IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

CIVIL CASE NO. 120 OF 1994

BETWEEN : Kippion Harry and Others
- Plaintiffs

A N D : The Attorney General representing the Government of Vanuatu
- First Defendant

The China Chang Jiang Energy (Group)
- Second Defendant

JUDGMENT

During 1992 the Government of the Republic of Vanuatu decided that there should be a hydro electric scheme located on the Island of Malekula to supply electricity to the towns of Norsup and Lakatoro. It would appear that a decision had been made to place a generation plant on the Brenwe River, someway upstream from the villages of Brenwe and Unmet which are both on the banks of the River as it enters the Sea. In order to supply the towns of Norsup and Lakatoro with power it was necessary to have transmission lines which had to go some 25 kilometres. The land was occupied by many families and family groups. The Plaintiffs to this action are all occupiers of land on Malekula. They have come to this Court seeking damages for trespass, nuisance and a breach of statutory duty and on the Constitution Articles on the part of the Defendants, for they say that the Defendants have, in readiness for the installation of the power transmission lines, entered upon their land without permission, agreement or any statutory authorisation, and that they have cut down their trees, gardens and, in some cases, fences and have destroyed a house. The First Named Defendant in answer to these allegations maintains that it had the agreement of certain chiefs to carry out such action and that its actions were consequently lawful. It is useful at this point to set out a chronology of events as I find them.

10.8.92 A service message was broadcast on Radio Vanuatu asking for landowners in the area of Brenwei, Unmet, Anouatak and Ouri to attend a public meeting at Unmet. The Message was in the following terms :

"FROM : Malekula Lokol Gavman Kaonsel Ofis

IGO LONG : Olgeta pipol we oli claim graon we bambae Hedro power istap long em long brenwei riva.

TEKS : Mi wandem talemaot long yufala evriwan se bambae kaonsel wetem depatmen blong Lands i holem wan miting wetem yufala long Wednesdei 10 Februari 1993, long 9 o'clock moning long Unmet. Emi impoten tumas long yufala evriwan we i klem graon ia i present long miting ia.

Thank yu.

SAEN : Seckretri Malekula Lokol Gavman Kaonsel - Lakatoro

BRODKAS : 5.30 p.m. - 8/02/93

5.30 p.m. - 9/2/93

5.30 p.m - 10/2/93"

11.8.92 A meeting was held at Unmet Village, Chief Nissai, Chief Killet and many others attended the meeting. Mr Lambert Maltock, Secretary to the then Malekula Local Government Council spoke to the people.

Oct. or Nov. 1992

A memorandum of understanding is executed between the 1st Defendant and the Second Defendant in relationship to the Constitution of the hydro electric scheme.

2/11/92 The Prime Minister attended at the proposed site of the hydro generation plant and there was a pig killing ceremony. Chief Kalman from Brenwe and Chief Nissai from UNMET were present. Chief Virambat from UNMET performed the pig killing.

26.11.95The Land Acquisition Act No. 5 of 1992 came into force.

8.2.93 - Service message were broadcast about a public meeting on the 10th of February 1993.

9.2.93 "FROM : Malekula Lokol Gavman Kaonsel Ofis

IGO LONG : Olgeta pipol we oli claim graon we bambae Hedro power istap long em long brenwei riva.

TEKS : Mi wandem talemaot long yufala evriwan se bambae kaonsel wetem depatmen blong Lands i holem wan miting wetem yufala long Wednesdei 10 Februari 1993, long 9 o'clock moning long Unmet. Emi impoten tumas long yufala evriwan we i klem graon ia i present long miting ia.

Thank yu.

SAEN : Seekretri Malekula Lokol Gavman Kaonsel - Lakatoro

BRODKAS : 5.30 p.m. - 8/02/93

5.30 p.m. - 9/2/93

5.30 p.m - 10/2/93"

6.4.93 Joint Venture Contract between Government of Vanuatu and China Chang Jiang Energy Co (Group) is entered into.

19, 20 & 21/3/93 Service message is broadcast, the text of which was :-

"Kaonsel i wantem talemaot long yufala se bambae ino long taem Hydro Power-Project blong Brenwei i stat an bambae igat nid blong stanemap power Pol mo pulum power kebol folem rod stat long Unmet kasem Aop, Lakatoro mo Norsup. So, Kaonsel i wandem save ol kastom onas blong ol graons we rod blong Unmet to Norsup i pas tru long em blong tok tok long saed long stanemap Power Pol mo Kebols ia. So, Kaonsel i wandem askem evri konsen blong kam long Lakatoro Kaonsel Hedquota long Mande 22 May 1993 long morning blong yumi toktok about bisnis ia, from emi urgent mo important tumas. Tankiu tumas long koperesen blong yufala wanwan."

