

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

CIVIL CASE NO. 258 of 2013

BETWEEN: ELIZABETH MERMER
Claimant

AND: CHARLOT SALWAI
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

AS CONSOLIDATED WITH

CIVIL CASE NO. 945 of 2015

BETWEEN: CHARLOT SALWAI
Claimant

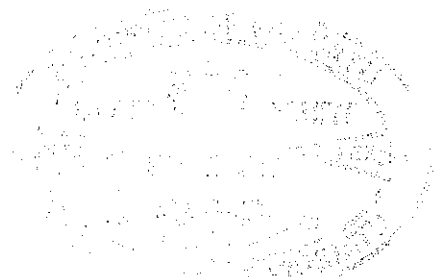
AND: ELIZABETH MERMER
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

Coram: Justice Mary Sey

Counsel: Colin Leo for the Claimant
James Tari for the First Defendant
Sammy Aron for the Second Defendant

Date of Judgment: 9 September 2016



RESERVED JUDGMENT

Introduction

1. This case concerns encroachment and trespass and temporary loss of use of land because of interference by way of encroachment and trespass.

Background

2. **Land Lease Title 11/OD33/032** (hereinafter called **032**) and **Land Lease Title 11/OD33/020** (hereafter called **020**) are adjacent properties located in the Ecole Colardeau area of Port Vila. They were both registered on 14 December 1994 in the names of Mr. Gilbert Mermer and Mr. Charlot Salwai respectively.
3. Prior to the registration of land lease titles **032** and **020** the two properties were Government quarters. There was no survey plan and the properties were separated by hibiscus hedges.
4. In **1993**, the Vanuatu Government decided to survey the land area for the purpose of subdivision and sale of the Government quarters. The Government's surveyors at that time were called the Service Topographique (Sce Topo). The survey plans, which were approved by the Department of Lands, show that the two servants' quarters are located within lease **032** which is Mrs. Mermer's lease.
5. In **1999**, Mr. Salwai built a concrete wall on his property along the boundary which was in existence before the survey was carried out.
6. Thereafter, the Department of Lands received complaints from the Claimant about the First Defendant carrying out developments which encroached onto her lease.
7. On **12 December 2001**, the Mermers engaged the services of a private surveyor company (Survey Development and Land Services). They carried out the second survey and put pegs on the land and Mr. Salwai was advised by Mr. Lebu Kalterekia that he had encroached **7 meters** onto Mermer's land.
8. On **4 August 2011**, the Department of Lands wrote a letter to Mr. Salwai informing him that he was carrying out developments which had encroached onto his neighbour's lease title.
9. On **17 February 2012**, the then Minister of Lands, Mr. Steven Kalsakau, wrote to Mr. Peter Tata (the Acting Director of Lands) instructing him to rectify the survey plans of **lease 032** and **lease 020**.

The Claim

10. Mr. Gilbert Mermer died on 3 September 2012 and Administration of the estate of the deceased was granted to Mrs. Elizabeth Mermer.

On 12 November 2013, Mrs. Mermer commenced proceedings in **Civil Case No. 258 of 2013** seeking damages for trespass against Mr. Salwai.

On 9 December 2015, Mr. Salwai also commenced proceedings in **Civil Case No. 945 of 2015** seeking rectification of leases **032** and **020**.

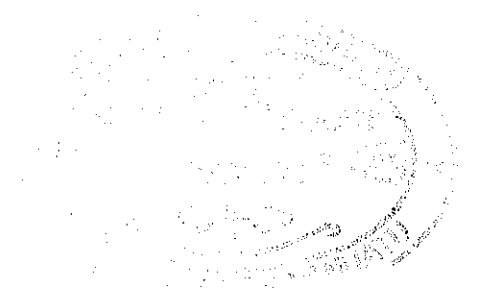
On 31 March 2016, the two cases were consolidated by direction of the Court.

The Evidence

11. Mrs. Mermer's evidence was essentially contained in the following documents which she confirmed as her Sworn Statements in her examination-in-chief and which were admitted in evidence as follows:
Exhibit "C 1" – Sworn Statement dated 30 August 2013 with annexures "EM1" - "EM6"
Exhibit "C 2" – Sworn Statement dated 28 July 2014 with a Valuation Report prepared for lease **032** by Richard Teter Dick of Vanuatu Property Appraisals;
Exhibit "C3" – Sworn Statement dated 4 May 2016.
12. Mr. Salwai relied on his Sworn Statement in support of Defence in **Civil Case No. 258 of 2013** filed on 17 December 2014 and his Sworn Statement in support of Supreme Court Claim in **Civil Case No. 945 of 2015** filed on 20 April 2016. These were tendered and admitted as **Exhibit D1 (1)** and **Exhibit D1 (2)**.
13. The Sworn Statement of Mr. Jean-Marc Pierre dated 25 September 2014 was admitted in evidence as **Exhibit D2 (1)** for the Second Defendant.

