

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 41 of 2009

BETWEEN: ALLAN PAMAVARI

Claimant

AND: KEN MANSI

Defendant

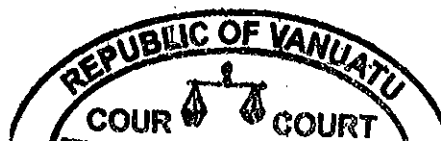
Coram: *Justice D. Fatiaki*

Counsel: *Mr. G. Boar for the Claimant
Mr. K. Loughman for the Defendant*

Date of Decision: *1st July 2010*

JUDGMENT

1. This claim concerns the sale of the Defendant's lease title No. 11/OG33/087 situated at Freshwota 4 Area in Port Vila (*'the property'*).
2. The Claimant's broad claim is that he orally agreed with the Defendant in December 2006 to purchase the property for VT2,500,000. He paid the money to the Defendant on 15 December 2007, and despite the Minister of Lands consenting to the transfer of the property to the Claimant, the Defendant refused to execute the necessary transfer document in order that it could be registered in the Land Registration Office and the property finally transferred to the Claimant.
3. The Claimant also says that they had also agreed that after the purchase price was paid he and his family would move onto the property. This took place in March 2007 and after they moved he carried out substantial repairs and improvements to the property. He had also rented out part of the property to a Sam Mahit for a monthly rental of VT150,000.
4. After several months of living on the property, he received a Notice to Quit the property from the Defendant's solicitor who also claimed a sum of VT2.34 million as the balance purchase price still owing (*see: AP5*). The Defendant refused to vacate the property or pay the amount claimed. Several months passed and the Claimant received a further letter (*see: AP14*) from the Defendant advising him that he (the Defendant) had sold the property to Livo Mele. Despite several attempts by the Claimant to stop the sale going through, the transfer of the property to Livo Mele was registered. The Claimant eventually vacated the property in about March 2009.



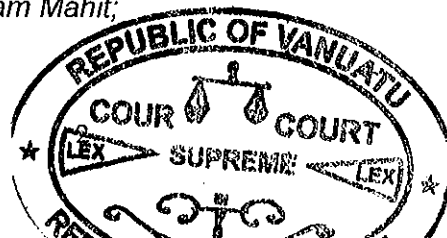
5. The Claimant issued a Supreme Court claim on 7th April 2009 seeking specific performance, costs and such further orders as the Court deems just. Initially the Claimant sued only the Defendant but the action was subsequently amended to join Livo Mele and his wife (as the Second Defendants) and the reliefs sought by the Claimant was also amended by removing the claim for specific performance and substituting claims for (as finally amended at the trial):-

1. *"An order directing the First Defendant to reimburse the Claimant the sum of VT2,500,000 plus interest at 10% per annum commencing January 2007;*
2. *An order directing the First Defendant to reimburse the Claimant for VT18,550 being the annual land rent of the premises and VT186,250 being for legal costs;*
3. *An order directing the First Defendant to reimburse the Claimant the sum of VT708,870 being for repairs and improvement on the premises;*
4. *An order directing the First and Second Defendants to pay VT300,000 for the Claimant's emotional distress and anxieties; ;*
5. *An order directing the First and Second Defendants to pay costs of an incidental to this action;*
6. *Such further orders as the Court deems fit."*

6. The claim against the Second Defendant was later discontinued by Notice filed on 14 October 2009 and they took no further part in the proceedings.

7. The trial in this matter was greatly assisted by a Statement of Agreed Facts and Issues for the determination of the Court. The Agreed Facts were:-

1. *"The Defendant Ken Mansi was the registered proprietor of Lease title No. 11/OG33/087 (the property) located at Fresh Wota 3 area, Port Vila;*
2. *The Defendant received VT2,500,000 from the Claimant;*
3. *The Defendant vacated the property sometime in 16th March 2007;*
4. *The Claimant moved onto the property sometime in March 2007;*
5. *The Claimant took Mr. Sam Mahit on to the property and rented the property to Mr. Sam Mahit;*

