FRAZAR PATTY (representing the Vihuvunagi tribe) AND ISABEL DEVELOPMENT AUTHORITY –v- JAMES TIKANI (representing the Makara tribe)

HIGH COURT OF SOLOMON ISLANDS
(F.O. KABUI, J.)

Civil Case No. 197 of 2000

Date of Hearing: 12th July 2002
Date of Judgment: 26th July 2002

Mr J. Apaniai for the Plaintiff
Mr G. Suri for the Defendant

JUDGMENT

(Kabui, J): This is an application by summons filed by the 1st and 2nd Plaintiffs on 26th April 2002 for assessment of damages, costs and such further orders as the Court thinks fit.

THE BACKGROUND

The Plaintiffs filed a Writ of Summons and a Statement of Claim on 14th August 2000 against the Defendant, claiming trespass, a restraining order, damages for trespass, such other remedies as the Court thinks fit and costs. The Defendant having failed to file an appearance, the Plaintiffs filed a Notice of Motion on 26th September 2000 applying to the Court to enter judgment against the Defendant in default of appearance. I heard the application on 27th November 2000 and granted the orders sought. One of the orders I made was that the Defendant pay damages for trespass in such amount to be assessed if not agreed. There is no evidence to confirm that assessment of damages had not been agreed and so the matter had to come back to Court.

DAMAGES FOR TRESPASS TO LAND

As to the law, I can do no better than to refer to Clerk & Lindsell on Torts, 11th Edition, 1954 at pages 543-546. The first principle is that a plaintiff is entitled to recover damages for trespass to land even though the plaintiff has sustained no damage or loss. The measure of damages to be awarded falls into three classes of cases. The first is where the trespasser simply passes over the soil for his or her purpose without causing any damage to the land. That is to say a mere user of the land without any damage being done to the land. The damages recoverable would be the price, which a reasonable man would be willing to pay. The second is where actual damage has been done. For example, constant user has cut a roadway or a bank has been dug away. The measure of damages in such a case would be the amount by which the land has been diminished and not the cost of restoration. In some cases the diminution of value would be the cost of restoration but as a rule it would be less. In cases where in widening a ditch, a stripe of the land is cut away, the measure of damages was the value of the land removed and not the cost of restoration of the land to its original condition. The nature of the Plaintiff's interest in the land also has a bearing on the amount of damages. For example, damages in a tenancy at will would be nominal. The third is where things on the land is severed and carried away. The measure of damages depends upon whether the Plaintiff sues in trespass for damages or in trover for their value as chattels. Aggravated or exemplary

damages may also be claimed by the Plaintiff in appropriate cases. Likewise, consequential damages may be claimed by the Plaintiff.

WHAT THEN IN THIS CASE?

