

HIGH COURT OF SOLOMON ISLANDS

HEDLEY VIKASI -v- JOHNSON VUNAGI Anors AND COMMISSIONER OF LANDS

Civil Case No. 059 of 2001

Honiara: Brown PJ

Date of Hearing: 1<sup>st</sup> March 2003

Date of Judgment: 13<sup>th</sup> May 2003

Andrew Radclyffe for the Plaintiff

Thomas Kama for the First Defendants

Attorney General for the Second Defendant

*Land and Titles – Fixed Term Estate – claim of ownership – claimant not registered – equitable interest as purchaser for valuable consideration – ouster of possession – change of ownership of Perpetual Estate from Commissioner of Lands to tribe claiming customary ownership.  
Land and Titles Act (Cap 133)S.117*

*Land and Titles – claimant to Fixed Term Estate never registered as holder of estate – refusal by Commissioner of Lands to consent to transfer – consent subsequently given but revoked before claimant able to cure defect in transfer document – change of circumstances of the plaintiff when ousted from possession – effluxion of time – competing interest of Perpetual Estate holder.  
Land and Titles Act (Cap 133) S.253(1)*

*Administrative Review – revocation of consent by Commissioner of Lands to transfer – right in court to review on Wednesbury principles – discussion of Commissioner's powers to revoke – Commissioner misconstrued power under the Act.  
Ridge –v- Baldwin (1964) AC40 Associated Providence Picture Houses Ltd –v- Wednesbury (1948) 1 KB 223.*

*Land and Titles – sale of companies FTE to Solomon Islander – transfer not registered – plantation land – Perpetual Estate with Commissioner of Lands – grant of PE to traditional landowners in 1995 – usufructary holding by purchaser conflicts with customary rights of landowners – circumstances of the purchase and subsequent grant of PE to different persons gives rise to dichotomy under the Act – tenor of the Act favour traditional landowners – recourse to S.253(1) of the Act to resolve the differences – the PE holder to compensate the purchaser of the FTE and that FTE to be extinguished.  
Land and Titles Act (Cap 133) S.253(1).*

The Land and Titles Act require the Commissioner of Lands' consent to a transfer of a Fixed Term Estate. The plaintiff, a purchaser of a FTE from a plantation company in 1981, sought the Commissioner's consent but when granted, was unable to have his interest, as owner, registered because of a defect in the transfer document. The Commissioner subsequently purported to revoke his consent and the purchaser never had his interest registered. In 1995, the 1<sup>st</sup> defendants, as customary owners, had the Commissioner grant them the Perpetual Estate in accordance with the terms of the Act. In 2000, the PE holders, extra judicially forced the plaintiff from the plantation and took possession.

The Plaintiff says the Commissioners' revocation of his consent to the transfer should be set aside. The plaintiff seeks an order directing the Registrar of Titles to register the plaintiff's transfer of the FTE to him, as owner and possession of the plantation. The 1<sup>st</sup> defendants seek declarations, recognizing their rights as PE holders, and extinguishing the FTE since the registered owner has not carried out the conditions of the grant.

- Held:*
- (1) Section 117 of the Land Titles Act operated so as to afford the plaintiff, in equity, the right to seek registration as owner of the FTE.
  - (2) The Commissioner of Lands purported revocation of consent to transfer was void ab initio, for he ignored the plaintiff's standing as a purchaser for value from the FTE holder in favour of other conflicting claimants whose rights if any, were subordinate to those of the owner of the equity in the estate and the legitimate expectation to be heard (the *Wednesbury* principles) on revocation.
  - (3) Consequently on the doctrine of *Ridge -v- Baldwin*, this court may judicially review and rectify this act of the Commissioner of Lands in revoking his consent.
  - (4) The dichotomy created by the grant of the PE to a tribe different from that of the plaintiff, who claims as usufructary and as entitled to rights as transferee of the FTE, is a question for resolution in accordance with the tenor of the Act, without recourse to law obtaining in other jurisdictions.
  - (5) The appropriate course is to acknowledge the paramount right of the PE holder vis a vis a transferee seeking registration of the remainder of a FTE from a defunct corporation, a transferee whose usufructuary rights ceased upon his loss of possession of the land in 2000.  
Land and Titles Act (Cap 133) S.253(1).

### **Cases Cited**

The following cases were cited in the judgment.

*Ridge -v- Baldwin* (1964) AC40; (1963) 2 WLR 935; (1963) 2 AU ER 66.

*Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation* [1948] 1 KB 223

*Wilson -v- Moir* (no2)(1916) NZLR 637

*McFarlane -v- Wilkinson* (1923) VLR 350

Plaintiffs summons and statement of claim

1<sup>st</sup> Defendants cross-claim for declarations of right.

The plaintiff comes by way of summons, claiming entitlement to be registered as a Fixed Term Estate (F.T.E.) holder through R.C.Symes Ltd (Symes), from whom he had bought Dadale Plantation, on the north side of Dadale Bay, on the west coast of Santa Ysabel. A terms purchase was carried out following the sale in about 1981, but although the balance of purchase money had been tendered and accepted, the form of transfer from Symes was, for various reasons, never registered.

The 1<sup>st</sup> defendants, who have since acquired the Perpetual Estate, oppose the orders sought by the plaintiff, and seek declarations freeing their PE from the burden of the FTE.

The Commissioner of Lands has been joined, for revocation of consent to the FTE transfer has partly given rise to these proceedings, for it prevented the plaintiff from becoming registered as the owner of the FTE before the 1<sup>st</sup> defendants succeeded to the PE. Symes, whilst on the title as FTE holder has become defunct, while the plaintiff says he has succeeded to the companies interest in Dadale Plantation in any event.

It is admitted and on the evidence, clear that AC Symes Pty Ltd (Symes) had a Fixed Term Estate (F.T.E.) over the subject land, Dadale Plantation, which has an area of some 215 hectares. It had been used as a copra plantation. The term was for 99 years from the 1<sup>st</sup> January 1956. A term of this agricultural lease was for *suitable land* to be used as a plantation *"in a proper husband-like manner"*.

The Plaintiff, who had been employed by Symes as a ship's captain and who is a Isabel Islander, sought by letter to buy Dadale in 1981 and as a consequence, paid \$8000.00 over a number of years, to Symes and went to live there in 1981. There was some talk of buying the property with a Mrs. Palmer, but I am satisfied Mr. Vikasi pursued the purchase and paid the purchase price by instalments, on his own behalf. Receipts stated *"being for further payment of purchase of Dadale Plantation subject to approval of Commissioner of Lands"*. Eventually, the whole of the purchase price was paid and the plaintiff sought a transfer so that he could be registered as owner of the FTE.

Prior to that, Symes had written in reply to the Public Solicitor on the 30<sup>th</sup> November 1984 in relation to Dadale, confirming receipt of \$4,000.00 from *"Hedley Vikasi's group towards the purchase of Dadale Plantation"*. Having regard to the offer to purchase, the receipts in similar form, and the acknowledgment in Symes letter of moneys from Vikasi towards the purchase of Dadale, I am satisfied there is sufficient evidence in terms of the Statute of Frauds to find a contract to purchase "Dadale" by Hedley Vikasi .