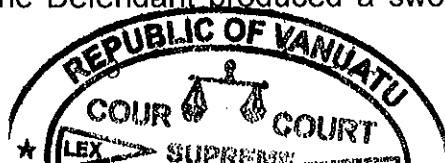


6. *The Minister for Lands signed his consent to transfer the property from the Defendant to the Claimant on 17th September 2007;*
7. *The property was valued by Caillard Kaddour to be worth VT4,840,000;*
8. *The Defendant issued a notice to the Claimant to vacate the property;*
9. *The Defendant issued a notice to Sam Mahit to pay rent directly to him (Defendant);*
10. *The Minister for Lands Mr. Raphael Worwor signed consent to transfer the lease on the property from the Defendant to Mr. Livo Mele sometime on 16th December 2008;*
11. *The Defendant notified the Claimant that he (Defendant) had sold the property to Mr. Livo Mele;*
12. *Mr. Livo Mele bought the property from the Defendant for VT3,000,000."*

8. **The Agreed Issues were:-**

1. *"Whether or not the sum of VT2,500,000 paid by the Claimant to the Defendant on or about 15 December 2007 was full and final payment for transfer of leasehold title 11/OG33/087 ('the premises') to the Claimant or was it an installment payment of the value of the premises which stood at VT4,840,000;*
2. *Whether or not the Defendant ought to reimburse the Claimant for money spend on:-*
 - (a) *Claimant's expenses incurred in the premises;*
 - (b) *Claimant's payment of annual land rent for the premises;*
 - (c) *Claimant's legal expenses incurred in eviction of Sam Mahit from the premises.*
3. *Whether or not the Claimant was entitled in law to demand rent of VT150,000 and VT10,000 from Sam Mahit and other tenants who had occupied the premises;*
4. *Whether or not the Defendant can deduct from VT2,500,000 any outstanding rent owed to him from the Claimant. "*

9. At the trial the Claimant produced 2 sworn statements and was cross-examined. The sworn statement of the Claimant's wife was also admitted in evidence although she was not available for cross-examination. Likewise in his defence the Defendant produced a sworn statement and



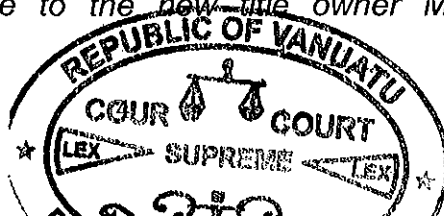
was cross-examined. He also produced a sworn statement of Livo Mele who purchased the property after the Claimant. He too was unavailable for cross-examination.

Issue (1): Whether or not the sum of VT2,5 million paid by the Claimant to the Defendant on or about 15 December 2006 was full and final payment for the transfer of leasehold title NO. 11/OG33/087 (the premises) to the Claimant or was it an installment payment of the value of the premises which stood at VT4,84 million?

10. The Claimant's evidence is that he was approached by the Defendant in early December 2006 with an offer to sell his leasehold title No. 11/OG33/087 to him for the sum of VT2,5 million. He had then consulted his wife and they met with the Defendant and his wife and they agreed to purchase the leasehold for VT2,5 million. The entire purchase price was paid to the Defendant on 15 December 2006. There was no mention of a valuation of the leasehold at the time or that the full purchase price for the property was anything other than the VT2,5 million agreed to by the parties. They had also agreed that the Claimant could move onto the property once the purchase price was paid. In March 2007 the Claimant took possession of the property as agreed.
11. The Defendant equally forcefully asserts that the verbal agreement with the Claimant was for him to purchase the property at the valuation of VT4,84 million which was shown to him. The Claimant was to pay an initial installment of VT2,5 million and then pay the remaining balance of VT2,34 million after his son's wedding. The Defendant moved out of the property to enable the Claimant to house his relatives who had come from Santo to attend his son's wedding and also for it to be the venue for the wedding as the Claimant's place at the time was not big enough to host the event.
12. I have carefully considered the whole of the evidence in regard to this issue and I have no hesitation in stating that I prefer and accept the evidence of the complainant as truthful and independently supported by a contemporaneous document entitled ACKNOWLEDGEMENT which was prepared by the Defendant at the time he received the VT2,5 million. That type-written document dated 15 December 2006 was prepared in English and signed by the Defendant and is addressed to the Claimant. It reads:-

"I, Ken Mansi, own a plot of land at Fresh Water 3 area (Fresh Water North) plot number and title number 11/OG33/087

This is to acknowledge that MR. ALLAN PALMER from Santo bought the plot of land from me. I acknowledge receiving from MR. ALLAN PALMER the sum of Two Million Five Hundred Thousand Vatu on the 15th of December 2006 for the plot of land title number 11/OG33/087. We are now in process of transferring the title to the new title owner MR. ALLAN PALMER.



I suppose to vacate the land at the end of January 2007.

