Lands & Physical Planning, as we have found above; and
- (b) there was no actual or proper assessment of damages, if any, to justify K4.1 million as the settlement figure.

35. Zacchary Gelu breached his duty of care to his clients (Secretary for Lands & Physical Planning and the State) as a lawyer. He failed to perform (or properly perform) due diligence as to the claim by Andrew Maid by not seeking instructions from the Secretary, Department of Lands & Physical Planning when the purported Notice of claim was initially given, and then again upon service of the originating process until execution of the Deed of Settlement dated 11 October 2002.

36. As a result, Zacchary Gelu failed to take all steps necessary to defend the State and the Secretary, Department of Lands & Physical Planning by NOT:-

- (a) seeking any instructions from-
  - (i) Secretary, DLPP;
  - (ii) Registrar of Titles;
  - (iii) Attorney General;

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- (iv) Government Printer;
- (b) conducting any due diligence, including searches or making relevant inquiries with the above offices;
- (c) filing a notice of intention to defend;

(d) filing a defence for the State parties on the following merits:

(i) Lack of mandatory notice under Section 5 of the Claims Act;

(ii) The State Lease issued to Andrew Mr Maid was properly cancelled because–

O Hon. Mr Maid was never recommended by the PNG ?

Land Board as the successful applicant for a State Lease because PNG Land Board Meeting No. 2017 was not properly convened and, therefore, illegal o PNG Land Board Minutes recommending Hon. Mr Maid as the successful application for a State Lease was done fraudulently o Hon. Mr Maid was never gazetted as the successful applicant for a State Lease

(e) filing an appropriate application to dismiss the entire claim for non– compliance with Section 5 of the Claims Act

(f) providing any advice to the State parties on the veracity of Andrew Maid's claim and any recommendations on the way forward to defend the claim

(g) seeking any independent advice on the professional reports and material relied upon by Andrew Maid in support of his claim

In respect of the execution of the Deed of Settlement dated 11 October 2002, the Commission notes that there was lack of compliance with:

( a ) S e c t i o n 61 o f t h e Public Finances ( Management) Act 1995 – c ontracts i nvolving t h e payment o f an amount exceeding

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K100,000 require the approval of the Minister for Finance. No approval was sought nor obtained from the Minister for Finance through the Secretary for Finance prior to the signing of the Deed by Zacchary Gelu.

(b) NEC Decision NG 07 22 August 2002 , Clause 10 – The National executive Council at its meeting on 22 August 2002 (some 2 months prior to signing of the Deed of Settlement) – "directed that there be no more out of court settlements by any State body or authority, including by the Attorney–General and Solicitor–General, without the approval of the NEC, acting on advice of CACC."

#### IV. Processing of claim and Pay–out

38. Our review of the payment vouchers maintained at the Dept. of Finance in relation to the case shows that an amount totalling K5,193,538 was paid out between 2003 and July of 2004. There were 16 cheque payments paid out over that period. The following were worth noting in respect of the payouts:

?

Date

Code

Cheque No.

Amount (K)

Details

DOR Unsigned

1

25/1/2003  
207-4201-4123-135  
710210  
190,000  
Part Pay.- deed of release debt  
Cheque copy only on file

2  
17/2/2003  
207-4201-2107-135  
712248  
100,000  
Pymt for O/S Deed of Release Debt (P/P)  
DOR has no signature of AG

3  
20/3/2003  
207-4201-4123-135  
715407  
100,000  
Pmt for o/s DOR claim  
Cheque copy only on file

4  
4/4/2003  
20742012107135  
716806  
300,000  
Payment  
O/Standing Debts  
Cheque copy only on file

5  
20/10/2003  
460- 31  
736989  
500,000  
Pmt of o/s court order WS 1534 of 2001  
DOR has no signature of AG

6  
31/10/2003  
460-31  
738376  
500,000  
Loss & Damages to Properties O.S No. 426  
DOR has no signature of AG

178  
7  
17/11/2003  
207-4201-4123-135  
739737  
200,000  
Pmt for o/s DOR claim  
Cheque copy only on file

8  
29/12/2003  
460- 31  
744562  
1,000,000  
Pmt o/s court order (part payment)  
DOR has no signature of AG

9  
18/3/2004  
207-4201-2107-135  
772571  
250,000  
O/S DOR Claim O.S No. 426 of 2001  
DOR has no signature of AG

10  
5/5/2004  
207-4201-2107-135  
777565  
560,000  
Pmt o/ s c/order OS#426  
2004  
Cheque copy only  
on file

11  
24/5/2004  
460-131  
779266  
200,000  
Pmt for o/s DOR claim  
Cheque copy only  
on file

12  
21/6/2004  
207-4201-2107-135  
781989  
200,000  
Pmt for o/s DOR claim  
DOR has no signature of AG