Nobody attended this meeting.

20.8.93 Meeting convened by area Council Secretary, Mr Asing Albert at Unmet village for the purpose of identifying land owners. It is said that the meeting "resolved" that the project should go ahead on the basis that compensation would be paid at the end of the project. Those in attendance were shown a map of what was then believed to be the proposed course of the transmission line. No survey had at that stage been carried out.

23.8.93 Upon the authorisation of the First Named Defendant pursuant to the terms of a Construction contract, the second-named defendant commenced to cut a survey line of one metre in width. This line went from the dom site at Unmet through to the PRV plantation at Norsup.

July 1994 to September 1994

The one metre clearing is enlarged to a 25 metre clearing. Work ceased on the 9th of September 1994 when an injunction was granted.

The Court sat in Port Vila and at Unmet and Lakatoro. Sixty two witnesses gave evidence to the Court. By its Defence in the proceedings the First Named Defendant admits that damage has been caused to the Plaintiffs properties; but denies that its entry onto such properties was unlawful. It further admits that no compensation has been paid in respect of any damage or entry. The First named Defendant further says :-

" 11. The First Defendant through his agent the Malekula Local Government Council did arrange and convened three (3) meetings at Unmet with the customary owners of Unmet, Ouri, Lasinwei, Anouatak and Tautu who were to be affected by bush clearings for the transmission line. Some of the Plaintiffs were at that meeting.

12. The representatives of the First Defendant did explain at the above meetings that bush clearings for purposes of erecting electricity posts would be undertaken by the Second Defendant and his servants through properties along the roadside and through bushes determined at appropriate by the surveyors.

13. It was also explained at these meetings that damages done to food and cash crops during the bush clearings should be recorded by the bush clearings of the individual property owners concerned, and that only upon the final completion, these records of damages would be verified with those prepared by the Agricultural Officer at Lakatoro and a lump sum claim would be made to the Government by the Malekula Local Government Council once the appropriate lump-sum compensation has been assessed by the Agricultural Officer.

14. At these meetings, the customary owners did not oppose nor withheld their consent from permitting the representatives of the First Defendant to enter the Plaintiffs' properties in order to clear bushes for purposes of erecting electricity posts.

15. At these meetings, it was also generally understood and accepted that only on the final completion of all bush clearing works, then a lump-sum compensation claim would be made and then distributed amongst the damaged property owners. the property owners either collectively or individually did not oppose no disagree with these mode of compensation payment."

The Facts

The thirty seven Plaintiffs are all occupiers of Land between the site of the Hydro electrical generating plant on the Brenwei River and Tautu. These people are entitled to occupy the land as a result of custom rights or as a consequence of agreements reached in the 1960's. As occupiers of the land it is not necessary for them to own the land. Their right of occupation does not appear in fact to be in dispute, although there may be some disputes as to customary ownership of the land itself. It is also noted that as occupiers of the land, notwithstanding that they may not own the land, they do, as a matter of custom and fact, own the trees and crops which are grown in and on the land.

In August 1992, as referred to in the chronology, a message was given by Radio to the people of Unmet and surrounding villages for them to attend a meeting. Mr Lambert Maltock, the then Secretary of the Malekula Local Government Council, attended the meeting. Chief Nisai from Unmet, Chief Kalman from Brenwei, Chief Kilet from Anauatak and Elder Michel from Tautu were all believed by Mr Maltock to be in attendance at the meeting. In addition there were some 100 hundred or so others. Mr Maltock stated to the Court that at the meeting he talked about the transmission line. I told them that it would go through their property.

Mr Maltock informed the gathering that if property was cut, the Government would compensate the owners of the property. He said, "They all agreed for work to go ahead. Every one agreed. They all said yes."