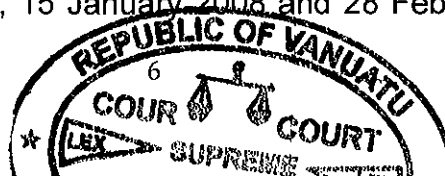
*Yours faithfully,
(Signed)
Ken Mansi."*

13. Nowhere in the Acknowledgment is there any mention of the payment of VT2,5 million being a deposit, installment, or part-payment, nor, is there any mention of a valuation or that the full purchase price was VT4,84 million. Furthermore the suggestion that the parties were "*now in the process of transferring the title to the new owner*" is in my view, quite inconsistent with the Defendant's claim that the acknowledgment was merely a record for the receipt of a deposit or part-payment of an undisclosed purchase price.
14. It is common ground that pursuant to their agreement, the Defendant eventually vacated the property in March 2007 and the Claimant took early possession of the property which had not yet been finally transferred to him. I am satisfied and so find that not only did the parties agree to the sale and purchase of the property for the sum of VT2,5 million as the full purchase price, but also, that the Claimant would take early possession of the property whilst the title was being transferred from the Defendant to the Claimant.
15. Furthermore the Claimant's son's wedding took place in May 2007 and 2 months passed before the Defendant wrote to the Claimant.
16. By letter dated August 21st, 2007 (see: Defendant's Annex 'KM3') the Defendant purported to repossess the property because he claims an application for ministerial consent to transfer the lease to the Claimant was not approved for "*2 reasons*" (1) there was outstanding land lease payments owing on the property; and (2) there had been a failure to follow the proper procedure in applying for the Minister's consent. The Defendant also offered to refund the Claimant's VT2,5 million.
17. Again, nowhere in the Defendant's letter of August 21 is there any demand or mention of an unpaid or outstanding balance due on the purchase price for the property or, of it being a "*reason*" for the Defendant wanting to "*repossess*" the property yet, that would have been the most obvious reason for an unpaid vendor wanting his land back. When asked about this remarkable omission in cross-examination, the Defendant remained mute.
18. Be that as it may, as to the first of the "*reasons*" proffered, the Defendant reluctantly accepted in cross-examination that it was his responsibility, as the registered owner and vendor of the property, to clear the outstanding land lease rental on the property. He also reluctantly agreed that as at 9th



March 2007 the outstanding lease rentals of VT18,550 on the property had been paid by the Claimant, but incredibly he maintains that he only learnt of the payment after the case went to Court (see: Claimant's Annexure AP2). He does not deny however, that he has personally benefited from the discharge of a liability that was primarily his. Furthermore as from that date outstanding land rental on the property ceased to be an available '*reason*' for the refusal of ministerial consent or for the non-transfer of the leasehold title to the Claimant.

19. As to the second "*reason*" given in the Defendant's letter, the Defendant reluctantly accepted that he had not personally applied for the Minister's consent to the transfer of the property to the Claimant and, although he was aware of the existence of such an application, he was unwilling to wait for the Minister's consent to be given because he claims "*the Defendant was already conducting business on the land*". Given the Defendant's earlier agreement to give the Claimant early possession of the property and the absence of a settlement or completion date for the transfer of the leasehold title to the Claimant, that is not an acceptable reason to repossess the property or revoke the partly-performed agreement to sell the property to him.
20. The Defendant was then reluctantly forced in cross-examination to accept that barely 3 weeks after his letter, ministerial consent to the transfer of the property to the Claimant was in fact given on 17th September 2007 (see: Claimant's Annexure AP3). From that date, the absence of ministerial consent ceased to be an impediment to the transfer of the property to the Claimant and could have occurred had the Defendant not reneged on the agreement. But again, incredibly, the Defendant maintains that he only saw the ministerial consent after the case went to Court.
21. The first written mention by the Defendant of the Claimant's VT2,5 million being "*a deposit*" or that full payment of the purchase price had not been completed or paid is to be found in his letter of 29th October 2007 to the Claimant's lawyer which was copied to the Claimant. The letter also mentions that the value of the land is '*VT4,840,000*' (see: Defendant's Annexure KM7).
22. In similar vein is the Defendant's letter of 5 November 2007 to Sam Mahit who had been allowed by the Claimant to operate the shop on the property after the Claimant had taken early possession. The letter requested Sam Mahit to pay the land rent to the Defendant as "*the land owner of the land title 11/OG33/087*" (see: Defendant's Annexure KM8). Although strictly correct, the letter blithely ignores the parties agreement for early possession and the Claimant's equitable interest as a fully paid-up purchaser in occupation, which would have sustained a caution against any further dealings with the property.
23. Finally, the Defendant sent the Claimant three (3) type-written reminders on 27 December 2007, 15 January 2008 and 28 February 2008 in which