The Issues

14. The pivotal issues posed for the Court's determination are:
- (a) Whether the First Defendant in **Civil Case No. 258 of 2013** has encroached onto the Claimant's land?
 - (b) Whether the Claimant is entitled to damages against the First Defendant for trespass?



- (c) Whether there was an error in the survey plans of leases **032** and **020** which caused the registration to be obtained by mistake?

Discussion and Decision

15. It seems clear that prior to the registration of land lease titles **032** and **020** there was no survey plan and the two properties were Government quarters separated by hibiscus hedges. As a result of the survey in 1993, and subsequent subdivision, leases **032** and **020** were created as follows:

- **Lease 032 (Mermer's) – Land area is 16a 76ca
Consideration value of VT1,353,040**
- **Lease 020 (Salwai's) – Land area is 17a 42 ca
Consideration value of VT1,321,540**

16. The survey plans which were approved by the Department of Lands show that the two servants' quarters are located within lease **032** which is Mermer's lease.

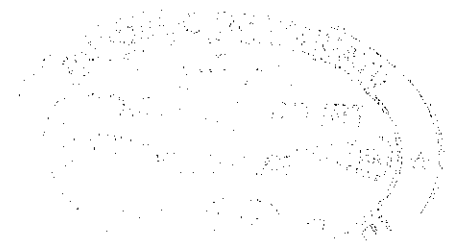
17. The Claimant confirmed that she is entitled to the two servants' quarters which are on her property. She agreed that there was no lease title before 1994 and that the properties were separated by hibiscus hedges. Mrs. Mermer said it was from the survey plan that she and her husband first noticed the encroachment. She denied counsel's suggestion that the survey should follow the hibiscus hedges and that the 7 meters formed part of the First Defendant's land.

18. For his part, the First Defendant contends that when he bought the property it was based on the understanding that he was buying it with one servant's quarters because all the Government quarters are entitled to one servant's quarters. He confirmed that when the survey was carried out at the Colardeau area in 1993 he was living in the Government quarter which is now covered by lease **020** as a Government employee and not as the registered proprietor.

19. The crux of Mr. Salwai's contention can be gleaned from paragraphs 6, 7, 8, 9, 10 and 11 of his sworn statement in support of Defence i.e. **Exhibit D1 (1)**.

“6. *The physical nature of these properties before titles have been created and registered was that [each] properties were entitled to servant quarters and Mr. Gilbert Mermer acknowledged that the two servants' quarters one belongs to the Claimant and the other belongs to him.*

7. *The result of this common understanding is that Mr. Gilbert Mermer allowed me to construct the fence separating the two properties.*



8. *The fence was created even after the leases have been registered in our names.*
9. *I also confirm another erroring relation to my other neighbor Minister Alfred Carlot [whose] fence encroaches three meters into my properties.*
10. *It was this common understanding of the error affecting these properties and people living along the boundaries of the properties [which] used to be boundaries before the leases were registered.*
11. *On or about 17 February 2012, the then Minister of Lands directed the government authorities concerned to rectify the error. Annexed hereto and marked "CS1" is a true copy of the letter from the Minister."*

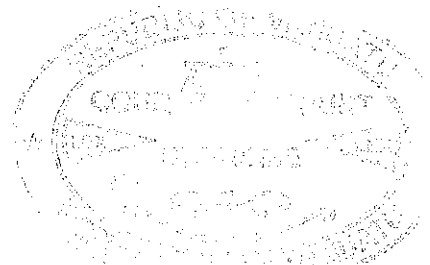
20. Suffice to say that I have perused the aforementioned letter dated 17 February 2012. It was written by the then Minister of Lands, Mr. Steven Kalsakau, to Mr. Peter Tata (the Acting Director of Lands) instructing him to rectify the survey plans of **lease 032** and **lease 020** in the following terms:

"Therefore as Minister responsible for Lands & Survey I have decided to intervene in rectifying this matter by giving the following instructions:-