In cross examination it become evident that at the time of the meeting Mr Maltock did not know where the transmission line would in fact be going, as no survey had been undertaken. It is very difficult to see how as a result of such a meeting it could be said that the owners or occupiers of the land to be affected had agreed to the entry onto their land when it was infact not known where the transmission would actually be going. There appears in any event to have been no attempt to ensure that each person at the meeting was in fact a land owner or occupier of any relevant land and that all of the land owners and occupants were in fact present. It would appear that, as the meeting had 100 people present and as events have transpired, there were 60 land owners affected of whom 37 were plaintiffs in this proceedings most of whom did not go to the meeting on the basis of the evidence given by them, then a significant number of people who were in attendance had absolutely no right to signify any agreement, that the project go ahead. If such people did purport to give consent, it would be of no effect as they had no interested in respect of which they could give such consent. I am thus not prepared to find that any valid agreement in law or custom came out of this meeting. It has been put that Chiefs Kalman, Nasai and Kilet all agreed to the matter proceeding as presented and that the project could go ahead. It was submitted that it was the chiefs who controlled the interests of the people in custom and that they, having given consent, were then bound by it and had bound all of "their people" to whatever they agreed upon. In my view if it were possible to make out an agreement

of that nature from this meeting it would be entirely uncontionable and unfair, as clearly there were no details of the land or number of people to be affected by the power line and thus the chiefs would not have known in any real sense at all, what it was that they were being asked to agree upon. Chief Nisai denied that there was any agreement for work to go ahead on any power lines. He said that at the meeting those in attendance did not say anything, they just listened. Chief Kilet denied having been at the meeting and said that he did not give his agreement as a result of this or any subsequent meeting, to the cutting of the ground. Chief Kilet mentioned that he is the custom owner of Tiboon, being some of the affected land and he did not give his agreement as custom owner.

The meeting on the 20th of August was followed by a pig killing ceremony at the site of the proposed dam for the hydro scheme on or about the 2nd of November 1992. The First named Defendant asserted throughout the hearing that it was this pig killing ceremony that gave the First named Defendant the right to do all such things as may have been necessary to complete the whole of the project and to signify the agreement of all the people, especially the chiefs, to the project and their acceptance of compensation at the end of the works.

In cross examination Chief Nissai was asked by counsel for the First named Defendant :-

"In custom what does killing a pig mean, especially with a man like the Prime Minister". In Answer he said "The meaning is we join together".

Q. Join together for what?

A. In order that the project can go on

Q. So the ceremony meant the project could go ahead?

A. Yes, because that is the sign of the beginning of the work in that area. At that time it was just for the starting of the project;

Q. I put it that the pig killing ceremony also covered the transmission line. True or not?

A. The pig killing ceremony took place to allow the starting of the work"

And shortly later :-

"Q. I ask you to tell the Court - did the pig killing ceremony cover not only the work for the dam, but also the transmission line?

A. It was just for the starting of the work - just at the dam site.

Q. You mean for the transmission line you needed another pig killing ceremony?

A. At that time during the ceremony we did not realise where the lines would go or how they would stand".

It is thus clear in that there was no agreement in custom evidenced by the pig killing ceremony that related to the transmission lines for the very sensible and cogent reason that the chiefs and their people did not know where the lines would be going.

It is further important to note that at the time of the pig killing ceremony to go ahead any agreement would be a best with the Government. At this point it would appear that the Government had entered into or was about to enter into the Memorandum of Understand with the Second named Defendant. The ownership of the project was subsequently confirmed to be in the hands of the Chang Jiang Malekula Electricity Company in April 1993 which in turn entered into an agreement with the Second Named Defendant for the construction of the project.

Thus the Government was not directly a party to the construction and ownership of the project, it is merely a share holder in the Chang Jiang Malekula Electricity Company. It has been conceded by Mr Ala that in custom any right that could be gained through a custom ceremony could not be the subject of assignment. It is thus questionable as to whether there was or is any right which subsists in Chang Jiang Malekula Electricity Company to carry out the works said to have been agreed to.

One further meeting was held at Unmet by Mr Albert, an employee of the Local Government Council. It was called on the 19th of August 1993, and held on the 20th of August 1993. Those in attendance were shown a map of where it was believed the line would go. There had still been no survey carried out. It is also doubtful in my view that many of those in attendance understood the details of the map. Most of the plaintiffs demonstrated a lack of understanding as to how a map should or could be read. They have not had to refer to maps before in their lives. In any event the line did not appear to follow that shown on the map.

On the 23rd of August 1993 a one metre wide cut is made to allow engineers working on the project to carry out a survey. This line goes from the dam site to Tautu, a distance of over 25 kilometres. It is not suggested that the cut was authorised pursuant to the provisions of the Land Survey Act and there must in my view be a real doubt that the surveyor was in any way licensed to carry out such a survey.