When he came to seek the transfer, the plaintiff found that Symes had R.V. Emery, Receiver and Manager appointed on the 16<sup>th</sup> March 1987. The Receiver again impliedly confirmed the contract, for in reply to the Public Solicitor, the Receiver said by letter dated 20<sup>th</sup> July 1988

*"I acknowledge receipt of your letter dated 14<sup>th</sup> July 1988, and advise that I am now prepared to proceed with this transaction. However, I note with concern that Mr. Johnson Vunagi, who also had a caveat on parcel 106-002-1, claims to be one (who represent) the original owners of this land. No doubt the Commissioner of Lands will take this into consideration when you apply for consent to transfer the parcel.*

The Receiver had apparently been appointed at the behest of the National Bank of Solomon Islands and Earthmovers (SI) Limited. But the consent to the transfer was refused by the Commissioner of Lands by letter of the 10<sup>th</sup> August 1988, to the Public Solicitor. He said:

*"be informed that I cannot consent to any transaction as this parcel of land is also included with other RC Symes properties on Isabel which is under the Receivership by National Bank of Solomon Islands and the matter is pending due to the request by Isabel Province.*

Again, in October 1988, the Commissioner of Lands refused consent, saying:

*"It is understood that there is a court case over this land and therefore would rather wait until a decision is made before we consider granting consent for a transfer".*

Eventually, moneys standing to the credit of the Public Solicitor's trust account were sent to London to facilitate execution of the form of transfer of the parcel 106-002-1 (Dadale block) from Symes to Hedley Vakasi of Furona Village, Isabel. The form recited the payment of the sum of \$8,000.00 in consideration for the transfer. It was returned, dated 2<sup>nd</sup> October 1992, signed by M. Wang Chairman, G. Wang Director and witnessed by V. Wang and presumably with the Commissioner's letter of consent, sent to the Registrar of Titles for registration.

No company seal was affixed and the transfer was rejected by the Registrar of Titles on the 4<sup>th</sup> December 1992 because it did not comply in form.

On the 16<sup>th</sup> October 1992, by letter addressed to RC Symes Pty Ltd, PO Box 88, Honiara the Commissioner of Lands gave his consent to the transfer of the companies FTL to Hedley Vikasi. The original document is not amongst the bundle of documents agreed, in evidence. Only a copy (74) was included, the original having been sent to Symes at PO Box 88 Honiara.

LR 327  
16/10/92

Dear Sir,

CONSENT TO TRANSFER FIXED TERM ESTATE:  
PARCEL NO: 106-002-1

*I refer to the letter written to me, dated 1/10/92 concerning the above subject.*

*Consent is hereby given to R.C. Symes Pty Limited to transfer its fixed term estate in the above parcel to Mr. Hedley Vikasi, a farmer, C/- Furona Village, Isabel Province.*

*Yours faithfully,*

Josiah P. Riogano  
Commissioner of Lands  
Ministry of Agriculture and Lands

cc: Public Solicitor  
PO Box 553  
Honiara

On the 8<sup>th</sup> December 1992, a letter was sent Mr. Johnson Vunagi, (one of the 1<sup>st</sup> defendants) by Joseph P. Riogano, Commissioner of Lands in the following terms

Dear Sir,

LR 327 DADALE PLANTATION - ISABEL

*Refer our discussion and yours with Mr. Nesa, this is to confirm that I have received the sum of \$4,000.00 from your self as payment to reimburse the payment by Mr. Hedley Vikasi to R. C. Symes Pty Limited.*

*To date, I have not been able to hear anything from Mr. Vikasi's Solicitor, however I have a strong feeling to implement my proposal, that is to cause a subdivision of three (3) blocks on the said land.*

*I feel that this is the only way to solve the long-standing dispute over the said estate.*

*Yours faithfully,*

*Josiah P. Riogano  
Commissioner of Lands  
Ministry of Agriculture and Lands*

He had already given consent to the transfer to Hedley Vikasi. The letter does illustrate a "long standing dispute" which I accept, was the case.

On the same day he wrote to the Public Solicitor, a long letter (77) proposing that Dadale be subdivided into 3 parcels and transferred to 3 claimant groups. In that letter he also cancelled his consent issued to Symes to transfer the FTE to Mr. H. Vikasi. I reproduce part of that letter.

*I therefore resubmit the same proposal as follows:*

- (i) I reimburse Mr. Vikasi the sum of \$4000.00 believed he had paid R.C. Symes Pty Limited for the said estate.*
- (ii) That the said estate be subdivided into three (3) parcels and allocated to the three (3) parties, that is including Mr. H. Vikasi.*

*You may raise some questions on the above proposal and may be concerned about the legal implications because of Mr. Vikasi, but if you are to see the implications that my happen to either parties if we are not bothered to make some compromises with them, then, certainly we are to be blamed for not giving the best solution.*

*Be informed that if you cannot justify why I cannot implement the above proposal by 31/1/98, I shall proceed to reimburse the sum of \$4000.00 to Mr. Vikasi and cause the subdivide the estate into three (3) parcels.*

*Be also informed that the other two parties have already agreed to the above proposal and are prepared to assist wherever necessary.*

*I therefore cancel my consent issued to R.C.Symes to transfer his FTE to Mr. H. Vikasi.*

*Yours faithfully*

*Josiah P. Riogano  
Commissioner of Lands  
Ministry of Agriculture and Lands*

The Public Solicitor responded straight away. He wrote on the 10<sup>th</sup> December 1992, on his client's behalf:

Dear Sir,

Dadale Plantation LR 327

*I refer to your letter of 8/12/92. I no longer act for Hedley Vikasi as my job was completed on submitting the transfer for registration. The property should have been registered in Vikasi's name by now.*

*Please contact Vikasi direct with your proposals. I suggest you get advice from the Attorney General before you do anything further as in my opinion the action you propose taking is outside your powers and an unjustifiable interference in the contractual relations between RC Symes Pty Ltd and Mr. Vikasi's consent you are laying yourself and the Government open to a claim for damages.*

*Yours faithfully*

*(Andrew Radclyffe)*  
*Public Solicitor*

After a passage of time, a second Form of Transfer dated 3<sup>rd</sup> November 1995 under seal of Symes, was returned from execution by the transferor in London to the transferee, Hedley Vikasi.

By then the Perpetual Estate (PE) was with the 1<sup>st</sup> defendants. It had been granted on the 19<sup>th</sup> April 1995. Once again the Public Solicitor commenced his round of correspondence seeking the consent of the holders of the PE to the transfer of the FTE to Hedley Vikasi. It was refused.

The transfer has never been registered. Symes remains on the title as the Fixed Term Estate holder. Just to add further gloss to the argument over the land, Lungole Awich J had reason to dismiss an application (by decision in civil case No. 343 of 1995 dated 6<sup>th</sup> January 1998) by the Hobrae Tribe to have the registration of the perpetual estate of the three custodians for the Taraoa Tribe (the same three 1<sup>st</sup> defendants as appeared herein) set aside.