he claimed "the outstanding amount is VT2,3 million". That figure when added to the VT2,5 million paid by the Claimant to the Defendant results in a shortfall of VT40,000 from the valuation price of the land ie. VT4,84 million which was the figure that the Defendant claims the Claimant had orally agreed to purchase the land for.

24. Why, the Defendant a businessman who claims to have been vigorously pursuing the balance purchase price since May 2007 with little success, would be willing to forgo that amount is, in my view, a further adverse reflection on the Defendant's credibility generally and, more particularly, as to the purchase price for the property that he claims was orally agreed to by the Claimant at the very outset. Defence counsel in his closing address attempted to explain the VT2,3 million figure demanded in the Defendant's 3 letters as "a mistake" but I do not accept that explanation nor do I accept that such a 'mistake' (if it were) would be repeated thrice in written correspondence over a period of 3 consecutive months.
25. The letters are also significant for another reason and that is they reflect adversely on the Defendant's credibility and honesty in that a week before the first reminder letter was written he had already obtained ministerial consent to transfer the property to Livo Mele for VT3 million which sum he acknowledges he had received in the executed Transfer of Lease dated 19th December 2008 (see: Claimant's Annexure AP15).
26. In conclusion I determine issue (1) in the Claimant's favour and order the Defendant to re-pay the Claimant the sum of VT2,5 million with interest calculated at 6% from 19th December 2008 the date of the transfer to Livo Mele which finally and in my view, unequivocally evinces the Defendant's intention no longer to be bound by his agreement to sell and transfer the property to the Claimant.

Issue (2): Whether or not the Defendant ought to reimburse the Claimant for money spend on:-

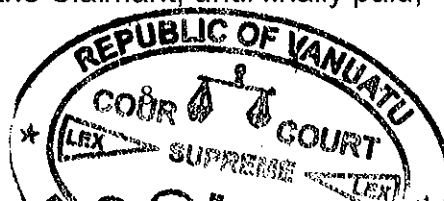
- (a) Claimant's expenses incurred in the premises;
- (b) Claimant's payment of annual land rent for the premises;
- (c) Claimant's legal expenses incurred in eviction of Sam Mahit from the premises.

27. Although the costs of the repairs and improvements done by the Claimant to the property are not seriously denied, defence counsel nevertheless asserts that in the absence of any agreement between them, whatever renovations the Claimant made to the property was voluntarily undertaken by him at a time when the property had not yet been transferred to him or registered in his name, and therefore, was undertaken at his 'own risk' (whatever that may mean). Counsel also submits unrealistically that the Claimant had enough time to remove whatever renovations he made to the property when he eventually vacated it and finally, that the evidence as



to the actual repairs and improvements carried out by the Claimant is so 'vague' that the Court could not be satisfied as to make an award for it.

28. In this regard the Defendant's own valuation report on the property dated 25 July 2004 (ie 3 years before the Claimant purchased it) clearly indicates that as of that date, the entire old wooden house situated on the property was "*in need of repairs*" and the Extension of a storage room and retail shop was of "*rough construction without proper ceiling and not painted inside/outside*". The new construction in progress of 2 self-contained apartments had only a completed concrete floor slab and nothing else. The Defendant also accepts in his letters of August 21, 2007 (KM3) and 29 October 2007 (KM7) that the Claimant and another person were carrying out "*developments on the land*".
29. The Claimant says after he moved onto the property in March 2007 he "*expended money on repairs costing VT708,000*" made up of materials costing VT308,870 and labour costs of VT400,000. In this latter regard I note that the Claimant runs a construction business and would easily have been in a position to undertake the necessary repairs and improvements to the property that were highlighted in the valuation report.
30. The undated printed invoice provided by the Claimant (AP6) itemizes large quantities of building materials including cement, treated timber, toilet and bathroom fittings, boards, nails, insulation and chain link fencing wire. The evidence as to where and how these materials were incorporated into the property, I accept, is sparse but not so vague as to be incapable of acceptance by the Court.
31. After carefully considering the evidence I am satisfied on a balance of probabilities that the Claimant did expend money and labour on necessary repairs and improvements carried out to the old wooden house in which his family lived as well as in completing the '*new construction*' on the property. Such repairs and improvements resulted in an appreciation in the value and saleability of the property as evidenced by the resale of the property to Livo Mele for VT3 million. On price alone, the Defendant made a profit of VT500,000 being the difference in the selling price to the Claimant and later to Livo Mele. He has also sold a property valued at VT4,84 million for VT5,5 million.
32. The difference in the sale prices is the figure which in the Court's view, represents by how much the property appreciated as a result of the repairs and improvements undertaken by the Claimant and which was lost to the Claimant when the Defendant reneged on their agreement.
33. Accordingly, I award the Claimant a sum of VT500,000 with interest of 6% per annum until fully paid; for Issue 2 (a); and VT18,550 for Issue 2 (b) with interest of 6% per annum from 9th March 2007 the date when the payment was made by the Claimant, until finally paid;