Nothing more occured until in or about July 1994 work began on clearing the ground of trees , crops other obstructions for 12 metres on each side of the survey line cut in 1993. Whilst the first cut caused some damage, the second cut caused a "clear fell" path 25 metres wide and approximately 25 kilometres long.

The First named Defendant asserted as I have already observed that the actions of cutting down the trees, crops, fences and in some cases houses and fences was done with the consent and agreement of the occupiers of the land. It is said that the chiefs all agreed and that even if the individual occupiers did not agree or were not consulted, their chiefs had power to bind them.

Each of the Plaintiffs who gave evidence, (and that was all but one, who was an infant), stated that they occupied land that had crops, trees or other property on it, that such had been destroyed by cutting down, initially when the first cut was made, and then finally when the second cut was made. None of the Plaintiffs said they gave consent for entry onto the land by the Defendant or to the damaging of their property. One or two of the Plaintiffs believe that they were bound to follow their chiefs and if they had agreed to a matter then that was the end of it. All the other Plaintiffs did not recognise the authority of a chief to do this.

The chiefs for their part stated that their consent had not infact been given to the entry of the land for the transmission line, although it is clear in my view that consent to start the building the dam was given to the First named Defendant but not to anybody else.

I find that there was no consent for entry onto the Plaintiff's land or for the damage that occurred to take place. It is clear that the Plaintiffs were not identified as land occupiers before entry to the land was made and there individual consent was not sought. The chiefs, even if they did possess the right to bind their people, have not in fact given consent for the entry onto the land. At a time when it is said they gave consent, that is at or prior to the pig killing ceremony, the land involved had not been identified and was not identified for almost a year after the ceremony. The authorisation by the First named Defendant to the Second named Defendant to enter onto the land was thus baseless.

A further significant problem exists for the First named Defendant. It is created by the Constitution of the Republic of Vanuatu. It is a body politic. It does not in my view have any existence in "custom". It is not possible for it to enter into a "customary agreement" in the way that two or more indigenous Ni-Vanuatu may. This is not to say that it should not go through ceremonies which are of significance is custom and should in custom be observed, but it cannot base its actions upon custom. It must base its actions upon the laws of Vanuatu and it must observe all of the Constitutional requirements when dealing with the citizens of Vanuatu.

Article 2 of the Constitution provides that :-

"The Constitution is the Supreme Law of the Republic of Vanuatu."

Article 5(1), in so far as it is relevant provides :-

"The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental right and freedom of the individual without discrimination on the grounds of race, place of origin, religions, or traditional beliefs, political opinions, language or sex but subject to respect for the right and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health

.....

(d) protection of the law;

(j) protection for privacy of the home and other property and from unjust deprivation of property."

Pursuant to Chapter 12 of the Constitution , Article 73 provides :-

"All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants."

Article 74 "The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu"

Article 75 "Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land."

Article 76 "Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law and may make different provision for different categories of land, one of which shall be urban land."

Article 77 "Parliament shall prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate to persons whose interests are adversely affected by legislation under this Chapter.

Chapter 12 provides the only way in which the Government of the Republic of Vanuatu may interfere with the rights of people to land. Article 77 expressly refers to the provision by parliament for the payment of "compensation and the manner of its payment as it deems appropriate to persons whose interest one adversely affected by legislation under this chapter".

There is no inherent power in the Government to confiscate land or interests in land. The relevant legislation in existence in respect of land is as follows :-

Land Reform Act 1980

Land Leases Act 1984

Land Acquisition Act 1992

The Government has not sought to use any powers under any of this legislation. Instead it sought to deal in some kind of customary way with the people it presumed to have rights. No real effort was infact made to ensure that the occupiers of the land had been identified. The reason that this was not done was simply because it was not known where the proposed transmission line would be going until such time as the first cut had been made.

The Land Acquisition Act which provides for the acquisition of land in the public interest, sets out a series of intricate and detailed steps whereby notice is given to people affected by an acquisition and they are given a right to object. It provides by section 2 for the express empowering of a person by subsection (3), to enter upon the land so as ascertain if the land is suitable for the proposed public purpose. Section 3, provides for the payment of compensation for such entry and a right of appeal in the event that there is not agreement on or dissatisfaction in respect of the amount of compensation assessed. If the land is found to be suitable for the proposed purpose then a series of detailed provisions follow giving right to compensation payment and rights of appeal in respect thereof.