The judge, as well as relying on the fact that the Hobrae Tribes assertions of ownership were insufficient to ground a cause of action, found, on the evidence of the respondents in that action (the three 1<sup>st</sup> defendants herein) that the ownership of the particular land, in custom, had been litigated in 1948 and in 1977, between these very lines, and accepted the Taraoa's claim to primacy reflected in the Commissioner of Lands act in granting the PE to the three representatives of the Taraoa Tribe.

Where does this leave the plaintiff?

The plaintiff conceded, that by virtue of S.101 (1) of the Land and Titles Act, Symes is deemed to have a FTE for 75 years, from 31<sup>st</sup> December 1977. So the claim of the plaintiff to the estate of Symes must be reduced to that period. (The estate of the transferee cannot exceed the extent of the estate of the transferor).

Mr. Radclyffe then pointed to S.109 of the Land and Titles Act where the three sub paragraphs describe the rights of the owner of the perpetual estate, the fixed term estate. I should point out at this juncture the 1<sup>st</sup> defendants are registered owners of the PE but the FTE still remains with Symes.

Section 110 of the Land and Titles Act deals with indefeasibility of title on registration. Section 112(1) of the Land and Titles Act describes the perpetual estate holders rights "*to occupy, use and enjoy in perpetuity the land and its produce, subject to the payment of any rent and the performance of any obligation for the time being incident to the estate, and subject to such restrictions as may be imposed by or under this Act or any other written law*". The phrase "under this Act" would include the restriction imposed by a Fixed Term Estate described in Section 113(1) (2) of the Act.

Section 113(2) provides that the owner of a fixed term estate may, dispose, wholly or in part, either during his life or by will, of such estate in any manner he thinks fit. Mr. Radclyffe places emphasis on this right of disposal in Symes, and points to the view of the Premier of Isabel Province who can be seen to reflect the terms of the Act. The letter of the Premier to Mr. James Wang (of Symes) dated 2<sup>nd</sup> April 1986 is reproduced in full for it illustrates the competing claims to the Dadale Plantation, and is evidence of the state of the plantation at that time.

The premier of the Isabel Province had been keen to buy the plantation, and it would seem that the Province was the third interested party that the Commissioner was referring to in his letter of the 8<sup>th</sup> December 1992 (above). The Premier wrote to James Wong of Symes on the 2<sup>nd</sup> April, 1986, a letter in the following terms (52).

Mr. James Wong  
R C Symes  
Honiara

Our Ref: F07/2/14  
Date: 2<sup>nd</sup> April 1986

#### LR 327 DADALE PLANTATION

*The unsettled issue hanging over Dadale Plantation has amplified itself to a stage where Mr. Hedeles properties were destroyed by burning during the Christmas and New Years period.*

*By law you are free to sell your land to whoever you feel you want to deal with. According to our files and I accept being corrected the Varie Group had been recommended by the then Isabel Council to negotiate the return of the said plantation. Soon after Mr. Hadley Vikasi also applied for the same. Mr. Hedley was supported by the faction opposing the claims of the Varej Group on the Sinagi Taraoa. The Sinagi Taraoa dealt through the Province and Mr. Hedley directly with you.*

*For the cause of real development Dadale Plantation should not be left in such a stage it is in now but rehabilitated and developed. It just would not be so with the current atmosphere. Whoever between the groups will now and onwards harass the other. It is for this reason that I now appeal to you to allow the Province to pay the land. The Province will develop it and sell it eventually to the would be party in the future.*

*Whatever the future situation be the requirements of the resolutions made by the Assembly will take precedence.*

*I believe Mr. Hedley has already paid you \$4000.00. Can I now take it that you will now refund Mr. Hedley the said sum and have Dadale developed by the important and independent man in the issue – Isabel Province.*

*Sir I hope my proposal finds favour. If so you would be getting yourself out of the court of play and leaving the matter to be dealt by Isabelians alone.*

*Yours faithfully*

*C. M. Vahia*  
*Premier*

Before the time of the Premier's letter, Mr. Vunagi had occasion to write to the plaintiff.

*Mr. Hedley Vikasi*  
*Furona Village*  
*Isabel Province*

*Ministry of Home Affairs & Provincial Government*  
*PO Box G11*  
*Honiara*

*Dear Hedly,*

*Ref: PF/J. Vunagi*  
*Date: 3/6/85*

RE: COMPENSATION TOWARDS YOUR HOUSE BURNT \$200.00

*Find enclosed the sum of \$200.00 (two hundred dollars) towards the compensation of your house as have been burnt by me on 2/2/84.*

*As Custom settlement will only be the solution to our misunderstandings, the matter I see must still be dealt with by the Paramount Chief of Isabel and that is Bishop Dudley Tuti.*

*Should you wish to discuss things with me my contact address and telephone are as above.*

*Yours faithfully*

JOHNSON VUNAGI

*cc: Bishop Dudley Tuti*  
*(Paramount Chief Isabel)*  
*Jejevo Settlement*  
*Buala Station*  
*Isabel Province*

Mr. Radclyffe then referred to the Acts provision dealing with overriding interests.

S.114(g) *"The owner of a registered interest in land shall hold such interest subject to such of the following overriding interests as may, for the time being, subsist and affect the same, without their being noted on the register -*

*(g) the right of a person in actual occupation of the land or in receipt of the rents and profits thereof save where enquiry is made of such person and the rights are not disclosed."*

The provision is applicable to this case for in 1995 the PE was granted to the 1<sup>st</sup> defendants. From a perusal of the letters which have been set out above, and the evidence contained in the bundle of documents it is very clear that the defendants knew of the plaintiff's claim to the land by virtue of this contract with Symes. The plaintiff was in occupation of the land at the time the 1<sup>st</sup> defendants took the Perpetual Estate.

The question remains, however, what is the nature and extent of the plaintiff's interest at the time the 1<sup>st</sup> defendants took the Perpetual Estate on the 14<sup>th</sup> April 1995, and can that interest be defeated by the 1<sup>st</sup> defendants.



Section 117 of the Act is pertinent to the first part of the question.

117. - (1) *No registered interest in land shall be capable of being created or disposed of except in accordance with this Act and every attempt to create or dispose of such interest otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any such interest.*
- (2) *Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest unless the agreement upon which such is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized:*
- Provided that such an action shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –*
- (i) *has in part performance of the contract taken possession of the property or any part thereof; or being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.*
- (3) *Every instrument when registered shall have the same effect for all purposes of and incidental to this Act as if it had been made under seal; but nothing in this subsection shall be construed to prevent a party to such an instrument affixing his seal thereto, or giving to the instrument any additional form of solemnity not inconsistent with the provisions of this Act.*

I have already found that the agreement to purchase the Fixed Term Estate satisfies the Statute of Frauds. There are sufficient memorandum, signed by the party to be charged, clearly identifying the land the subject of the contract. In those circumstances, upon payment of the balance of the purchase price, the purchaser is entitled to call for a transfer of Symes interest in the Fixed Term Estate, that right was exercised, and eventually a transfer in registerable form was obtained. Having satisfied the provisions of the Statute of Frauds, the material part of which is incorporation S.117(2), the plaintiff would have been entitled to a court order, obliging the vendor, Symes to execute a transfer of his interest in registerable form, at the time when the balance of purchase moneys were lodged with the Public Solicitor's trust account in July 1988.