13  
13/7/2004  
460- 31  
784063  
200,000  
Pmt for o/s DOR claim  
(legal fees)  
Cheque copy only  
on file

14  
10/3/2005  
207-4201-2107-135  
804833



400,000  
Pmt for o/s claim for  
interest  
Cheque copy only  
on file  
15  
7/6/2005  
207-4201-2107-135  
812767  
293,538  
Pmt for o/s interest  
Based on Parkil Lawyers submission.  
Cheque copy only  
on file  
16  
30/6/2005  
207-4201-2107-135  
814547  
200,000  
Payment of O/S Court Order  
Based on Parkil Lawyers submission.  
Cheque copy only  
on file  
?  
?  
5,193,538  
?  
Damages agreed per DOR  
4,100,000  
Included costsof  
K100,000  
?  
Interest calculated at 8%  
893,538  
Interests for 2yrs,8mths & 21 days  
Based on Parkil Lawyers submission  
Total to be payable  
4,993,538  
?  
?  
Over payment  
200,000  
Unexplained over payment  
?

39. Some payment vouchers had copies of the DOR that did not have the SG signature (unsigned by Zacchary Gelu) while some were missing. Despite 179

the anomalies noted in terms of attaching incomplete documentation especially in regards to unsigned DOR, payments were approved and processed by staff at Finance Department who were

tasked with financial authority, to ensure appropriate documentations were included prior to processing of claims

40. Payments made to Andrew Maid was over paid by K200,000, (cheque no. 784063 dated 13 July 2004). This amount has to be recovered by the State from Andrew Maid.

41. Payments were collected by Andrew Maid at the Department of Finance directly rather than through the SG office.

42. The Finance Department processed cheque payments for the damages direct to Andrew Maid in his name rather than in his lawyer's name (trust account).

43. Parkil Lawyers who acted for Andrew Maid demanded the Attorney General (Francis Damem) by letter dated 5 August 2004 for interest to be paid together with their calculation for an amount of K893,537.87.

44. The Attorney General then wrote a cover letter dated 5 January 2005 instructing the Finance Secretary to pay. He also stated in that letter that the calculation was in order and sanctioned for payment despite improper calculation of interest.

45. Some of the payments made were through the Vote 460-31 (Suspense Account #2). Funds in Suspense Account #2 are not considered as legally available funds for the purpose of Court settlements. Hence payments made out of the suspense accounts are deemed unlawful or illegal.

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46. Interest totalling K893,538.00 was paid based on the submission made in 2004 by Parkil Lawyers and supported by the Attorney General and subsequently paid by the Department of Finance in 2005.

47. Based on the Commission's re-calculation of interest there was a miscalculation by Parkil Lawyers. Interest was over paid by K520,571.29. No independent verification was carried out by the Solicitor General, Attorney General or by internal auditor at Finance Department to verify the calculation before processing the interest component.

48. When Andrew Maid collected the cheques, which were made under his name directly from the Department of Finance, there were several correspondences from his lawyer (Peter Pena & Associates) complaining to the Finance Department regarding the method of payments.

49. The correspondence were either addressed to the Secretary of Finance and copied to the Solicitor General or Attorney General or vice versa, and related to an agreement that the lawyer had with his client about the amount of legal fees including standard procedures of settling court

proceedings by Finance Department. The State was not privy to this agreement.

50. Peter Pena & Associates letters asserted having an interest in the total sum of the claim, totalling K1.1 million as legal fees. There was another letter written to Andrew Maid reminding him of the fee arrangement that they had in place, the pertinent part of which are quoted in respect of apparent improper dealings from both Peter Pena & Associates and Andrew Maid to obtain the settlement:

"Is there any wrong about the way we went in and negotiated (through making further written submission) and increased the damages by K1.1 million (even though you were prepared to accept K3 million)"

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"We are aware of the arrangement you have with certain officers of the Department of Finance to access payment cheques directly. We think it is highly improper and have advised you so in writing. We place you on notice that should you do anything to interfere in payment of our fees, we will not hesitate to report your dealings directly to appropriate authorities for investigations and action".

51. Andrew Maid and his lawyers engaged in unprofessional conduct in the pursuit of the claim and its payment. Peter Pena & Associates claim for K1.1 million in legal fees is baseless in so far as the State is concerned as their costs were expressly limited to K100,000.00.

52. Because of the issues surrounding his legal fees, Andrew Maid wrote a letter to Peter Pena & Associates (copies to Attorney General and Finance Secretary) dated 15 April 2003 terminating their services. By then he was receiving parts of the settlement proceeds. An excerpt of the letter Andrew Maid wrote which is worth noting:

For you to claim a percentage of any reward relying on some verbal agreement which I cannot recall further, has not been evidenced in writing and which appear to be unreasonably excessive is simply not accepted. As far as I recall the Deed of Settlement sufficiently catered for your costs at K100,000 for a matter which did not go to court. In fact, a substantial portion of the work leading to settlement was done by my own contacts, with your knowledge and consent'.