The provisions of this Act may have been applicable to this matter. They were not applied or sought to be applied by the Government.

Counsel for the First named Defendant has informed the Court that it is intended that leases will be obtained over the subject land and that such will be done in the future. Thus it is acknowledged that there are no leases at present. There would appear to have been absolutely no steps taken towards leases being granted or obtained by the Defendants or the Chang Jiang Malekula Electricity Company. There have been no certificates issued to a negotiator, there are no leases or no agreements to lease. In my view there is and has been a complete failure by the Defendants in this case to observe the laws of the Republic of Vanuatu.

I find it extra-ordinary that this project has proceeded in the way it has. Mr Lambert Matok informed the Court that the only instruction he received from the Minister of Lands and the Department of Lands were verbal. Nothing has been put in writing in this matter other than a memorandum of Mr K. Massing to Mr Maltok on the 1st of April 1993 in which he records difficulties with land owners. Mr Lambert Maltok took no notes of meetings with such a project of this significance. I find this amazing. Further, Mr Lambert Maltok stated that he had not consulted with the Attorney General's Chambers to obtain any advice as to how entry onto the land should be effected or what, if any, legislation was applicable. He was aware of the existence of the Land Lease Act and the Land Acquisition Act, but did not know what they infact provided. He did not know what legal structure or mechanism was to be used for acquisition of the land. He had also not been supplied with a survey map of the land involved. All he believed he had to do was find the custom owners of the land. He informed the Court that he had done this before in other projects and that there had been no problems in the past.

Mr Maltock was unable to provide any answer to the question put in cross examination by Mr Hakwa as to what would happen if there was a rejection of the quantum of compensation offered by the Government. The reason for this is clear in my view. There would have been no authorisation in law for the government to make any payment of compensation, because there were no provisions of the law being applied. The payment would have been entirely exgratia and there would have been no rights of appeal.

Mr Maltok said of the compensation "it was just my idea as to how it was to be done. I had no conversation with the Minister about this or with the Attorney General's Chamber".

Mr Maltok further admitted that when talking to the people :-

"I did not tell them that their gardens would be cut down, but I did know that this would happen." Mr Maltock relied on Albert Aising and in fact relied on his reports that he had consent.

Mr Maltok thus had no knowledge of the legal matters in respect of which he had been effectively directed to arrange. I do not wish to criticise Mr Maltok for this, he believed, I am sure, that what he was doing was the best he could do in the circumstances. But these circumstances arose because those authorities responsible had obviously either not thought about how the project was to be actually achieved according to law or did not consult with the correct government department to obtain the necessary advice. What has occurred in this matter is clearly a breach of the right of the Plaintiffs under Article 5(1)(j) in that they have indeed been unjustly deprived of their properly, that property being their trees, their crops, fences and buildings.

The fact that compensation as promised was not be paid to an unfixed time in the future is further evidence of an unjust deprivation, as is the fact that there was no mechanism for review or appeal in respect of any payment offered. The Court finds it abhorrent to the rule of law in this country that the government, by its officers have chosen or seen fit to entirely disregard the right of these Plaintiffs.

In defence of the actions of the First named Defendant it has been submitted that Article 74 of the Constitution is "the Constitutional apex of all land law in Vanuatu in custom rules" and that "Beneath this are the legislation inventions of the Land Lease Act and the Land Reform Act, which take effect subject to the Constitution". It must be said however that in any event, if I were to have found that there was an agreements between the custom chiefs as to the entry onto the land, which agreement I have not found. Custom rules must in any event be subject to the fundamental individual rights which are given to people in Article 5 of the Constitution as are the bases of the freedoms and protection of all people in the Republic of Vanuatu.

It has further been submitted in support of a customary way of doing things instead of following written law that :-

"The realities of custom land ownership in Vanuatu are such that if one sought to issue detailed leases and easement before commencing any project in a rural area, no project would ever commence. It would take years to first establish (a) who were the land owners and (b) what right those land owners acknowledge as being conferred on the occupiers" and "where a development in the public interest is being carried out in a rural area, therefore, the most sensible course is to take soundings of the local people about the project and establish whether they consent to the encroachment on their land for this purpose."

Whilst the court is cognisent of the great problems in respect of land law in Vanuatu and the court total inability to itself deal with a backlog of land disputes, the law is there to be observed. If practical problems exist in respect of a particular project it is within the power of Parliament to enact legislation to deal with such difficulties. It is not appropriate to avoid the practical difficulties by simply avoiding the law. At page 8 of the First named Defendant submission it is further said "if the result of the exercise of public soundings is strong, opposition, it may be necessary to stop the process and have further negotiations or follow Land Acquisition Act procedures." In this submission the First Defendant clearly acknowledges the import of the Land Acquisition Act and why it was implemented.