The proviso to S.117(2) makes it easier for the plaintiff, however, for he was in occupation of the land at all relevant times up until Christmas 2000. These factual matters about the plaintiff's occupation really are not in dispute, although the 1<sup>st</sup> defendants did dispute his use of the land, criticizing his lack of husbandry.

The Commissioner of Lands refusal to grant his consent to the transfer of the Fixed Term Estate from Symes to the plaintiff never once raised the issue of husbandry, or lack of it, as grounding his refusal. From reading the correspondence, the Commissioner was anxious to reconcile competing claims. I use the word "claims" advisedly, for in this case they did not necessarily reflect "interests" in the Fixed Term Estate. Clearly the plaintiff had such an interest for he was a purchaser from the Fixed Term Estate holder, Symes; was in occupation, to the knowledge of the defendants; and upon tender of the balance of purchase money to the vendor, entitled to call for a transfer.

In other words, at that time the 1<sup>st</sup> defendants became registered as the Perpetual Estate holders; the plaintiff had an “over-riding interest” in terms of S.114 (g) (“the rights of a person in actual occupation of the land”) without their interest being noted on the Register.

**Powers of Commissioner**

The powers of the Commissioner when called upon to consent to a transfer are set out in S.144(1)

*The Commissioner shall not give his consent to the grant of a lease under subsection (2) of section 143 unless and until he is satisfied that the proposed leasee is of good repute and has the capacity and ability to use and maintain and, where applicable, develop the land in accordance with the development and town and country planning provisions applicable to the land and in a manner consistent with the promotion of the public benefit.*

Reading the letters of the Premier, Isabel Province and the letters of the Commissioner of Lands I am satisfied the Commissioner's refusal was based on his expressed wish to subdivide the land into 3 blocks, and transfer the blocks to the 3 claimant groups. Whilst acknowledging Mr. Vikasi's intention to develop, the Commissioner's letter of the 14<sup>th</sup> February 1992 (68) touched on the disputes. He said “if such disputes continue to come in, Mr. Vikasi would not be secured to carry out his development”.

Mr. Radclyffe also mounted an argument on Section 148(1) of the Act, which deals with agreements implied in leases on part of lessee. I cannot see the relevance, for while the 1<sup>st</sup> defendants may now have the PE, at the time they took it; the estate was subject to subsisting interests of the plaintiff.

**Arguments**

The plaintiff argued that the Commissioner's consent, once given, could not be withdrawn for the reason given by letter of the 8<sup>th</sup> December 1992 (see above). He conceded, by counsel, that the Commissioner had power to withdraw his consent, by virtue of the Interpretation General Provisions Act (Cap- 85) S.30(i)(e). He says however, that the withdrawal of consent must relate to the matters contained in Sections 144 and 172 of the Act, relevant to the exercise of discretion in the first place. The Commissioner cannot withdraw his consent for unrelated reasons. Mr. Radclyffe pointed to the letter showing the withdrawal because of alleged disputes over the land and not for any of the reasons allowed by the Act. He is in effect saying that the Commissioner acted ultra vires his powers, as he stated in his letter to the Commissioner on the 10<sup>th</sup> December 1992.

I should say I agree with his argument, for withdrawal of consent must relate to the matters to which the Commissioner is bound to consider when granting consent. Without attempting to exclusively state matters for his consideration when revoking his consent, fraud or mistake obviously came to mind. Such revocation relates however, to his expressed wish to subdivide and transfer not matters dealt with in Ss.144, 172.

The disputes over the land have been long standing and at times vitriolic .

These disputes; over customary ownership (considered by Awich J); over the right to occupy; (between these parties) involving the Provincial Government for its own reasons; all affected the land before the 1<sup>st</sup> defendants grant of the PE, and have continued since.

They were pre-existing (see Commissioner's letters of August and October 1988, previous) at the time of the Commissioner's consent on the 16<sup>th</sup> October 1992 so there was a window of opportunity, from the consent until its purported revocation on the 8<sup>th</sup> December 1992, for the plaintiff to register a transfer and obtain the indefeasibility of title (S.109 of the Act) he so earnestly desired. The plaintiff was unable to avail himself of the opportunity for he was still struggling to obtain a form of transfer, properly signed by Symes.

Was the Commissioner within his powers to revoke his consent by letter on the 8<sup>th</sup> December 1992 for his implied reasons?

Was the manner of the Commissioner's revocation fair?

He was clearly minded to resolve, if at all possible, the on-going disputation over the land, disputation which had given rise to violence in the past, and threats of violence leading to the plaintiff's eventual departure.

This Court must look to the circumstances appertaining at that time, in December 1992. The 1<sup>st</sup> defendants had not been registered as the P. E. holder. That occurred on the 19<sup>th</sup> April 1995. In November and early December 1992, the plaintiff was entitled to become the registered owner of the FTE in Dadale Plantation. He lodged his transfer with consent, for registration with the Registrar of Titles. It was rejected because of form. The window of opportunity closed.

The manner in which the Commissioner revoked his consent clearly breached the Wednesbury principles. Hedley Vikasi would have had a reasonable expectation to be heard on the question of whether or not the Commissioner should revoke his consent. That expectation was not unfounded, for he had a vital interest in the proceedings. He was the incipient Fixed Term Estate holder. He was, to the knowledge of the Commissioner, the purchaser from Symes. He was not notified of the intended action of the Commissioner and consequently had no opportunity to be heard on the question. While the plaintiff raised the point, in his solicitor's letter to the Commissioner of Lands immediately after the purported revocation of consent, neither defendant has addressed the issue. Nevertheless, Wednesbury principles have been adopted and applied in this Court, and I propose to follow them in this case.

It was clearly the very point that interested the Commissioner, for his act in revoking his consent has given rise to this litigation. Mr. Deve has intimated he will abide the decision of the Court. Whilst I cannot stand in the shoes of the Commissioner and make decisions contemplated by S.144 of the Act, this Court has power to set aside and substitute a decision of the Commissioner when wrong in law (*Ridge -v- Baldwin* (1964) AC40).

Part XIII of the Act deal with transfers.

S172(1)

- (1) *An owner may, subject to the provisions of this Act including the provision to this subsection and subsection (2) transfer his estate, registered lease or charge to any person (including himself), with or without consideration, by an instrument in the prescribed form.*

- (2) *No fixed-term estate or lease shall be transferred without the prior written consent of the Commissioner to any person other than a person in whom a perpetual estate may be vested under the provisions of Part VII and the provision of section 144 (which relates to the conditions of consent for a grant of a lease) shall apply to a consent under this subsection as though section 144 referred throughout to such a consent.*
- (3) *A transfer shall dispose of the interest transferred from the whole remaining portion (at the time when the disposition purports to take effect) of the period for which the interest was registered.*

The restriction in S.172 (2) by virtue of Part VII, (Land Ownership) relates to, in so far as it affects this case, the conversion of estates held by persons other than Solomon Islands, to estates of 75 years.