L.R.690 or Parcel Number 09-2002-2 is registered land. It was once customary land. It had been acquired in 1972 under the Lands and Titles Act (Cap. 133). It was registered in the names of Ambrose Motui Iputu, Leslie Tango, Charles Bice Thenga and Hopkins Peter Nomi as joint owners. There was a dispute over the boundary between L. R. 690 and L. R. 689. L.R. 689 was acquired in the same manner as L. R. 690 and was registered in the names of Ellison Tena, Hugo Turabela, Ben Bao and Simon Haile for the Makara tribe. As a result of the dispute over the said boundary, the Defendant put up roadblock within L. R. 690. The purpose of the roadblock was to prevent the 1st and 2nd Plaintiffs and the contractor from entering L. R. 690 to carry out logging operation. The roadblock was 1, 700 metres inside L. R. 690 according to Mr. Savakana's affidavit filed on 14th September 2000. By default judgment made on 27th November 2000, the roadblock was declared unlawful and the Defendant was restrained from entering or setting up any further roadblock within the boundaries of L. R. 690. There is however, no description of the roadblock. That is to say, there is no evidence of the nature of the roadblock. Did the roadblock consist of rocks placed across the road or fallen trees or logs laid across the road? Was the road dug up to prevent trucks passing and if so how deep are the trenches and how many of them had been dug? The date the roadblock was set up was not also stated in evidence other than to say that it was done in June 2000. I take it that the roadblock was discovered in June 2000. I also take it that the roadblock did take the form of some physical obstruction to the road constructed within the boundaries of L. R. 690. The purpose of the roadblock was obviously to back up the Defendant's claim of ownership in custom of part of L. R. 690. It was too late to raise such a claim. L. R. 690 is clearly the property of the registered joint owners on behalf of the Vihuvunagi tribe. There is no evidence that any damage had been done to the land by the roadblock. The user principle therefore arises for consideration. This principle was discussed by the Solomon Islands Court of Appeal in **C. P. Homes Limited v. Solomon Tropical Products Limited and Zhong Xing Investment (S. I.) Limited (Trading as Dalsol Limited),** (Civil Appeal No. 5 of 1997). It is assumed in this case that the Defendant or his agents, servants etc. must have set up the obstruction across the road and left. The land is a virgin forest area intended to be logged by the1st and the 2nd Plaintiffs' contractor. No one lives there. The roadblock would not have reduced the value of the land in any way in terms of having caused damage to the land. There was trespass but there was no damage. How does one assess damage in such situation? There is the user principle. In this case, the purpose of setting up of the roadblock was not for a use of the Defendant but was a prohibition against the Plaintiffs not to trespass on land claimed to be owned by the Defendant. It was an entry by justification under custom in the exercise of customary rights. The burden of proof was however upon the Defendant to prove the existence of such rights, if any. Again, I refer to my remarks in **Nathan Kere v. Paul Karana,** (Civil Case No. 258 of 2000) where I expressed the difference in emphasis in terms of trespass in customary law and in common law. In Solomon Islands, registered land is a legal elevation of customary land by legal conversion under statute. The conversion process by acquisition is bound to create errors, which of course can be corrected within the provisions in the statute. There is however a time limits for errors to be corrected. Beyond that time limit, nothing much can be done to correct any error that may be discovered at a later date. This is why I dismissed the application to set aside the default judgment of 27th November 2000. I said in that judgment that the Defendant had no viable defence to the claim by the Plaintiff. However, up until 27th November 2000 the Defendant still believed that he had a valid claim in custom to part of L. R. 690. Such a situation would not have arisen in England under the common law because since King William, land in England had vested in the Crown and no one else. Trespass to land was therefore clear and neat in its application. The only exception was justification under customary rights, which were and still restricted in application. In Solomon Islands, a customary right to land is about ownership and not just rights of use. A claim under the principle of justification can be wide to include a claim to ownership such as in this case. The claim by justification in this case however came to an end on 27th November 2000 when this Court granted a default