The Plaintiffs, as has been noted above, have founded their action upon three main grounds :-

(c) Trespass

(b) Nuisance, and

(c) Breach of Statutory Duty

I shall deal with each of this matter separately.

Trespass

Trespass to Land is any unjustifiable intrusion by one person upon land in the possession of another. It is not predicated upon ownership, but rather upon occupation and possession although a person does not derive title from the owner of the land. To constitute a trespass, the act of entering onto the land must be voluntary in that the quality of the nature of the acts of the trespass will be known to him. See Classold V Cratchlay [1910] 2K. B. 244, Morris V Marsden [1952] 1 A 11 E. R. 925 and Clerke Linddsell on Tort, 14th Edition (1975) at page 758. Trespass is actionable, per se, however where actual damage has been caused a plaintiff is clearly entitled to recover damages for any loss suffered by him.

In cases where the trespass involves the severing of the things attached to the land a person may recover for the damages done based upon the value of trees and crops. The First named defendant has submitted the Common law regarding trespass cannot be applied to Vanuatu in the entirety because it would be inconsistent with the Constitutional provisions regarding land. It was submitted that the Constitution repeated both fundamental principles of trespass: (1) possession as the basis of the right of claim and (2) the inability of another to rely on jus tenti. I am unable to accept this submission. The Constitution makes it clear that by Article 5 (1) (j), that "protection for the privacy of the home "and other property is a fundamental right. Property in my view must include the notion of interests, one such interest being a possessory interest in property, whether one obtains such possessory interest by lease under the Land Leases Act, by long user, in that owner of the land in custom knows of the occupation of land by another but has taken no steps to remove the occupant, or the possession is pursuant to one of the many arrangements in custom whereby a person will possess, in the sense of occupying land, which is "owned" by another. The custom possessor has a right to protection from unjust, that is unlawful, "deprivation of property". In my view the Constitution, far from rendering common Law trespass in applicable in Vanuatu, in fact provides for its very application. I find that the case is made out in respect of the trespass. It is clear that neither in custom or pursuant to the Statutes of Vanuatu nor, for that matter based upon any legal justification, the

Government of the Republic of Vanuatu authorized the Second named Defendant to enter onto the land occupied and in the possession of the plaintiffs and each of them. There has been a trespass by the second named defendant which acted upon authorisation of the first named defendant. The damage of the land occurred on two occasions, the first was in the month of August 1993 and the second was between July and September of 1994, when on order of this Court halted work that was being undertaken.

Nuisance:

Nuisance may be defined as being " a condition or activity which unduly interferes with the occupation case and enjoyment of land". It is an "act or omission which is an interference with disturbance or an annoyance to a person in the exercise of his ownership or occupation of land or of some easement or interest or right to use and enjoy the land. See Clerk & Linsdel on Tort at p.803. It will be caused by an unlawful act. It is not actionable per se and actual damage must be proven. In this matter the allegation of nuisance is based upon the same facts as those contened for in the action for trespass.

Breach of Statutory Duty.

For a person to be able to establish a civil liability for a breach of statutory duty a plaintiff must show that:

a) the injury he has suffered is within the ambit of the statute.

b) the statutory duty imposes a liability to civil action.

c) the statutory duty was not gulgilled and

d) the breach of duty has caused injury.

In this matter it is submitted by the Plaintiff's that the Land Acquisition Act applies and imposes certain duties upon the First named defendant before it may " acquire " land for a public purpose. For non- compliance with a statutory duty to be actionable it must be shown that the injury that occurred was a type that the statute was passed to prevent. The Land Acquisition Act is an act which provides for the compulsory Acquisition of Land for any public purpose and provides a definition of land that "includes any estate, any interests on benefit to land, all things growing on the land, houses, buildings, improvements and all other things on land...".

It is predicated, in section 2, upon the Minister deciding that " land in any particular area is likely to be needed for any public purpose". If the Minister should decide it then provides for a series of complex steps to be undertaken which initially permit access for the purposes of the investigation and the eventual acquisition and payment of compensation.