There is no impediment to the plaintiff becoming the owner of a PE for he is a Solomon Islander. Part VIII of the Act, dealing with registration, sets out what is commonly referred to, as the indefeasibility provisions.

Was the plaintiff, then when he sought registration in about November, early December 1992, in equity, entitled to be registered?

He was in the position of a purchaser for valuable consideration, but on notice of various claims, including that of the 1<sup>st</sup> defendants, who claimed as customary owners. That claim of the 1<sup>st</sup> defendants was the basis for their application to be registered as Perpetual Estate holders. That estate may subsist together with a Fixed Term Estate. The Act recognizes this principle. The 1<sup>st</sup> defendants hold their estate, subject to the existing Fixed Term Estate of Symes. So the fact of the existence of the 1<sup>st</sup> defendants claim to an estate at the time the plaintiff sought to be registered in 1992, did not affect his entitlement, *visa a vis* the 1<sup>st</sup> defendants, to be registered as the Fixed Term Estate holder. Had the form of transfer been in order, he would have been registered, so in equity, he may claim entitlement to be registered as owner of a Fixed Term Estate.

May the Commissioner withhold his consent?

As I have found, on Wednesbury principles, his revocation of consent must be set aside. But after such a length of time, some eleven years, what purpose would be served by referring the act of revocation back for reconsideration, when it is clear, on the reasoning in his letter of the 8<sup>th</sup> December 1992, he was acting on incorrect principles. The proper course is for this Court to substitute a decision in accordance with law. His rationale relied on the expressed wish to resolve conflict, amongst those interested parties, including the Provincial Government. Worthy in itself, it subordinated the equitable right in the plaintiff to be registered as the owner of the Fixed Term Estate. It also overlooked the fact the plaintiff had an "overriding interest" in terms of S.114(g).

By subordinating that right, to satisfy other claimants, without rights at law, but mere assertion, the Commissioner has misconstrued his powers under S.144 of the Act. His act of revocation may be the subject of judicial review, (*Ridge -v- Baldwin*). The Commissioner was bound to consent to the register of the transfer of the Fixed Term Estate from Symes, for the plaintiff's rights in equity, succeeded to those of Symes, who was the owner of the Fixed Term Estate. The 1<sup>st</sup> defendants rights were recognizable as customary owners for whom, in accordance with the tenor of the Act, the Commissioner held the PE and were subsequently recognized by the grant of the PE, but subject to existing interests. In the absence of other basis for his decision in revoking his consent, the Commissioner's act was void, ab initio for he acted ultra vires his powers, under S.144.

The subsequent grant of the PE to the 1<sup>st</sup> defendants absolved the Commissioner of his duties to hold the land under the *trusts*, (my choice of words) of the Act, but since the trust was for the benefit of the customary owners, and since a FTE can subsist concurrently with a PE, the Commissioner's act in revoking his consent, must now be seen to be wrong.

The 1<sup>st</sup> defendant's claim as owners of the customary estate had been settled in time before the Commissioners act of purported revocation in December 1992. By revoking his consent, he impliedly subordinated the FTE of Symes, (which was held in equity by the plaintiff) to competing interests of others. The original consent remains in force.

#### Intervening Circumstances

If there had been nothing further, the plaintiff would, by court order, be entitled to register his transfer with the Registrar of Titles. But much has happened in the 11 years since. The plaintiff no longer occupies the plantation.

But from some time in 1981 he, with his family, lived in Dadale, in a leaf house and worked the land. He planted coconut trees and gardens, including gardens of taro, potato and oranges. In 1984 his house was burnt by Johnson Vunagi's group, which resulted in police action and compensation. In 2000, another group came, and forced him from the plantation.

The plaintiff, in his evidence said may-be 12 people from Malaita came and in 2001, may-be Johnson Vunagi's group cut down the coconuts. Some 75 big trees and 25 small trees were felled. He said at no time whilst he was in occupation, did the Lands Department man or the provincial government criticize his work on the plantation. He was adamant that he wanted to stay on Dadale for he bought it, and owns it. He is unwilling to allow Vanagi line to stay there.

Mr. Kama, in cross-examination, brought up the issue of Hoprai tribe's interest in the land. Mrs. Palmer (who originally joined with the plaintiff in seeking to buy the land) was of Hoprai. The plaintiff was evasive, but denied that Mrs. Palmer had paid money towards the purchase, rather the \$1000.00 that she had advanced had been returned.

Mrs. Palmer was not a party to the eventual agreement, of that I am satisfied. Mr. Kama then attempted to seek evidence out of the mouth of the plaintiff of the Commissioner's intentions when this could not advance the cause, and was disallowed.

What is clear, however, was that the plaintiff was aware of a problem over the land, raised by the provincial government, when he bought the land in 1981. When asked why there was such a delay between the 1981 payments and the 1992 transfer, the plaintiff answered, "maybe the other groups want to come in and interfere, the Vunagi group". There is no doubt that was the case, especially when the Court has regard to the fact of the 1984 arson attack.

Mr. Kama then sought to show that the plaintiff was not able to develop and work the plantation. The plaintiff denied the allegations, asserting that he had planted and cleaned the plantation, when needed and had labourers come 2 or 3 times. This work included bush on the hills, not only about the house.

Now I accept the plaintiff's evidence of work about the plantation. While there was some suggestion by the provincial government (which was itself interested in the plantation) that the plantation was ill-kept, the Commissioner of Lands did not raise the issue, in relation to the conditions imposed by the Fixed Term Estate, to peruse good husbandry.

But that failure of the Commissioner is not conclusive of the fact. On hearing the plaintiff, and reading the material before me, I am not satisfied that the plaintiff has shown he maintained the land as a copra plantation, for no attempt was made to support his annual income. He may have made gardens and cleared beneath the coconut trees, but for his immediate benefit. There was no apparent plantation work in progress, when the plaintiff left the land.

Mr. Kama did obtain a concession from the plaintiff, who conceded that the suggestion of the Commissioner of Lands to subdivide was a good one and he had agreed, but Mr. Vikasi then recanted and when asked why he wanted all the land, said he was happy, for he had bought the plantation.

Despite Mr. Vikasi's denials, I am satisfied a notice for vacation of Dadale Plantation published by Mr. Johnson Vunagi on the notice boards of Furona Island Church, Samasodu Church, Jejevo Church and given the Provincial Secretary, and various other persons and Chiefs on Isabel as well as Dadale Plantation itself, would have come to his attention.

