IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 10 of 2004.

BETWEEN: PAKOA TOARA & SANDY BELL ISHMAEL
Appellants

AND: MOI DINH
First Respondent

AND: KALO KALRAN
Second Respondent

Coram: **Hon. Chief Justice Lunabek**
Hon. Justice Robertson
Hon. Justice von Doussa
Hon. Justice Fatiaki
Hon. Justice Treston
Hon. Justice Bulu

Counsels: **Mr. Saling Stephens for the Appellants**
Mr. Jack Kilu for the First Respondent

Hearing Date: **26 October 2004**

Judgment Date: **5 November 2004**

JUDGMENT

This is an appeal against a reserved judgment of the Supreme Court delivered on 29th March 2004 at Luganville, Santo, dismissing the appellants' claim in its entirety and awarding costs to the First Respondent.

In their **Statement of Claim** the appellants who are the registered joint proprietors of leasehold title No. 03/OL72/020 situated at Solway area in Santo, claim general damages for trespass by the

respondents onto their land and for the material damage caused by the respondents in causing truckloads of gravel and earth to be removed from the leasehold property without the appellants' knowledge or consent.

The first respondent in his **Statement of Defence** pleaded as follows:-

> "***1. He does not know if the Plaintiffs are the registered owner of Leasehold Title No. 03/OL72/020 situated at Solway area and therefore does not plea to paragraph 1 of the claim;***
>
> ***2. He does not admit to paragraphs 2 – 3 of the claim;***"

(This pleading does **not** on any view, raise a serious issue or question in regard to the appellant's ownership of the land under consideration. It simply required evidence to be called on the point.)

> ***3. He admits entering the named property and unearth quarry from the property but as far as specifically admitted he does not admit to trespass. His conduct was duly approved by the Second Defendant and one Mr. Jimmy Awa.***
>
> ***4. He denies the Plaintiffs have suffered loss for quiet and peaceful enjoyment of the property as the Plaintiff would in fact be enriched for development and improvement of their said value of lease;***
>
> ***5. He further denies the Plaintiffs are entitled to any damages, interest and cost claim in sub paragraph 1 – 3 of page 2 of their statement of claim.***"

Alternatively, the first respondent claimed to be indemnified by the second respondent who is alleged to have '***duly approved***' the

actions of the first respondent in entering and leveling the land. There was no pleading filed by the second respondent.

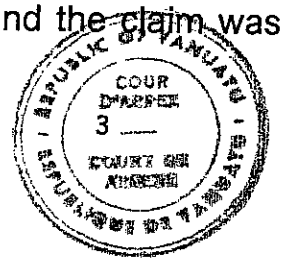
At the trial the first appellant testified in support of the claim and produced several documents including a copy of the leasehold title. Both respondents also testified at the trial and called one witness. After the close of the defence case the trial judge summoned a further witness Jimmy Awa to attend Court, give evidence and produce documents.

In answer to specific questioning in this Court counsel before use, who had not appeared in the Supreme Court, made enquires and provided information which appears inconsistent with the record. Mr. Awa's evidential contribution to the ultimate decision is minimal so we have not had to pursue the point.

In his reserved judgment the learned trial judge identified no less than five (5) questions or issues that are said to arise from the appellants claim. These were as follows:-

> *"(a) Whether the (appellants) are the registered proprietors of Leasehold Title No. 03/OL72/020?*
>
> *(b) Whether the first (respondent) is a businessman?*
>
> *(c) Whether the second (respondent) is a resident of Luganville?*
>
> *(d) Whether the first (respondent) unlawfully entered the (appellants') property and removed earth and gravel for gain? and*
>
> (e) *Whether the (appellants) suffered loss for quiet and peaceful enjoyment of their property?"*

Suffice it to say that the learned trial judge determined each issue in favour of the respondents and the claim was accordingly dismissed.



Somewhat surprisingly however the trial judge upheld the first respondent's counterclaim against the appellants.

The appellants filed a **Notice of Appeal** against the judgment challenging the learned trial judge's findings in respect of each of the issues identified in the judgment. In summary, the appellants complain that in respect of issues (1) to (4) "***the learned judge has dwelled and determined an issue which was not pleaded in the statement of defence ...***" and as to issue (5) the appellants' complain of error in the trial judge's finding that what the first respondent did on the appellants' property "***was not damage but rather value added on the property.***"

Finally, there is a complaint that the trial judge had wrongly upheld the first respondent's counterclaim against the appellants' when the claim was clearly directed against the second respondent.

We do not propose to deal at length with all of the appellants' grounds of complaint which we consider to be all well taken.

For instance the first issue namely, the proprietorship of the appellants was not put in issue by the respondents' pleadings and the only evidence placed before the trial judge at the trial was that of the first appellant who also produced a copy of the relevant leasehold title which clearly named the appellants' as the lessees of leasehold title No. 03/OL72/020.

Despite that evidence **and** despite the cross examination of the first appellant being confined to an enquiry as to how much was paid for the leasehold **and** what developments (if any) had been undertaken by the appellants as required by the development clause in the lease, the trial judge rejected the appellants copy title because there was not formal proof of registration.