In this case it may be said that this is an Act that, if applied, would have permitted entry, however for it to apply the Minister must just make a decision pursuant to section 2. It is not that an Act of general application to all situations and until the Minister makes the decision required in section 2 it has no application. No evidence has been lead to indicate that the Minister has made such a decision. That I do not believe that there has been a breach of statutory duty in the sense that would actionable. If the decision had been made and the provision of the Land Acquisition Act had thereafter not been followed, then in my view it would have been clear that the umbrella would have been opened to cover the Plaintiff's in this case. The import of both the Land Leases Act and the Land Acquisition Act to this case is that they provide the primary legal means whereby the defendants could have obtained lawful entry to the land if they had been applied. The fact is that they have not been applied. There is no right in either of the defendants to obtain an interest in the subject land other than by the Laws of Vanuatu as provided for in the Constitution as neither may obtain such by custom. Such is made clear by the Constitution. article 75 provides that " Only indigenous citizen of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land".

The Government cannot acquire land by a " recognised system of land tenure" in the sense meant as it is not a " citizen of the Republic of Vanuatu". The Government gets its power to acquire land from Article 80 of the constitution which provides : "Notwithstanding Articles 73 and 74 the Government may own any land acquired by it is the public interest".

Breach of the Constitution.

The action is further based upon a breach of the Article 5(1) (i) of the Constitution in that there has been an unlawful deprivation of the property of the Plaintiff's. Article 6 clearly gives a right of action to the Plaintiff's and provides that the Court can award compensation in respect of a breach, if so found, for reasons already stated above. As I set out above I find that there has been a breach of article 5 (1) of the Constitution in that without lawful exercise or justification the First named defendant by its agents has entered upon the lands of the plaintiffs, or has authorised the second named defendant to so enter the land occupied by the plaintiffs and has deprived them of their property, being trees, crops, fences and structures upon the land.

Damages.

In respect of the quantification of damages I shall take perhaps the unusual step of firstly dealing with the submissions of the First named Defendant.

In this matter there has been substantial damage caused to the trees, palms and crops of the plaintiffs, with the exception of Micha Joseph whose only interest in this matter is in respect of the grant on an injunction to restrain entry onto his property.

The damage suffered by the plaintiffs has varried significantly. Coconuts palms at full bearing age of 20 years have been cut down in some instances. Such can be replaced but they will take many years to return to full bearing age. The same can be said of cocoa trees. It is important to note that this Court is not considering the question of compensation for the acquisition of land or an interest in land. It is only considering the question of damages in respect of trespass, nuisance and pursuant to Article 6 of the Constitution.

Mr. Jenamy Bongkone, a field assistant with the Department of Agriculture gave evidence that he was asked to count the damage to crops and property of the Plaintiffs. He went with a number of other people, but had no dealings with any of the Plaintiffs. No arrangement had been made for this. He said however that there was an agreement for him to go onto the land to make the assessment. This was not the first time he had undertaken such work, although he had only a small involvement in past. He used figures that are largely given to him by Mr Jeanot Nibtick and infact only made a very limited count of the damage. He said " I took some of the people and just walked through the damage. We did not count". He only knew the age of plants, where he looked, by guessing, if the owners were not present. It appears that of the 37 plaintiffs, the witness in fact only inspected the properties of five. The other properties visited were not of the plaintiffs. The information provided by Mr. Bongkone is in my view flawed in the most fundamental way.As he relied almost entirely upon hearsay in collecting the data which he submitted originally had been obtained by him as a result of his inspection of the land. The final report by an Agricultural economist, Mr Philip Arubilake, was based on these figures provided to him after they had been collated by John Wycliff, it must also be flawed. Mr Arubilake recognised and acknowledge that his report was only good as the figures upon which it was based. There was also a failure to count the trees damaged as it is not regarded as the work of the Agricultural Department.

There is a further problem with the First named defendant assessment which goes to the very basis of the nature of the damages in this case. The first defendant has based the assessment of damages upon the Agricultural Department Policy called "Crop Compensation Policy". This policy has no bases as a legally authorised policy in the sense that it is authorised by any legislation. It has been usefully developed over a period of time to assist parties in dispute following damage that may

have been caused to crops, as a result of cattle straying and the like. It is based upon a Vanuatu average and is expressed in methodology in the following terms:

"The estimates of crop losses for cash crops is determined by estimating the loss of revenue related to the removal of the crop over the period required to re-establish the crop to full production potential. The cost of re-establishment is also included. In the case of immature tree crops, only the cost of re-establishment is valued".