The notice was as follows:

To: *Mr. Hedley Vikasi*  
*Furona Island*  
*Katova Ward*  
*Isabel Province*

PF: *J. VUNAGI*  
*PO BOX 858*  
*HONLARA*

*Mr. John Bahu*  
*C/- Hedley Vikasi*  
*Furona Island*  
*Katova Ward*  
*Isabel Province*

*Mrs Mary Bahu*  
*C/- Hedley Vikasi*  
*Furona Island*  
*Katova Island*  
*Isabel Province*

*Dear Madam/Sir,*

**RE: NOTICE FOR VACATION OF DADALE PLANTATION LR327**  
**PARCEL NO. 106-002-1 WITHIN THE PERIOD OF THREE MONTHS**

*The Commissioner of Lands through the office of the Registrar of Titles, had granted the Perpetual Title and Ownership back to the Taraoa Tribe who were the original customary owner, the said registered land as specified above as from 19<sup>th</sup> April, 1995 and which was confirmed by a High Court decision on 6<sup>th</sup> January 1998, (Civil Case No. 343 of 1995, John Palmer (Hobrae Rep) –v- Johnson Vunagi and Others (Taraoa Reps).*

I Johnson Vunagi, on behalf of the Taraoa Tribe of Samasodu Village, Katova Ward, Isabel Province, hereby giving you Mr. Hedley Vikasi, John Babu and Mrs. Mary Babu, Furona Island, Katova Ward, Isabel Province, this three months notice and to be abided by the following orders:-

- (a) That you must vacate Dadale Registered Land by demolishing all the buildings of whatever structures within the duration of the three months notice and to remove all your good building materials to Furona Island safely.
- (b) That you do not have any legal protection and rights to enter, build house and live at Dadale registered land.
- (c) That on 2<sup>nd</sup> January 1984 the houses you had built on the same registered land were all burnt down and your re-entry to the said property is an evidence that you possess a very unchristian and a non Isabellian character behavior and attitudes.
- (d) That in the case where you think you had paid some money to the Commissioner of Lands or someone else with the intention to obtain the Fixed Term Estate of the land, that those monies can be refunded to you in full by the Taraoa Tribe upon receiving the receipts.
- (e) That expenses you have incurred during your illegal entry and live on Dadale Plantation are NOT NEGOTIABLE.
- (f) That the duration of the three months notice beings Mid Night on Sunday 22<sup>nd</sup> March, 1998 and expires mid-night on Sunday 14<sup>th</sup> June, 1998.
- (g) That there is No provision for negotiation on any interest for a lease, sub-lease or sub-division open on Dadale Registered Land.
- (h) That families from the Taraoa Tribe are moving in to work and live at Dadale Plantation soon without notice.

With the foregoing orders, I believe with trust that as Christians I have no doubt that order (d) would seriously honoured and pursued for full or instalment refunds as the two parties would agree and settle the matter in the most harmonious and peaceful manner.

I can be reached in Honiara for an open discussion on order (d), but the **THREE MONTHS NOTICE MUST BE HONOURED**.

All copy addresses are hereby notified the same.

Yours sincerely

Johnson Vunagi

COPIES: Provincial Secretary, Isabel Province  
Sir Bp Dudley Tuti (Paramount Chief) Isabel  
Isabel Provincial Police Commander  
Chief Japhet Munai, Moloforu Village, Isabel  
Chief James Bako, Furona Island, Isabel  
Chief Kikolo Fotapara, Jejevo Village, Isabel  
Chief Edward Vunagi, Samasodu Village, Isabel  
Mr. Stanley Vunagi, Samasodu Village, Isabel  
Mr. David Rabu, Samasodu Village, Isabel

NOTICE BOARDS: *DADALE PLANTATION (1)*  
*FURONA ISLAND CHURCH NOTICE BOARD*  
*SAMASODU CHURCH BUILDING NOTICE BOARD (1)*  
*JEJEVO CHURCH BUILDING NOTICE BOARD (1)*

As a consequence of this notice, I am satisfied the plaintiff was forced from the property some time in 2000, when some 12 to 15 people, possibly Malaitans at the 1<sup>st</sup> defendants behest, moved Mr. Vikasi and his family off. Such removal was extra judicial, but the 1<sup>st</sup> defendants believed they had the right to remove the plaintiff, for he was, in their eyes, not entitled to remain for he had not been registered as the holder of the FTE. That factually, was correct, but it ignored his equitable rights as purchaser from Symes.

Since then Mr. Vikasi has seen some 75 old plantation trees cut down and some 25 small trees cut.

While there was some dispute about the houses which remained standing after Mr. Vikasi was forceably removed, I am further satisfied his own house, in the photograph, remained standing but if others remained, they were of minor importance. The copra shed was in a broken down state before Mr. Vikasi left. Trees, which Mr. Vikasi had planted, some 400 on his own statement, remained undamaged.

Mr. Vunagi had offered to buy Mr. Vikasi out, an offer known to Mr. Vikasi but rejected by implication, it would seem.

On re-examination, Mr. Vikasi was adamant he did not agree to the Commissioner's suggestion of a subdivision. I accept that.

Mr. Vunagi gave evidence on the 1<sup>st</sup> defendant's behalf. He was clearly aware of the Acts tenor in that he sought and was granted the PE on his tribes behalf, the subject land "*undeveloped and identified by the Provincial Government as the customary owners.*" So far as the issue of development of the land was concerned, I am satisfied that was a material consideration in the Commissioner's deliberation over the grant of the PE. In this evidence, he recounted that the plantation was "all bush" in 1974, and that Symes was not harvesting the coconuts. Whilst he was told that Mr. Vikasi was negotiating with Mr. James Wong to buy the plantation in 1978, he took no notice, until in 1983, he felt obliged to make a point (presumably as a customary landowner) and gave notice to "the Government and Province that I was intervening, and I said I'd burn down the houses. There was only one house there then."

In fact the house was burnt and Mr. Vunagi subsequently compensated Mr. Vikasi. I am satisfied, however, that Mr. Vunagi was aware Mr. Vikasi had contracted to buy the land from Symes, and I am further satisfied that Mr. Vunagi had declined to seek to negotiate with Symes, for on his evidence, he relied upon the espoused Government policy of granting undeveloped land to the customary landowners and, in accordance with the Local Court Order of 1977, the Taronia Tribe would have been entitled to the subject land under such policy had there not been the matter of the FTE. Mr. Vunagi had objected to the Commissioner's proposal to subdivide the land for the tribe, entitled to the whole land, wanted it back. To show his good intentions, he lodged what he understood to be the purchase price, some \$4000.00, with the Commissioner of Lands, intending to buy back the FTE and regain possession from Mr. Vikasi. That proposal failed, but he was able to use the same money to secure the grant of the PE. In 1998, he posted the notice to vacate.



He had no response from Mr. Vikani. As a consequence, he told his tribe to move in. I am satisfied the 1<sup>st</sup> defendants were effectively in possession by early 2000, when Philip Vahia and his late wife, Hilda, settled there. Mr. Vunagi says he is willing to reimburse Mr. Vikasi. He says he accepts that \$8000.00 was paid, \$4000.00 in instalments and a later payment of \$4000.00. He also was aware some trees were cut down.