## G. RECOMMENDATIONS

From the evidence received by the Commission, the recommendations are as follow:

Referral to the Attorney General

1. Immediate commencement of an action against Hon. Andrew Maid, MP to:

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a. challenge the legality of the Deed on the following grounds:

i. Lack of mandatory notice under Section 5 of the Claims Act;

ii. Hon. Mr Maid was never recommended by the PNG Land Board as the successful applicant for a State Lease because PNG Land Board Meeting No. 2017 was not properly convened and, therefore, illegal

- iii. PNG Land Board Minutes recommending Hon. Mr Maid as the successful applicant for a State Lease was done fraudulently Hon. Mr Maid was never gazetted as the
  - » successful applicant for a State Lease
- iv. lack of Ministerial approval prior to executing the Deed under Section 61 of the Public Finance (Management) Act 1995, and by reason of the Supreme Court decision in Fly River Provincial Government v Pioneer Health Services (2003) SC705 and followed in NCD Commission v Yama Security Services Ltd (2005) SC835
- b. recover the sum of K5,193,538

2. Immediate commencement of an action against Peter Pena & Associates to recover the sum of K200,000

Referral to the Public Prosecutor

3. Immediate commencement of an action against Hon. Mr Maid to recover the sum of K5,193,538 under the Proceeds of Crime Act 2005

4. Immediate commencement of an action against Peter Pena & Associates to recover the sum of K200,000 under the Proceeds of Crime Act 2005

Referrals to the Lawyers Statutory Committee

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5. Zacchary Gelu for dishonourable, improper and unprofessional behaviour

6. Francis Damem for dishonourable, improper and unprofessional behaviour

7. Peter Pena of Peter Pena & Associates for dishonourable, improper and unprofessional behaviour

8. Jeffrey Abone of Parkil Lawyers for dishonourable, improper and unprofessional behaviour

Referrals to the Royal PNG Constabulary

9. Zacchary Gelu for settling Hon. Mr Maid's unlawful claim

10. Francis Damem for clearing overpayment of K520,571.29 in interest

11. Hon. Mr Maid for making and benefiting from his unlawful claim

12. Peter Pena of Peter Pena & Associates for assisting Hon. Mr Maid pursue his unlawful claim and the monies they gained from that claim

13. Jeffrey Abone of Parkil Lawyers for assisting Hon. Mr Maid pursue his unlawful claim and the monies they gained from that claim

Referrals to the Prime Minister

14. Appoint a Commission of Inquiry into the Department of Lands & Physical Planning

15. Appoint a Commission of Inquiry into the Office of Solicitor General

Consequential Legislative or other reform

16. Attorney General's Act 1989 and Claims By & Against the State Act be amended to the following effect:

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- a. the Solicitor General must be a lawyer of high standing and at least with 10 years litigation experience
- b. the Solicitor General to be appointed by Judicial Legal Services Commission
- c. the Solicitor General shall act on the written instructions of the State departments, agencies or instrumentalities concerned, unless in urgent cases where oral instructions would suffice provided written instructions are subsequently given within a reasonable time to retrospectively confirm the verbal instructions previously given
- d. the Attorney General granted with the exclusive power to settle cases out of court with prior approval from the all State departments, agencies or instrumentalities concerned and National Executive Council
- e. the Attorney General shall execute all deeds for settlement on behalf of the State and the Solicitor General shall witness his signature, failing which the deed is unenforceable
- f. all settlements involving the State, including Provincial Governments, departments, agencies or instrumentalities, has no effect unless sanctioned/approved by the National Court
- g. Any proposed settlement of costs concerning the State or costs awarded against the State must involve production of an itemized bill of costs in taxable form for consideration by the Solicitor General and Attorney General for settlement, and if not agreed upon, should be taxed in the normal way under the National Court Rules.

Financial Instructions made under the Public Finance (Management) Act 1995 be amended to the following effect:

- a. Finance Form 3 be revised to cover, where necessary, withholding of tax assessed for remittance to IRC in respect of all claims submitted for payment

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- b. Finance should be prohibited from raising and settling any judgment orders or lawyers bill of costs, without written clearance solely from the Office of the Attorney General

Claims By & Against the State Act 1996 be amended to the following effect:

- a. Notice of intention to make a claim against the State under Section 5 to be given to the extent damages is sought;
- b. Section 5 notice to be given to all State agents named as defendants
- c. Section 5 notice to be given to IRC to assess arrears in tax payable, if any
- d. Originating process (including statement of claim or in support) to be served on all the State agents named as defendants before any hearing
- e. All deeds of settlement to be drawn and executed on prescribed form

Land Act 1996, related legislation and instruments be amended to the following effect:

- a. Exemption of any State land from advertisement for application or public tender shall be determined by a Land Exemption Committee consisting of the Minister, Secretary, DLPP and State Solicitor who must all agree;
- b. Register of all leases, licenses and interests granted by the State to be created, kept and maintained by an officer appointed by the Secretary, which shall detail:
  - i. The name of the proprietor and date of acquisition;
  - ii. Nature of interest/ type of lease/license;
  - iii. Zoning status of parcel of land;

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iv. Status of covenants and caveats registered, if any. c. PNG Land Board shall consult Register of all leases, licenses and interests granted by the State before considering application for a particular State lease

Public Services (Management) Act 1995, related legislation and instruments be amended to the following effect:

- a. Prescribe "serious disciplinary offence" is committed where:
  - L State line agency named as defendant fails to provide full and proper instructions to SG
  - ii. State suffers loss as a result of negligence or failure to exercise due care in performance of duties
- b. On a finding of "serious disciplinary offence" –
  - i. Ground for termination
  - ii. Ineligible for appointment to any public office

## B. Police

The Commission has opened investigation on forty five (45) matters, which are said to have arisen from Police raids. Fifteen (15) of these are reported. All disclose a similar pattern. These claims alleging unlawful actions by police have led almost to an industry in itself. Claims for compensation for assault, damage to a loss of property and crops have resulted in many judgments against the State for many millions of Kina. The Department of Justice and Attorney General has advised that claims based on Police raids account for some 40 % of all claims against the State.

All claims investigated by the Commission arose from raids which are alleged to have occurred in the Highlands region. Of these, the Commission has found that many of the matters were fabrications.

In most cases, the Commission finds the Solicitor General failed to effectively seek instructions from the police. In at least three (3) matters, instructions were provided by Police but deliberately ignored.

Like most State agencies examined, the Police do not have a systematic process by which records are created, maintained, reviewed and stored in an accessible manner.

In the course of conduct of hearings in Mt Hagen, the Commission visited the Solicitor General's Highlands Regional Office and found that ninety (90) per cent of all claims against the State handled by that office arose from alleged Police impropriety. The office had in excess of 3,000 files emanating from the five (5) Highlands provinces, all handled by three (3) lawyers,, two (2) of whom are recent

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graduates to cover all the National and District Courts in the Highlands region. These gross inadequacies were exacerbated by the lack of logistical support.

The Highlands Divisional Commander called for improved consultation and greater co-ordination between the Police stationed throughout the country and the Solicitor General in this area.

The Commission recommends that there be greater co-ordination between the Police Commissioner and Director, Police Legal Services with the Attorney General and and Solicitor General so as to better defend die interests of the State.

Because these claims have not been defended the extent of responsibility of Police in them, has not been tested.

However the basis of these claims which have progressed to settlement are all allegations of gross breaches of constitutional rights of the People by unlawful Police action. This signals an urgent need for inquiry, not simply to stop compensation claims but more importantly to protect the constitutional rights of the People, as well as to ensure the integrity of the Police and their operations.

Accordingly the Commission recommends a Commission of Inquiry be held into the conduct of the Police and their use of 'raids' on communities in pursuit of criminal investigations.

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(a) UmbaY Gabriel



An air of mystery surrounds this Police raid based claim. To this day, the Commission of Inquiry (Col) has not seen or heard from Umba Y Gabriel, even after summonses and letters were sent through his lawyers and Notices were extensively published in the Newspapers. Sworn evidence was given of a huge sum of money being lugged into a hotel room in the dead of night, for counting and distribution. In a case already full of intrigue, the biggest bombshell was dropped on 31st May 2009 when Mr. Gabriel Yer supported by senior officials of the Department of Finance, gave sworn (affidavit) evidence that the full amount of K1.6 million had been returned to the Department of Finance (henceforth "DoF") on the 19th February 2008. This information was used by lawyer, Mr. Dick Korowa Kipoi in his application to have the Col cease investigations into the matter of Umba Y Gabriel. By a strange and twisted logic, he argued that the money had since been returned to DoF; therefore, no payment had originally been made so as to bring the matter within the Terms of Reference (henceforth "TOR") of the Col.

As will be seen in the brief, this matter has all the hallmarks of a scam claim

(\ created and facilitated by a triad of people in- the highest offices of the PNG V bureaucracy. It was initiated by a serving Deputy secretary for DoF (current Secretary, Mr. Gabriel Yer) as principal plaintiff. Although no section 5 Notice was given, the claim was settled in record time by a willing Solicitor General (Mr. Zachary Gelu) and an even more obliging Secretary for Justice Department (Mr. Francis Damem).