That was not an issue raised by the pleadings or the evidence. It first appeared in the Court's judgment and was determinative of the appellants claim. This should not have happened. At the very least the appellants should have been made aware of the Court's concerns about their title document **and** given the opportunity to address the matter either by way of calling further evidence **or** by making submissions. Unfortunately this did not happen and the appellants are left with a justifiable sense of grievance.

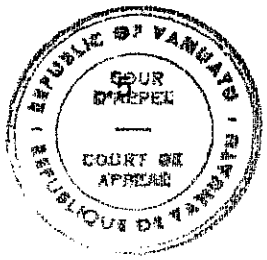
We have said it before in Richard Lo –v- Alick Sagan (Civil Appeal No 2 of 2003) and we stress it again that:-

> ***"It is fundamentally important in the system of pleading and procedure that governs the conduct of litigation in this Republic that Courts determine only the issues raised between the parties in the pleadings and at trial .... It is fundamental to a fair trial that each party is made aware of the case of the opposing party, and given a fair opportunity to answer (it)."***

Where the issue is one that is being raised by the trial judge in his judgment, the principle will apply with even greater force.

It is also inconsistent with the first respondent's defence which was based on an expressed authorization by named persons who claimed to possess a Power of Attorney over the land.

In so far as the second issue may be said to arise, the description of the first respondent as '***a businessman***' although denied in the pleadings, was entirely irrelevant for the purposes of the action. He was the alleged tortfeasor and was sued in his personal capacity. This is supported by the first respondent's own admission that he had entered the appellants' leasehold and had removed gravel and soil which he used '***to bury a swampy part of an access road to (his) private property located at Red-Corner, Luganville.***'



The mere fact that the heavy machinery used in the excavation on the appellants land might have belonged to a company of which the respondent was an employee is entirely inconsequential and could not have led to the dismissal of the claim against the first respondent as occurred. The first respondent was undoubtedly a proper party to the action and whats more on his own admissions, was the sole beneficiary of the soil and gravel removed from the appellants land.

The fourth and perhaps the fundamental issue in the case namely, the lawfulness of the respondents entry and activities on the appellants' land was dealt with in the following manner in the judgment. The learned trial judge after setting out the evidence relating to the involvement of the second respondent and Jimmy Awa with the first respondent, concluded: "***that entry was not unlawful but ... was made in good faith and on a mistaken belief that Sandy Ishmael had given his authorization to either ... Kalo Kalran or Jimmy Awa ... also the first defendant (respondent) believed that the property was not registered, there could be no trespass.***"

With due respect to the learned trial judge the conclusion even if supported by the evidence does not provide a defence to the appellants claim in trespass.

The learned author of **Salmon on Torts** (16th edn.) describes the tort of trespass to land in the following passage (at p.38.).

> "***Every invasion of property, be it ever so minute is a trespass. If the entry is intentional, it is actionable even though made under an inevitable mistake of law or fact and even though the defendant honestly believed that the land was his own or that he had a right to enter on it. There is no foundation for the assumption that a man cannot be a trespasser unless he knows he is one.***"

Even more relevant for present purposes is the statement of Prof. John Fleming in the '**Law of Torts**' (7th edn.) where the learned author says (at p. 37):-

> "***Intentional invasions are actionable whether resulting in harm or not. Neither the intruders motive is material nor the fact that his entry actually benefited the occupier. The requisite intent is present if the defendant desires to make an entry although unaware that he is thereby interfering with another rights. Thus it makes no difference whether the intruder knows his entry is unauthorized or honestly and reasonably believes the land to be his.***"

Plainly a tortfeasor's honest and mistaken belief as to his authority to enter onto land does not provide any answer to a claimant with a superior possessory title to the land.

Finally, in dealing with the issue of the damage (if any) caused to the appellants land, the learned trial judge without considering the evidence and after criticizing the appellants for their inactivity on the land concluded that: "***what the respondents did was not damage but that they actually added value and developed the land on the appellants' behalf.***"

This was a conclusion based solely on the bald subjective assertion of the respondents and entirely unsupported by any independent objective evidence. It is common ground that a once sloping piece of land had been levelled by excavating and removing truckloads of soil and gravel and, on the photos produced, extended for the entire length of the appellants block of land. The process to all intents and purposes is irreversible and the appellants are left to their remedy in damages.

The above quoted extract from Fleming on the **Law of Torts** also makes clear that the trial judge's conclusion in this regard constitutes a clear error of law. It does not lie in the mouth of a trespasser to

claim that what he did on the land was beneficial to the owner sufficient to excuse or justify the trespass.

The appeal is allowed. The order dismissing the appellants claim is set aside. The order for costs against the appellants is also set aside. Judgment is entered in favour of the appellants against the first respondent for damages to be assessed. Given the common concession that the question of damages was not dealt with in the trial and as no evidence about damage was led, the case is returned to the trial judge for damages to be assessed at a properly constituted hearing.

The appellants are entitled to their costs of this appeal which we fix at VT125,000 including disbursements. The costs of the trial will be determined by the trial judge when the trial is completed.

DATED at Port Vila, this 5th day of November 2004.

BY THE COURT

.....	.....	.....
Hon. Lunabek CJ.	**Hon. Robertson J.**	**Hon. von Doussa J.**
.....	.....	.....
Hon. Fatiaki J.	**Hon. Treston J.**	**Hon. Bulu J.**