It is important to note that whilst it is said in the policy that it takes into account the "loss of revenue related to the removal of the crop of the period required to re-establish the crop to full production potential" it was evident from the evidence of Mr. Douglas Malesu, the then director of the Agriculture Department and one of the authors of the policy, that in fact the expression "full production potential" meant only to the age of the first crop, no matter how small it may be. Mr Douglas Malesu said:

"The policy is not actually designed to compensation for actual loss, but to provide for the farmer to have some money until he can start earning some money again".

It is this clear that there is absolutely no correlation in methodology between that used by the Agricultural Department and the methodology that must be used by the Court when examining the actual loss suffered by the defendants. The quantification of the loss in this case must be based upon a calculation of what sum paid now will fully compensate the Plaintiffs and each of them for the loss suffered by them over the period of time it would take to re-establish those trees, palms and crops to a point where they were producing as they had before they were cut down, less any income earned.

The Plaintiff has through John Morsen Willie, Mr David Tosul and Mr Daniel Laiyang, provided evidence of the loss and damage to the crops, trees, fences and buildings of the Plaintiffs. Counsel for the defendant was highly critical of the evidence of Mr John Morsen Willie in respect of a report that was first produced to the Court. It became apparent during the course of Mr John Morsen Willie's evidence that some mistakes had been made in its collation. He informed the Court that he had prepared the report in great haste. I am satisfied that the numbers of trees and crops which are now recorded in an amended report in the report are as close as is reasonably possibly to achieve.

The Defendant's counsel has also criticised the valuations given to the trees by the Plaintiffs experts. However in cross-examination the expert, Mr. Daniel Laeyang was not moved to change his evidence and the Defendant produced no witness to rebut of the evidence of Mr Laeyong. I do not propose to take into account the objection that some of the timber was not of an economic size to mill. The fact is that if it had not been cut down but had been allowed to grow it would have been of economic value. Such loss is reasonably claimable in my view. The Plaintiffs have lost the benefit of this in the future and I view the inclusion of the calculation of this as being appropriate in those

The final Orders are:

1) The Defendants, by their servants and agents are restrained from entering upon any of the lands of the Plaintiffs.

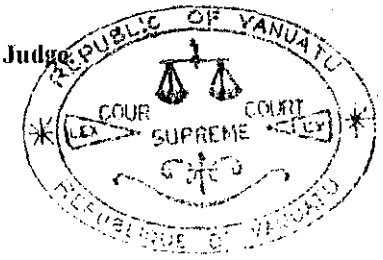
2) That damages are to be paid by the Defendants to the Plaintiffs as set out in the schedule hereto.

3) That there be liberty to apply reserved to the parties to make application to disolve the injunction as set out in paragraph are hereof.

4) That the costs of this proceeding, including all reserved costs, shall be paid by the First named Defendant and shall be taxed failing agreement.

Rowan M. DOWNING.

Judge.



DETAILS OF DAMAGES CLAIMED BY EACH CLAIMANT VALUE OF FOODCROPS + TIMBER.

Claimant 1.	VT	243, 040	Claimant 24.	VT	1,720,318
Claimant 2.	VT	15,300	Claimant 25.	VT	524,892
Claimant 3.	VT	Nil. No loss.	Claimant 26.	VT	612,284
Claimant 4.	VT	13,000	Claimant 27.	VT	505,670
Claimant 5.	VT	99,501	Claimant 28.	VT	1,008,617
Claimant 6.	VT	62,700	Claimant 29.	VT	586,715
Claimant 7.	VT	787,328	Claimant 30.	VT	613,207
Claimant 8.	VT	229,314	Claimant 31.	VT	146,362
Claimant 9.	VT	662,178	Claimant 32.	VT	630,246
Claimant 10.	VT	575,231	Claimant 33.	VT	1,193,938
Claimant 11.	VT	583,305	Claimant 34.	VT	20,100
Claimant 12.	VT	300,924	Claimant 35.	VT	906,152
Claimant 13.	VT	613,701	Claimant 36.	VT	176,886
Claimant 14.	VT	97,650	Claimant 37.	VT	980,698
Claimant 15.	VT	1,156,140			
Claimant 16.	VT	138,600			
Claimant 17.	VT	196,724			
Claimant 18.	VT	341,068			
Claimant 19.	VT	490,775			
Claimant 20.	VT	379,323			
Claimant 21.	VT	109,570			
Claimant 22.	VT	327,068			
Claimant 23.	VT	705,843			