1? Refer?to?Annexure?"E"?in?Affidavit?of?Gabriel?Yer?sworn?on?31/05/09?  
2?This?happened?shortly?after?the?matter?was?listed?in?the?newspapers?as?one?of?interest?to?the?  
Col.?  
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A cheque for K1,649,130 in the name of Umba Y Gabriel was made payable firstly to Paul Paraka Lawyers and then to Harvey Nii Lawyers Trust Account after the first cheque was cancelled. The amount was paid out to honour a Deed of Settlement signed on the 15th February 2003 between Mr. Zachary Gelu as Solicitor General and Mr. Paul Paraka who signed on behalf of Umba Y. Gabriel for reasons which have not been explained to date. The Deed of Settlement was signed scarcely a month after the claim was purportedly filed in the National Court on the 07th of January 2003 as WS 23 of 2003.

The earlier claim WS 805 of 2001 was filed by a different lot of plaintiffs represented by Blake Dawson Waldron Lawyers (BDW) and then by Posman, Kua and Aisi lawyers (PKA) when the action officer Mr. Goiye Gileng joined PKL after resigning from BDW. The claim is still pending. PPL were initially briefed by the State to defend the matter. Using evidence provided by the Simbu police, PPL filed a defence and successfully set aside default judgment obtained by the plaintiffs. Instructions from police in Simbu clearly stated that the damage was caused by tribal enemies of the plaintiffs clan who took advantage of the police and CIS presence which had caused people to

abandon their properties and flee into the bushes to hide. Simon Kauba the current Divisional Commander for the Highlands region was Simbu Provincial Police Commander at the time. He gave evidence to the Col confirming that the Police never destroyed anything<sup>3</sup>. Yet PPL did not feel constrained by this knowledge because it went ahead and filed law suit for Umba Y Gabriel and others, a claim which arose from the exact same facts although the plaintiffs were different. Not only that, it managed to negotiate settlement with the Solicitor General on whose behalf it had steadfastly defended the related court proceedings in Joseph Witne Baundo and Others.

3?Refer?Transcript?#?102?from?pg.?3300.?

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Later proceedings registered as OS 58 of 2006<sup>4</sup> and OS 755 of 2008<sup>5</sup> were filed by disgrunded co-plaintiffs of Gabriel Yer Toi in their efforts to get Mr. Yer to pay them their part of the payout. The two actions are still pending. At the same time a lot of pressure is being put on Mr. Gabriel Yer by his own tribesman outside of Court to pay them their share.

#### A. DOES THE MATTER FALL WITHIN THE TERMS OF REFERENCE?

This matter falls under TOR No. 1, 5, 8,10 & 12 (see attached copy of TOR).

Firstly the amount claimed is over K300,000 and was paid out in 2004. The claim was settled out of court by a Deed of Release. This case also highlights the involvement of very senior governmental officials including the current secretary for DoF, Mr. Gabriel Yer, the then Secretary for the Department of Justice and Attorney General (henceforth DJAG) Mr. Francis Damem and the Solicitor General then, Mr. Zachary Gelu. Of significance is the role played by private law firm, Paul Paraka lawyers (henceforth referred to as PPL) which seems to have had a very close relationship with all three of them and Mr. Thaddeus Kambanei<sup>6</sup>. In fact PPL acted for Mr. Gabriel Yer, Mr. Gelu, Mr. Damem and Mr. Kambanei throughout the period of the

? Inquiry. PPL has also fought relentlessly both directly and through its satellite law firms<sup>7</sup> to prevent the Col from carrying out its mandated tasks by filing numerous challenges in both the National and Supreme Court.

V

A?Paulus?Kama?v.?Gabriel?Yer?Toi,?Thadeus?Kambanei?&?State.?Action?filed?by?Henaos?lawyers? seeking?orders?to?remove? Gabriel?Yer?as?plaintiff?in?WS?1231/02?and?to?pay?monies?received?in?settlement?of?claim?into? National?Court?Trust? account.?

5? Mandai?Aglua?& 225?others?v.?Gabriel?Yer?&?John?Wau.?Action?filed?by?Gabriel?Gendua? Lawyers?seeking?similar?orders?as?the?above.? Specific?orders?sought?for?court?to?make? declaration?that?Gabriel?Yer?is?in?fact?Umba?Y?Gabriel?and?not?entitled?to?be?a?plaintiff?in?WS? 23/03.?

6?Secretary?for?DoF?at?time?claim?settled?and?request?sent?by?Attorney?General?to?Finance?for? payment.?

7? Firms?run?by?ex???employees?of?PPL?including?Nicholas?Tame?of?NTame?Lawyers,?Mr.?Jack? Nalawaku?of?Nalawaku?Lawyers,?Mr.? Dick?Korowa?Kipoi?of?Kipoi?Lawyers?and?Mr.?Kumoro?Sino? of?Sino?Lawyers.?