Having heard Mr. Vahia, I accept his evidence about the unworked state of the plantation when he took possession in 2000. Mr. Edwin Ero then gave evidence for the defendant. He was the Allardyce Station, Isabel Agricultural Field officer. He was asked to do an agricultural assessment (127) and later, a report (116) was identified as one done by Hayiekiel, another officer. I intend to use both reports, as necessary.

Mr. Kama's submission on the 1<sup>st</sup> defendant's behalf were delivered late, so that I had addressed the plaintiff's arguments on their own, before I had the benefit of these submissions. Nevertheless, I shall deal with relevant aspects, for Mr. Radclyffe has had the opportunity to reply.

Mr. Radclyffe, in his reply, addressed Mr. Kama's insistence that Symes, by its failure to work the plantation in a husband-like manner, was in breach of the covenants and conditions of the lease. As a consequence, Mr. Kama says, the FTE lease was liable to forfeiture for non-compliance with the conditions, with concomitant power in the Commissioner of Lands to take steps to enforce the forfeiture. Further, Mr. Kama, says that this breach was a ground for refusing to grant consent to transfer the estate. He referred me to the case of *Wilson and Moir (No.2)(1916)NZLR637*, as authority. That case however turned on the issue of specific performance of a contract to purchase, not on the issue of a breach of covenant (which was acknowledged by the vendor in Moirs' case) giving rise to the Commissioner's right to withhold consent to the transfer, as here. It is distinguished on its facts. Mr. Radclyffe argued, that if there was a breach, it had been waived by the Commissioner of Lands.

I do not need to go past the correspondence by the Commissioner, (reproduced here) to accept Mr. Radclyffe's assertion, for while all the correspondence may show, impliedly, that criticism may be leveled at Symes (and subsequently the plaintiff) for their husbandry practices, the Commissioner never relied upon that issue when delaying his refusal to consent, rather raised other considerations which I have dealt with at length.

But this argument about grounds upon which the Commissioner may or may not have based his refusal to grant consent to the transfer, does raise the issue of exclusion of extrinsic evidence in substitution of documents. This issue was raised very early in the proceedings, by Mr. Deve for the Commissioner and pressed by obversion, by Mr. Kama. The consent of the Commissioner was a document in evidence. It was in the plaintiff's agreed bundle and the letter has been reproduced here. The Act requires the consent before the transfer may be registered. The document affords the "best evidence", then, of this requirement of law. Or in the phraseology of Phipson, the document becomes the "exclusive memorial". Whatever matters the Commissioner had in his mind before his consent are subsumed by the fact of his consent. I need no justification for relying on the "best evidence" maxim.

Mr. Kama did raise, as an issue to be overcome by the plaintiff, that obligation to obtain such consent lies with Symes, not the purchaser of the beneficial interest in the Fixed Term Estate, the plaintiff. Mr. Radclyffe disputes this assertion, relying on the terms of the Act, which recites merely that consent is necessary.

The cases cited by Mr. Kama imply that a vendor is under an obligation to take reasonable steps to obtain the consent, (*McFarlane -v- Wilkinson* (1927) VLR 350), but do not support his assertion of exclusivity in a Vendor to obtain a consent, for if so, however could a purchaser sue for specific performance if a recalcitrant vendor sat on his hands and did nothing to obtain a consent?

So far as the issue of power in the Commissioner to revoke his consent, was concerned, both counsel agreed on the existence of power, which I accept exists. But as I have found, the power has been exercised ultra vires, and is a nullity.

The 1<sup>st</sup> defendant went on to argue that, as holder of the Perpetual Estate, they have the right to withhold consent to the registration of the Plaintiff as the Fixed Term Estate holder. While Mr. Kama did not refer me to any authority which supported his assertion, he did recount the history of conflict between these parties and between the 1<sup>st</sup> defendant and the Hobrae Tribe (the unsuccessful applicants in the High Court challenge referred to earlier).

The right to consent lay with the Commissioner under the Act, and Mr. Kama's argument, although plausible (for it relies on the continuing difficulties where the Fixed Term Estate and Perpetual Estate lie with different parties) cannot avoid the terms of the Act. His reliance on the supposed *right* in the Perpetual Estate holders to deny consent does illustrate however, the corollary, which is the *obligation* attaching to the Perpetual Estate. That is, to hold subject to the Fixed Term Estate.

The 1<sup>st</sup> defendants then, hold subject to the Fixed Term Estate. I have found that the plaintiff, strictly, is entitled on equitable principles, to become registered as the Fixed Term Estate holder.

Through effusion of time and having regard to the factual situation, (where the plaintiff has been forced off and is unable to return without risk) this Court should not precipitate a possible physical confrontation wherever there is a lawful, viable alternative. It is clear that this Western concept of creating perpetual and fixed term estates, side by side, was with a view to affording foreign interests, perhaps to work land belonging to Solomon Islanders without totally alienating such land. Such a concept, supportable perhaps in colonial times, does not sit easily today where the Perpetual Estate holder is aggrieved that another Solomon Islander, seemingly against reason (for the High Court said the Hobrae tribe had no claim) can impugn their incidents of ownership. But these rights of the plaintiff, exist, nevertheless, as this Court has found, on an equitable basis. But this basis does not help these 1<sup>st</sup> defendants accede to a course of action, which will flow from implementation of my findings, registering the plaintiff as Fixed Term Estate holder in place of Symes.

Such a course the 1<sup>st</sup> defendants would decry, for it would clearly affect their understanding of their rights, as landowners in custom, rights which they have been perusing extra judicially. Perhaps it could succinctly be said by the customary landowners "the usufructuary cannot claim ownership" (Aleck and Rannells ed "Custom at the Crossroads" UPNG 1995; 194).

While it is a simplistic view of customary landownership, it does illustrate the dichotomy between customary land law and the incidental effect created by coexisting PE and FTE's under the Act, in the circumstances of this case. The Act provides for a state of affairs (a current subsisting FTE and PE with almost the same statutory rights to produce of the land, etc) which is unacceptable in custom. A customary landowner may determine those allowed to come onto and occupy their land, with usufructuary rights apportioned according to custom.

The land use is at the will of the landowner. Under the Act, a FTE holder may sell and transfer his estate, subject to conditions, notwithstanding separate customary landowners.

Such a course will exacerbate the present bad feeling between the parties. It would mean, as well as the order for registration of the transfer of Symes Fixed Term Estate to the plaintiff, a consequential order giving possession to the plaintiff. The difficulties in affording the plaintiff's possession, in the face of other occupiers, after so long, must give pause to this Court.

What lawful alternative is there when this court recognizes the plaintiff's right to registration of a Fixed Term Estate?

Despite evidence to the contrary, isn't the maxim *Construction legis non-facit injuriam* (construction of the law does not work any injury) the end of it? For there surely will be more trouble over the land were the plaintiff to replace Symes on the title as Fixed Term Estate holder.

Mr. Kama has sown the seeds to a resolution of the problem by his counterclaims. He sought a declaration that the fixed term estate ceased to subsist when the 1<sup>st</sup> defendants lawfully re-entered and took possession of the land. On the facts found, the re-entry was not lawful but extra-judicial.