- *1) That lessees continue to respect and enjoy their rights and privileges associated with assets fixed within their respective boundaries as physically confined or marked by their fence line made during the colonial era [which] by common sense. I expect all of us to continue to respect and adhere to the same practices of identifying and having responsibilities over properties unless other arrangements can be reached either between parties or as may be directed by any court of Law.*
- *2) That in my capacity as Minister of Lands and Natural Resources, I hereby give instruction that you proceed with the rectification of the survey plans for titles 11/OD33/020 basically to enlarging its square meters where property investments of Mr. Charlot SALWAI are located and consequently reduce square meters for residential title 11/OD33/032 limiting its area only on where the lessee's properties cover.*

Given these explanations and instructions on this matter, I would appreciate your prompt attention and action to facilitate the necessary adjustments accordingly"

21. I shall comment on this letter later on in this judgment but for now I intend to deal with the First Defendant's sworn statement as detailed in paragraph 19 above.



22. That sworn statement with respect is crucial and it reinforces the Amended Defence filed on 28th January, 2015. Paragraph 4 therein refers to *an error in surveying the boundaries of the properties* and this averment is further developed in paragraphs 11 to 14 as follows:

"11. Without admitting any allegations made therein the First Defendant further states that:

- (a). the second Defendant agreed before the sale of the two properties that the one property is entitled to have a servant's quarters;
- (b). The Second Defendant prior to the sale of the two properties through their then Housing Officer walked the boundary and agreed that the two properties have to each have a servant's quarters;
- (c). The value of the properties were made in accordance with how big and or small the properties were at the time of sale and that is to say the boundaries follow the [all]hedges and one servant quarters for each properties;
- (d). The Council of Ministers agreed for the properties to be sold including the servant quarters along the hedges as demarcated before the survey plans have been drawn;

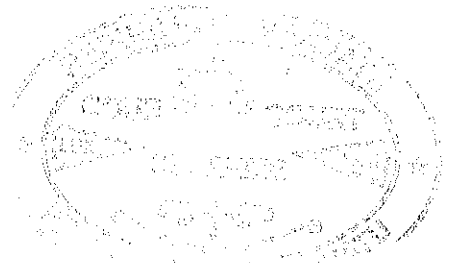
12. The Second Defendant failed to ensure that the survey plans follow the decision of the Council of Ministers.

13. The Claimant at the time of registration of his lease never developed the disputed area to be able to claim compensation for the overlap.

14. Therefore the First Defendant humbly claim that the boundaries of the two properties shall be made to ensure that the two properties each have servant quarters."

23. Of equal significance is the fact that a similar contention is put forward by Mr. Salwai in his sworn statement in support of his Claim in **Civil Case No. 945 of 2015** filed on 20 April 2016 i.e. **Exhibit D1 (2)**. At paragraphs 22 to 24 he asserts as follows:

"22. *I had undertaken a lot of developments way before the registration of the 020 until now I continue to develop the property including the servant quarters.*



PARTICULARS OF DEVELOPMENTS

- (a) *Renovating the servants' quarter as seen in annexure;*
 - (b) *Clearing the area;*
 - (c) *Ensuring hedges and flowers on the boundary are clean;*
 - (d) *Building a thatch bush kitchen (**building 2**) which [a] annexure "CS3";*
 - (e) *There is another building which is **building 3** and is annexure "CS4";*
23. *The first defendant never occupy the seven (7) meter encroachment into the 020 because of the common understanding and agreement by the Claimant, first defendant and second defendant for the claimant and first defendant [sic] occupy and develop properties according to the boundaries before registration.*
24. *Land lease title 020 and 032 were prepared, endorsed and registered by the Second Defendant and the process was done by reason of mistake.*

PARTICULARS OF MISTAKE

- (i) *The second defendant through the Minister of Lands has mistaken belief that he was signing the leases on land we agreed to with the Second Defendant (Government);*
 - (ii) *The second defendant through the Minister of Lands has mistaken belief that he was signing the leases with correct survey plans without errors."*
24. The First Defendant gave evidence. He said that leases **032** and **020** were registered by mistake as there was an error in the survey plans. He said that there was a Council of Ministers' ("COM") decision which said that each plot should be entitled to one servant's quarters. He contended that the survey department did not follow the COM decision. Mr. Salwai maintained that he believed one of the servant's quarters was his and that he started developing it since 1996 and that the developments are ongoing. He said the block fence at the back was constructed in 1999 before the second survey was done in 2001. He agreed that new pegs were put around the properties but he contended that the existing pegs on the land did not tally with the survey plan. He went on to say that the survey which was carried out affects all landowners in that Colardeau area and that his neighbours Mr. Alfred Carlot and Mr. Felix Laumae are also affected.