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## B. SOURCE OF INFORMATION AND DOCUMENTATION

This brief comprises of facts and findings from the files and records of;

- The Solicitor-General's office
- The National Court Registry at Waigani.
- The Department of Finance
- Evidence given to COI by Mr. Joseph Biangigl
- Evidence given to COI by Mr. Goiye Gileng
- Evidence given to COI by Mr. Billy Bonner
- Evidence given to COI by Mr. Gabriel Yer
- Written evidence given to COI by the Chief Electoral Commissioner, Mr. Andrew Trawen
- Evidence in writing given to COI by the Bank of South Pacific
- Evidence in writing given to COI by Harvey Nii lawyers
- Evidence given to COI by Mr. Gabriel Gendua of Gendua Lawyers
- Written evidence given to COI by Mr. Kama Paulus (co- plaintiff)
- Written evidence given to COI by Mr. Kain Wosae
- Written evidence given to COI by Mr. Joseph Witne Baundo

## C. RELEVANT FACTS (CHRONOLOGY)

The Matter

1. The claim arose from an alleged combined police and CIS raid on several villages in the Gena area of Kerowagi District in Simbu Province on the 19th and 20th August 2000. The raid allegedly resulted in the burning down of houses, theft or killing of livestock, assault on plaintiffs, destruction of cash crops and other property and desecration of burial sites. The total loss of property claimed as lost and physical injury suffered added up to KI,649,130.

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2. Despite the denials by Mr. Simon Kauba, it is within reason to infer that the Police and CIS did indulge in some destruction of property and assault on people though not to the extent claimed. The raids were done to track down high powered assault rifles from suspects who had broken into and stolen same from the armoury of the Barawagi jail in Simbu Province. The police and CIS personnel would have vented their frustration on the villagers as the theft of weapons from under their very noses would have been felt deeply indeed as a direct and even personal challenge to members of the two disciplined forces based in Simbu.

// 3.

In September 2002, Mr. Gabriel Yer filed a writ of Summons WS 1231/02"and put his name, Gabriel Yer Toi as lead plaintiff on behalf of himself and 225 others. This matter was never pursued and still remains pending in the National Court giving rise to the possibility that it could be used to reclaim the money returned to Finance in 2008 once the Commission of Inquiry into the Finance Department has ceased and things return to 'normal business as usual'. Perhaps this was the reason that the amount paid out in 2004 was returned without hesitation to the DoF when the Col began investigations.

4. Earlier, on the 12th of July 2002 (two years after the raid), Mr. Gabriel Yer wrote to the Attorney General giving notice of his intention to claim pursuant to section 5 of the Claims By and Against the State Act. The subject matter of the letter is captioned: "Notice of Intention to Make a Claim Against the State out of time...". The letter was addressed to Mr. John Kumura, who was Acting Solicitor General. The matter of seeking leave to make a claim out of time under Section 5(2)(c) is a matter for the Attorney General to make such a decision and not the Solicitor General. Therefore this letter should

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have been written to the Attorney General and not the Solicitor General.

In the second paragraph of the letter of 12 July 2002, Mr. Yer states the purpose of the letter to be: "to comply with the requirements of Notice under the Claims By and Against the State Act 1996. Since the raids occurred some nearly two years ago, I am writing to you to seek an extension of time under Section 5(2)(c)(i) of the Claims By and Against the State Act 1996." Mr Yer then gave reasons for the delay. The letter is legally and procedurally incorrect because when a possible claim is out of time as this one was, the consent of the Attorney General must be obtained to give a Section 5 notice out of time. This is a requirement under Section 5(2)(c) of the Claims By and Against the State Act (CBASA). Only after the Section 5(2)(c) permission is obtained from the Attorney General, then a Section 5 Notice of Intention to Make a claim Against the State can then be made within such time allowed by the Attorney General. These are two separate processes both

in time and sequence and also in law. Mr. Yer's letter of 12 July 2002 however intended to and did eventually accomplish both of these in the one and same letter.

Although the letter was addressed to Mr. John Kumura, Mr. Damem, Secretary for DJAG, responded by letter dated 21 August 2002. He wrote... "I note your Notice of Intention to Sue the State. I also note that your notice is out of time. I also note your reasons for delay in giving notice. I have considered the reasons for the delay in giving notice. I am satisfied with the reasons given. I therefore grant you leave to give notice out of time. You are given 21 days within which to lodge a formal notice of claim against the State." (emphasis added).

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Clearly Mr. Damem's letter only granted leave to Mr. Yer and others to lodge a formal section 5 Notice of Claim Against the State within 21 days. Presumably the Attorney General would then assess the late s.5 Notice and make a determination about whether it was proper in form and had sufficient detail before accepting it as proper s.5 notice.

7. Mr. Yer did not make a formal Section 5 Notice of Claim Against the State, and have it personally served (as required under s.5 (3) of the CBASA) either on the Acting Solicitor General or the Attorney General within the 21 days period granted to him. Instead, Mr. Yer proceeded to file proceedings in WS No 1231 of 2002 on 19 September 2002.