Alternatively, the 1<sup>st</sup> defendants claim to be entitled to merge the ownership of the perpetual estate and the fixed term estate, on surrender or discharge. Now this does lead the way to a resolution, but on its face, the defendant is not entitled as alleged.

The Act is a creature of the legislature, which sought to reconcile differences, which had caused landowners, leaseholders and occupiers of whatever nature, in the past, increasing trouble. Mr. Kama recites the history and to some extent, the rationale for the new Act which came into force in 1969. He says:

“Sections 21 and 23 of the Act deal with first registration of lease holds and conversion of certain leases. The perpetual estate was registered pursuant to S.21(1) of the Act in favour of the Commissioner of Lands, while the leasehold was converted into a fixed-term estate and registered in favour of R.C. Symes Pty Ltd pursuant to S.21(2)(b) and Section 23 of the Act. It was registered as “public land” (vide S.24). The perpetual estate ceased to be public land on transfer by the Commissioner of Lands to the 1<sup>st</sup> defendants and when it was registered on the 8<sup>th</sup> March 1995 in the joint names of the 1<sup>st</sup> defendants. The holder of the fixed term estate had openly supported the public policy that undeveloped land be returned to the original owners”.

It maintained that the sale to the plaintiff was conditional upon the approval and consent of the Commissioner of Lands. If the Court accepts the 1<sup>st</sup> defendants above submission that there was no valid contract of sale and the holder is now unable to perform the obligations under the cultivation lease then the mere holding onto the fixed term title serves no useful purpose”.

Now this Court has found that there was a valid contract for sale subsisting at the time the plaintiff sought to be registered in 1992, through the defective transfer. But at the time the 1<sup>st</sup> defendants become the Perpetual Estate holders in 1995, Symes had long gone but the plaintiff had not become the registered Fixed Term Estate holder.

It is only now, in this suit, that the plaintiff's rights have been determined and whilst, as I have said, the 1<sup>st</sup> defendant's hold, subject to such rights, in the convoluted state existing in 1995, the 1<sup>st</sup> defendants could perhaps be excused for the thinking they had, at last, become "owners" on title, as well as in customary law. There is clearly that dichotomy and one difficult to reconcile without recourse to S.253(1) of the Act.

*S.153(1) Any question connected with or incidental to any of the provisions of purposes of this Act arising before the High Court which is not expressly or impliedly provided for in this Act or any other written law shall be determined by the Court either by way of analogy to the provisions of this Act, or if in the opinion of the Court no such analogy appears to exist, so far as may be possible in conformity with the general tenor of this Act, and in either case without recourse, so far as possible, to the legal rules, principles, or decisions obtaining in any other state or country.*

I am satisfied that there is no particular provision which expressly or impliedly provides for the situation which has arisen here. The 1<sup>st</sup> defendants have become Perpetual Estate holders, with all the rights appertaining, and have ousted the plaintiff. The plaintiff never achieved the protection of the Register, as the transferee of the Fixed Term Estate held by Symes. Symes is defunct and no longer interested in the Fixed Term Estate for it had been sold to the plaintiff in 1980 or thereabout.

Whilst the sale has sufficient indicia for the provision of S.117 of the Act, the transfer document was not registered because of its deficiency in form, before the Commissioner for Lands purported to revoke his consent to the dealing.

The husbandry practices of the plaintiff, whilst adequate for his purposes, gave cause for criticism throughout the time of his occupancy. At the time in 1995 that the 1<sup>st</sup> defendants were granted the Perpetual Estate, the 1<sup>st</sup> defendants were aware of the adverse possession of the plaintiff, but subsequently forced the plaintiff off the land, extra judicially. Whilst the plaintiff would have been entitled to an order for registration of the transfer before 1995, the grant of the Perpetual Estate to the 1<sup>st</sup> defendants and the subsequent events have given this Court pause, for, through effusion of time, an order reinstating the plaintiff's possession of the plantation will adversely affect the 1<sup>st</sup> defendant's entitlement to their estate.

Now the exercise of a judicial discretion envisaged in the terms of S.253(1) of the Act must be exercised on proper principles. I have found analogous provisions of the Act, supporting Mr. Kama's argument relate, to the return of undeveloped land to the original owners. At the time the PE was granted the 1<sup>st</sup> defendants, the Commissioner must be presumed to have satisfied himself of the standing of the grantees and the undeveloped nature of the land. (*Omnia praesumuntur, rite et sollenniter esse acta*).

The 1<sup>st</sup> defendants actions over time, reflecting the customary principle that the usufructuary cannot claim ownership, are contrary to the rights of a FTE holder under the terms of the Act. Nevertheless, the plaintiff's ouster from occupation of the land is a fact that must be taken into account by this court. That ouster does not bolster his claim to the equity, which was first in time. It does illustrate the dichotomy of interests. This court need not make a finding on the lawfulness, or otherwise of the ouster, for the purposeful tenor of the Act coupled with the apparent dichotomy, enables me to go straight to the provisions of S.253(1) to enable resolution.

The appropriate course to resolve these conflicting interests is without precedent, it would seem, for counsel have been unable to refer me to any case.

I find that the general tenor of the Act is to recognize that underlying customary ownership and in principle, that guides the Commissioner' hand when dealing with the PE. This court should also be guided by this principle, but not so far as to exclude the plaintiff from compensation for the loss of his expectations to the FTE.

I propose to, in conformity with the general tenor of the Act, and having regard to the terms of S.253(1), make orders which will leave the 1<sup>st</sup> defendants free of the Fixed Term Estate, compensate the plaintiff at the expense of the 1<sup>st</sup> defendants (for their estate will have a commensurate benefit) and upon payment, order the Registrar of Titles and Commissioner of Lands to thereupon discharge or determine, the Fixed Term Estate.

**Orders:**

1. The plaintiff shall have judgment in relation to his claims for relief connected with and incidental to the provisions or purposes of the Land and Titles Act (Cap 133) in the following terms:
  - (i) his equitable right to become registered as the owner of the Fixed Term Estate in Dadale Plantation more particularly described as LR 327 Parcel 106-002-1 is recognized subject to:
  - (ii) the legal right of the 1<sup>st</sup> defendants as Perpetual Estate holders, to seek to compensate the plaintiff for adversely affecting his right to occupation and lawful enjoyment of his equitable interest in the FTE, which, through effluxion of time and the registration of the PE in the 1<sup>st</sup> defendants, now, may be extinguished on just terms as to compensation.
2. Proper assessment of the value of the monetary claim shall be stood over for further argument and for this Court to fix the compensation amount.
3. The 1<sup>st</sup> defendants cross claims for declarations are dismissed.
4. The plaintiff shall have his costs of his proceedings and his costs of the cross claim.
5. Upon order and payment by the 1<sup>st</sup> defendants of the compensation as aforesaid, the 1<sup>st</sup> defendants shall be entitled to an order, directed to the Commissioner for Lands and the Registrar of Titles, extinguishing the FTE affecting the subject land.

BROWN P J