25. During cross-examination, the First Defendant was questioned about the existence of the COM decision as alleged and he was asked why he did not adduce it in his evidence. He responded that he does not know whether or not there is a COM decision to that effect because he was only working as the Secretary of the COM at that time. No proof or record of such decision by COM was tendered by the First Defendant. Nonetheless, he strenuously contended that there is an error in the survey plans which should be amended by the Second Defendant to ensure that each of the two properties has one servant's quarters.
26. Mr. Jean Marc-Pierre (JMP) gave evidence from matters within his own knowledge as Director of Lands and from the records of the Department of Lands. These documents were tendered and admitted in evidence as annexures JMP1 and JMP2 to **Exhibit D2 (1)**. JMP stated that annexures JMP1 and JMP2 contain survey plans for leases **032** and **020**. He said the leases did not overlap and that there is no error in the survey plans which necessitated rectification by the Director pursuant to **s.11 of the Land Leases Act**.
27. JMP confirmed that the survey done by Sce Topo for the Colardeau area did not follow the old demarcation of hibiscus hedges which separated the Government's quarters before the survey. He said the survey was carried out in a holistic manner where a straight line was ruled from one end of the boundary to the other end to ensure that properties which were on sale in the area had equal dimensions. JMP also confirmed that his department took a holistic approach in surveying leases **032** and **020** to ensure the leases have equal square meters of land area as reflected by the value consideration of the two leases as shown in the lease documents themselves. The witness agreed that SceTopo has the power to enter onto the land pursuant to **s.20 of the Land Surveyor Act [Cap 175]** *for the purpose of any survey and may affix and set up trigonometrical stations, survey marks, beacons, poles, stones or blocks* to indicate the land boundaries. He confirmed that this was done in respect of leases **032** and **020** and that both the Claimant and the First Defendant have knowledge of their boundaries.
28. JMP agreed with defence counsel's suggestion that the First Defendant was interfering with the Claimant's lease. In answer to questions put to JMP during re-examination, he confirmed that if the survey had followed the old demarcation it would have been difficult for the survey plan to form a straight line from point A to point B to ensure that the plots have roughly equal square meters of land area. He further confirmed that he does not think there is an error in the survey plans and he went on to explain that an error exists where a lease overlaps with another lease. He said that there was no overlapping of leases **032** and **020** and that there was no mistake.



29. In his written submissions, counsel for the Second Defendant submitted that the First Defendant had knowledge of the boundaries of lease 020 as indicated by the survey plan which was approved in 1993, but that in 1999 he deliberately carried out developments by building a concrete wall which encroached by some 7 meters onto the Claimant's lease 032. It is further submitted that the First Defendant did so by following the hibiscus boundary which was in existence before the survey was carried out. Furthermore, that the Second Defendant through the Department of Lands did inform the First Defendant about the fact that there was no error in the survey plans and that his development was encroaching onto the Claimant's lease and he was further advised to respect the Claimant's right as the proprietor of lease 032.
30. However, the First Defendant refuted this and he strenuously contended that the late Mr. Gilbert Mermer had acknowledged to him that one of the two servants' quarters belongs to him. The First Defendant went on to state as follows:

"The result of this common understanding is that Mr. Gilbert Mermer allowed me to construct the fence separating the two properties."

31. I must say the First Defendant's assertions seem far-fetched and contrary to the evidence adduced by the Claimant and the Second Defendant. For instance, I find the tenor of Mr. Gilbert Mermer's letters to Mr. Salwai uncompromising and firm as can be gleaned from the letter annexed to **Exhibit C1**. It is obvious that Mr. Mermer did not only notify Mr. Salwai about the findings of Mr. Lebu Kalterekia from the Survey Development and Land Services, but he went on to give Mr. Salwai an ultimatum in the following terms:

*"Hon. TABIMASMAS Charlot Salwai
Colardeau Area
PORT VILA*

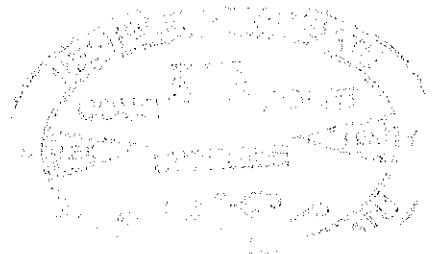
Dear Hon. TABIMASMAS,

Re: Letter blong Survey and Land Development Services dated; 12/12/2001

Mi raet folem letter ia antap [copy attach] we I kam tru long yufala long 12 December 2001 finis mo kam kasem tedei I stap mekem 9 year 1/2 we mi no risivim any ansa mo I mekam se mi no save karem aot any development.