8. In WS No. 1231, the mandatory Notice of Intention to Make a Claim against the State was never served on either the Attorney General or the Solicitor General as required under Section 5 of the CBASA. The purported Section 5 Notice of the letter of 12 July 2002 is a nullity. The letter of 12 July 2002 does not and cannot qualify as a Section 5 Notice for various reasons, including:

- letter only sought leave to make a claim against the State out of time pursuant to s.5(2) of the CBASA;
- leave to serve a formal Notice of Claim Against the State was granted by the letter from the Attorney General on 21 August 2002, but the Plaintiffs did not follow through with service of a formal Section 5 Notice as required under s.5(1) and (3) of the CBASA which together require personal service.

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9. At Paragraph 7 of the Statement of Claim in WS 1231 of 2002, the plaintiffs did not clearly plead that they had properly filed a Section 5 Notice of Claim Against the State or that they had sought

leave from the Attorney General to file their claim out of time in their letter of 12 July 2002 and that they had been granted leave to file within 21 days and that they had filed their Section 5 Notice within time.

10. Four months after filing WS 1231/02 in January 2003 another claim was purportedly filed by a person called Umba Y. Gabriel on behalf of himself and 225 others in Proceeding WS 23/2003. This time the claimants were represented by Paul Paraka Lawyers. Except for the change in the name of the principal plaintiff from Gabriel Yer Toi to Umba Y Gabriel all the other details including the names of the plaintiffs, the Defendants and the pleadings were exactly the same as the action filed by Mr. Gabriel Yer in WS 1231 of 2002. In the list of plaintiffs the lead plaintiff is named only as Umba Y G. There is no explanation as to why the person's middle name and surname were abbreviated to mere initials. The National Court Registry has told the Col that file WS 23/2003 is not registered in their system.

11. WS No. 23 of 2003 did not comply with all the requirements of Section 5 of the CBASA. Since these were new proceedings, it was mandatory that a Section 5 Notice of Intention to Make a Claim Against the State had to be made. Given that the claim was out of time, a Section 5 (2) leave to make a claim out of time had to be obtained, and then a formal Notice of Claim made and personally served on either the Solicitor General or the Attorney General. None of these happened. Non compliance with Section 5 of the CBASA is fatal — rendering the claim a nullity because of the mandatory wording of Section 5 (1): "No action to enforce any claim against the State lies

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against the State unless notice in writing of intention to make a claim is given in accordance with this section...". This makes WS No. 23 of 2003 an unlawful claim.

Evidence on file suggests that in 2007, the principal plaintiff in WS No. 23 of 2003 – Umba Y Gabriel – was a pupil in Grade 5, Class 5.1 at the Port Moresby Grammar School. Umba Y Gabriel is the son of Gabriel Yer and Nigl Zerike and was born on the 01st of May 1994 in Port Moresby. If this is so, then the principal plaintiff in WS No. 23 of 2003 is a minor, and therefore did not have the capacity to sue. At the time when the proceedings were filed, he would have been only 9 years old.

Further to the above, the Electoral Commission has provided written evidence to the Col that in the entire electorate of Kerowagi, Simbu Province, there was only one registered voter named Umba Gabriel described as a Subsistence Farmer of Genakeglaku Ward in Gena Waugla local level Government area. Born in 1986 he would have been about 14 years old in the year 2000 when the raids took place. He would also have lacked capacity to sue in person and would have needed an adult to act as his 'next friend' if indeed he is the elusive Umba Y Gabriel named in WS 23 of 2002.

On the 15th of February 2003, Paul Paraka Lawyers acting for the Plaintiffs executed a Deed of Release with the then Solicitor General, Mr. Zachary Gelu in the matter of Umba Y Gabriel WS No. 23 of 2003 and settled for the sum of K1,667,925.56. Mr. Paul Paraka personally signed the Deed of Release on behalf of the plaintiff. Note that 4 days later on 19 February 2003, Mr Gelu as

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filed a Notice of Intention to Defend in the related matter of Gabriel Yer Toi WS No. 1231 of 2002.

Questions: 1. Was the Solicitor General ever aware that these two matters were related?  
2. Whether Paraka Lawyers were at that time Acting for the State in all civil matters, including this one?

15. On March the 3rd 2003, Mr. Zachary Gelu, the Solicitor General wrote to the then Secretary for Finance, Mr. Kambanei and requested payment in WS No. 23 of 2003 since they had been settled out of court by a Deed of Settlement and Release. He requested that the full payment of K1, 667, 925.56 be made payable through the

\* Trust Account of PPL, lawyers for the Plaintiffs.