judgment against the Defendant for failing to enter an appearance within 14 days. As I have said above this Court later refused to grant an application by the Defendant to set aside the default judgment in a judgment delivered on 31st August 2000. The Defendant became a trespasser on 27th November 2000. In his affidavit filed on 26th April 2002, the 1st Plaintiff said the roadblock was set up in about the first week of August 2000 but the Defendant left on 1st December 2000 upon the Defendant being served with the default judgment on 29th November 2000. What time of the day the default judgment was served is not known. What time the roadblock was removed is also not known. There is a conflict of evidence on the date the trespass was alleged to have commenced. In the Statement of Claim filed on 14th August 2000, the date was put at sometime in June 2000 whereas in his affidavit cited above, the date was a date in the first week in August 2000. There is a further conflict in the evidence. In that same affidavit filed on 26th April 2002 the 1st Plaintiff said that the roadblock remained from the end of August to 31st October 2000. Whatever the correct date might have been the alleged trespass ceased on 1st December 2000. The period of 34 days the 1st and 2nd Plaintiffs alleged that the Defendant had committed trespass no longer arises for consideration for the Defendant became a trespasser only on 27th November 2000, the date of the default judgment. There were only 5 days of trespass being 27th November 2000 to 1st December 2000. The trespass ceased soon after the Defendant was served with the default judgment. As far as the Defendant was concerned, he only knew that he was a trespasser on 29th November 2000 on being served with the default judgment. He abandoned the roadblock on a day later. Paragraph 4 of the affidavit filed by the Plaintiff cited above however seems to suggest that the roadblock was simply abandoned but not removed. The evidence is not clear on this point. However, the roadblock without being manned is no obstruction to the 1st and 2nd Plaintiffs for they can be removed by the 1st and 2nd Plaintiffs to allow access to the 1st Plaintiff's land for the purpose of logging. On the whole, I take it that no damage has been done to the land so that it can be compensated. I have not been able to discover any authority on the question of the appropriate measure of damages for trespass where no damage has been done to the land in question other than the user principle mentioned above. As I have said I do not think this is a case where the user principle applies because the intention of the Defendant was not to use the land for anything but to drive the point home that he was the owner of part of L. R.690. Even if the user principle can be invoked, no reasonable man on Santa Ysabel can be found who is willing to pay the price for the user of the land in a claim of ownership of title in custom in its current state in the bush in Santa Ysabel. The land in question is being used only for the extraction of round logs than anything else. Now that he lost his claim, he became a trespasser as on 27th November 2000. He remained on the land unlawfully for 5 days. How does one quantify damages for 5 days of trespass on forestland in a remote part of Santa Isabel? Clearly, the damages ought to be nominal to vindicate the rights of ownership vested in the 1st Plaintiff. I can find no precedent for what should be nominal damages in this sort of case. Counsel for the Defendant, Mr. Suri, suggested that nominal damages should be $ 300. 00 as against $ 100.00 suggested by Counsel for the 1st and 2nd Plaintiffs. None of them cited any authority upon which their sums were based in terms of a known principle. Doing the best I can, I must return to the reasoning for the principle that trespass lies without damage. That is to say, the reason for this rigid principle is that committing trespass to land is like committing trespass to the person thus inviting a breach of the peace. This principle prevents the owner of the land from taking the law into his or her hands. (See page 520 of Clerks & Lindsell on Torts cited above). The sum of $ 300.00 suggested by Counsel for the Defendant works out $ 60.00 a day. I award $ 300.00 as damages for trespass to the 1st Plaintiff's land.

THE OTHER HEADS OF DAMAGES

The 1st and 2nd Plaintiffs in the Statement of Claim claimed damages for trespass. They did not claim consequential damages. They of course claimed other remedies as the Court thinks fit and costs. The other heads of damages only appeared in the written submissions produced by Counsel for the 1st and 2nd Plaintiffs and filed on 30th May 2002. In this regard, Order 22, rule 3 of the High Court (Civil Procedure) Rules 1964 "the High Court Rules" states, ..."**Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for**

general or other relief, which may always be given, as the Court may think just, to the same extent as if it had been asked for. And the same rule shall apply to any counterclaim made, or relief claimed by the defendant, in his defence".... The term "other remedies as the Court thinks fit" is taken from rule 3 above. It is restated thus: **A plaintiff need not ask for costs or for general or other relief; the Court will always grant him any general or other relief to which he is entitled provided it be not "inconsistent with that relief that is expressly asked for" (Cargill v. Bower 10 Ch. D. at 508).** (See The Annual Practice 1961, Volume 1, at 494). **But if the Defendant makes default in appearance, or in pleading, or does not appear at the trial, the plaintiff cannot obtain any relief which is not expressly claimed in the statement of claim.** (See same citation above). In this case, I cannot think otherwise than to say that the claim in the Statement of Claim is for general damages only for trespass. I cannot read into general damages specific damages unless such are particularized and pleaded. I will not grant consequential damages asked for by the 1st and 2nd Plaintiffs. Each party will meet their own costs.

F. O. Kabui
Judge