Wetem hona mo rispek mi stap askem blong yufala I rimuvum fanis I ko back folem wanem we survey I stap talemaot mo mi stap kivim 30 days blong yumi toktok or mi tekem wan immediate action. (Underlining mine)

Thankyou long understanding mo cooperation blong yufala."



32. Having heard the evidence and seen the documents which were produced, I have no reason to doubt that an encroachment has indeed occurred on the boundary bordering **lease 032 and 020**. I am equally satisfied that the First Defendant was carrying out developments which encroached into the Claimant's lease title by **7 metres**. I am not unsympathetic with the First Defendant but I can find no equity which justifies the Court in restraining the Claimant from exercising her legal right which I consider paramount and indefeasible.
33. I shall now proceed to deal with **Civil Case No. 945 of 2015** in which Mr. Salwai, as Claimant, seeks rectification of leases **032 and 020** on the basis of error in the survey plans. Basically, the Claimant's contention is that the leases were obtained by mistake for the sole reason that the Director of Lands would not have registered the lease had he known that the boundaries were demarcated in such a way that only one property is entitled to the two servants' quarters.
34. It is perhaps timely to look at the relevant statutory provisions which deal with rectification. These are **sections 11, 99 and 100** of the **Land Leases Act Cap.163** and they provide as follows:

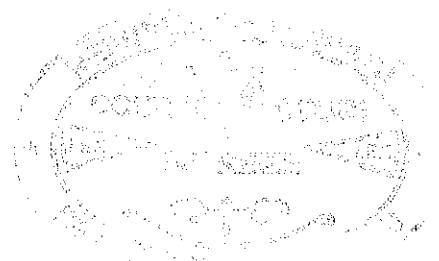
"11. Correction of land survey plans

If it appears to the Director that there is any error in a survey plan he may, after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do and giving every such person an opportunity to be heard, require the Director of Land Surveys to correct the error:

Provided that the Director may without such notice, require the Director of Land Surveys to correct the survey plan whenever such correction does not materially affect the interest of any person.

99. Rectification by the [Director

(1) Subject to section 100(2), if it appears to the Director that any register does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking such steps as he thinks fit to bring to the notice of any person shown by



the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:

Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.

(2) Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.

(3) The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.

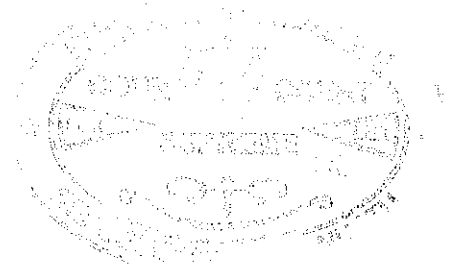
100. Rectification by the Court

(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

35. To bolster the Claimant’s case for rectification, his counsel has referred me to the case of *Naflak Teufi Limited v Kalsakau*, Civil Appeal Case No. 7 of 2004, in which the Court of appeal remarked as follows:

“In our view, the meaning of section 100 of the Land Leases Act CAP163 is not in doubt. We are satisfied that the object of the section is to ensure that the land register and the processes leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the



register and the internal processes culminating in registration. The section, in its terms, is one which empowers the Supreme Court where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake, to order rectification of the register by directing that any registration may be cancelled or amended. We note without comment, the disjunctive nature of the rectification power.

We endorse what was said by this Court in Civil Appeal Case. 25 of 2004, [2005] VUCA 5, Jone Roqara & Ors v Noel Takau & Ors about section 100: -

"For a party seeking rectification under s. 100 of the Land Leases Act, it is not sufficient to prove that a mistake occurred in the course of a transaction which ultimately concluded in registration of the interest which is sought to have removed from the register. In terms of s. 100, the Court must be satisfied that the "registration has been obtained, made or omitted by fraud or mistake". The section imposes a causal requirement. The mistake must lead to the impugned registration being made. The onus is on the party seeking rectification not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur."