16. Now comes the first surprise move done by PPL. On the 18th of March 2004 PPL wrote to Secretary Kambanei and advised that they had ceased to act for the Plaintiffs in Umba Y Gabriel & 225 Others –v– The State, WS 23 of 2003 and that the Plaintiffs were now represented by Harvey Nii Lawyers. PPL asked Finance to pay the full sum into the Trust Account of Harvey Nii Lawyers. It is not clear why the plaintiffs decided to instruct a new lawyer after PPL had successfully negotiated a settlement with the Solicitor General's office for the full amount sought in the Writ. All that remained to be done was to collect the money from Finance. Again Mr. Paul Paraka has failed to explain why he relinquished the case and forfeited his full legal fees by allowing the clients to instruct a new lawyer after his firm had done such magnificent work in settling the matter so swiftly.

17. None of the plaintiffs in the Umba Y Gabriel matter gave evidence to the Col to explain why the decision was made to engage another lawyer at that stage of the proceedings. In the absence of any

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evidence of dissatisfaction on the part of the plaintiffs against PPL it is open to the Commission to find that this was a deliberate move orchestrated by PPL to confuse anyone who might later investigate

J and follow the paper trail to PPL's doorstep.

18. PPL has kept right on representing Mr. Gabriel Yer during the Inquiry. Umba Y Gabriel has been represented at the Inquiry by a plethora of lawyers beginning with Mr. Harvey Nii, then Paul Othas of PPL. Then by known associates and ex — employees of PPL including Mr. Jack Nalawaku, Mr. Dick Korowa Kipoi of Kipoi lawyers and finally by Mr. Kumoro Sino of Sino lawyers. Such dedication

by a law firm to ex – clients who had previously been ungrateful and dumped them as their lawyers in favour of another firm, is remarkable. It is also very suspicious when it comes to working out their motives for doing so.

19. On the 22nd of March 2004, the then Attorney General himself, Mr. Francis Damem wrote to the Secretary for Finance and advised that PPL had ceased acting for the Plaintiffs in the matter of Umba Y Gabriel & 225 Others –v– The State, WS No. 23 of 2003 and that Harvey Nii Lawyers were now their lawyers and requested for the settlement payment to be made payable to Harvey Nii Lawyers Trust Account. In this same letter, Mr. Damem endorsed the decision of the Solicitor General to settle this matter out of court.

20. This action by Mr. Francis Damem is remarkable. Mr. Damem as Secretary for Justice and the Attorney General at the time did not need to write that letter. This task was one normally done by the Solicitor General. The Commission finds that his actions raises

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suspicious about whether Mr. Damem had a personal interest in the outcome of this claim.

21. On the 26th of March 2007, Harvey Nii Lawyers wrote to the then Secretary for DoF, Mr. Thaddeus Kambanei and requested payment in this matter of WS No. 23 of 2003 as agreed to under the Deed of Settlement. Mr. Kambanei promptly endorsed payment for the full amount as requested. Less than a month later, on the 24th of May  
« 2004 a Cheque of K1,667,925.00 was made payable to Paul Paraka Lawyers but this cheque was cancelled.

22. On the 12th of July 2004 through payment voucher GE:990161 a replacement Cheque for K1,667,925.00 was raised and made payable to Harvey Nii Lawyers Trust Account for the settlement payment of Umba Y Gabriel & 225 others.

23. Mr. Thaddeus Kambanei was represented by Mr. Guguna Garo, a Senior Associate in PPL, at the Inquiry hearings when he was summoned to give evidence. His relationship with the firm of PPL has endured like that of Mr. Francis Damem and Mr. Zachary Gelu. Again it is open for the Col to make a finding that the firm of Paul Paraka Lawyers had a close relationship with the highest officials in DJAG (Secretary Damem and Solicitor General Gelu) and the boss of DoF, Mr. Kambanei and his deputy, Mr. Gabriel Yer.

24. On the 19th of February 2008 the ftiU amount of K1,667,925 was returned to the DoF by Harvey Nii Lawyers. In his cover letter dated 19/02/08, Mr. Nii said the funds had been held in his firm's Trust Account since it was paid on 16th July 2004 ... "on instruction of our clients pending a resolution of various disputes among our clients on the



distribution of the settlement monies.. .In view of above and coupled with the recent NEC derision in early 2006 which halted all out of court settlements being paid based on the landmark Supreme Court judgment in the case of NCDC and Yama S e c u r i t y S e r v i c e s Limited, our client has accordingly instructed us to reimburse the money back to the State. 's Mr. Nii ends his letter with the remark that ... "The claimants can pursue their cases normally and have them proven before the Court of Taw". Any future claims arising from the raids conducted in Gena tribe in the year 2000 are now well and truly time barred under the Fraud and Limitations Act and so one would have to wonder which Court Harvey Nii Lawyers expect Umba Y Gabriel and his co- plaintiffs to pursue their claims in?