36. I endorse the pronouncement of the Court of Appeal that the onus is on the party seeking rectification not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur. In my considered view, the Claimant has failed to discharge this onus of not only establishing a mistake but also of satisfying the Court that the mistake caused the registration of leases **032** and **020** to occur in December 1994.
37. The Claimant further submits that there are irregularities and breaches of the law in the process leading to the registration of the lease and as such the Court must intervene to invoke section 100 of the Land Leases Act. I reject this further contention on the part of the Claimant because it was clear to the Director at the time of registration that lease **032** comprised the two servants' quarters. I accept the straightforward evidence of JMP that there is no error in the survey plans which could warrant the rectification of the leases. What the evidence clearly demonstrates is that before the survey, the old demarcation with hibiscus hedges separated the two boys' quarters with one on either side of the two properties. However, after the survey was done in 1993, the survey plans which were approved by the Department of Lands show that the two boys' quarters are located on lease **032** which is Mermer's lease. I find JMP's evidence credible and reliable and I believe him. I also accept counsel's submissions that the Minister has no power to request the Director to rectify the survey plans of lease **032** and lease **020** as any rectification by



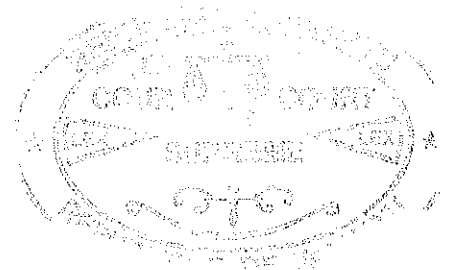
the Director or the Court can only be made pursuant to **sections 11, 99 and 100** of the **Land Leases Act Cap.163**.

38. I must say it is rather unfortunate for the Claimant to have taken such a blinkered approach to the whole issue of the encroachment. Perhaps this was grounded on the misguided notion that the Minister's instructions to the Director of Lands to rectify the two leases should be complied with. In effect, the instructions basically meant that the Director was to proceed with the rectification of the survey plan for title **11/OD33/020** by enlarging the square meters of Mr. Charlot Salwai's property and consequently reducing the square meters for title **11/OD33/032** and limiting the land area of the Mermer's property. To my mind, I fail to see how such a ministerial directive could have clothed the Director of Lands with power to rectify the leases in the face of concrete documentary evidence that there is no error in the two survey plans. Regrettably, this was a misconception and it is obvious that the Minister failed to appreciate that an increase in the land area for lease **020** and a decrease in land size for lease **032** would have affected their consideration values of **VT1, 321,540** and **VT1, 353,040** respectively.
39. In the final analysis, upon considering all the evidence adduced as well as the written and oral submissions by counsel, I have reached the conclusion that there is no error of overlapping in respect of leases **032** and **020** and I am satisfied that there is no mistake in the survey plans in consequence of which the rectification is sought.
40. I find that the First Defendant in **Civil Case No. 258 of 2013** has encroached onto the Claimant's land by **7 meters** and trespassed thereupon. I am therefore satisfied that the Claimant is entitled to damages against the First Defendant. With regard to **Civil Case No. 945 of 2015**, I find that the Claimant is not entitled to the rectification being sought as he has failed not only to establish a mistake, but also to satisfy the Court that it caused the registration to occur on 14 December 1994.

In the circumstances, **Orders** are made accordingly as follows:

- (a) I enter judgment for the Claimant in **Civil Case No. 258 of 2013** limited to liability for encroachment. The Claimant is entitled to costs against the First Defendant to be taxed if not agreed.
- (b) The Claimant's claim in **Civil Case No. 945 of 2015** is hereby dismissed. The First and Second Defendants are entitled to costs to be taxed if not agreed.

As regards **assessment of damages**, the Claimant has produced a Valuation Report dated 6th July 2014 and prepared by Mr. Richard Dick. His opinion is that the Market Value of



the encroached land is in the sum of VT 3, 000,000. However, in the interest of justice, there would be an **assessment of damages hearing on Tuesday 11th October, 2016 at 10.00 AM** at Dumbea between the Claimant and the First Defendant only.

Any relevant material on which the Claimant seeks to rely for proof of damages for encroachment is to be filed within 14 days with the First Defendant having a further 14 days to file any relevant material in answer.

DATED at Port Vila, this 9th day of September, 2016.

BY THE COURT



M. M. SEY
Judge