Issue 2 (c): Claimant's legal expenses incurred in the eviction of Sam Mahit from the premises.

34. The legal expenses finally claimed represents the Bill of Costs (AP7) rendered by the Claimant's counsel in successfully defending the Claimant in the Magistrate's Court Civil Case No. 127 of 2007 which Sam Mahit, the Claimant's tenant on the property, had issued against the Claimant seeking a refund of the rental he had paid to the Claimant under his tenancy. (See: AP10 and AP11).

35. I reject the claim for the following reasons:-

- (1) There is no evidence that the Claimant has actually paid the invoiced amount;
- (2) The Defendant against whom the amount is claimed was not a party to the Magistrate's Court proceedings for which the legal expenses were incurred;
- (3) The engagement of counsel was a personal choice and deliberate decision made by the Claimant;
- (4) There is a judgment in the Magistrate's Court (AP12) awarding the Claimant (who was the Defendant in the case) amongst others, "*costs totaling VT55,000 forthwith*" which remains extant and which has not been enforced by the Claimant.

Issue (3): Whether or not the Claimant was entitled in law to demand rent of VT150,000 and VT10,000 from Sam Mahit and other tenants who had occupied the premises;

36. The facts that give rise to this issue are common ground and agreed between the parties as follows:-

3. *The Defendant vacated the property sometime in 16th March 2007;*
4. *The Claimant moved onto the property sometime in March 2007;*
5. *The Claimant took Mr. Sam Mahit on to the property and rented the property to Mr. Sam Mahit."*

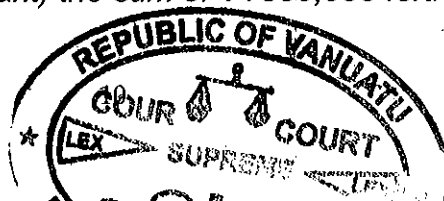
37. The Defendant asserts in his counterclaim that "*the renting out of the property ... was unlawful*", in the absence of any agreement that the Claimant could do so and in the knowledge that the property was still registered in the Defendant's name.



38. The Claimant admits renting out part of the property to Sam Mahit under a tenancy and landlord agreement and asserts a right, in law, to rent the property, "*since he paid the full agreed purchase price (for the property) to the Defendant*". In cross-examination whilst accepting that Sam Mahit agreed to pay a monthly rental of VT150,000 and had occupied the premises for several months, the Claimant nevertheless maintains that he received only the first months rent and nothing more from Sam Mahit.
39. The answer to this issue rests on the nature and incidents of the Claimant's occupation of the property pursuant to their agreement and whilst the transfer remained incomplete.
40. In this regard it is not seriously denied that after the Claimant moved onto the property he exercised exclusive possession over it as if he were the '*new title owner*' and would be considered in law, a lessee or tenant at will. Notably a '*lease*' is defined in the Land Leases Act [CAP. 163] as "*The grant with or without consideration by the owner of land of the right to the exclusive possession of his land ...*"
41. As for a tenancy at will, the learned authors of the leading publication of Megary and Wade The Law of Real Property (6th Edition) state in paragraph 14 – 075:-

"A tenancy at will arises whenever a tenant, with the consent of the owner, occupies land as tenant (and not merely as a servant or agent) on the terms that either party may determine the tenancy at any time. This kind of tenancy may be created either expressly or by implication. Common examples are where a tenant whose lease has expired holds over with the landlords permission;where a person is allowed to occupy a house rent-free and for an indefinite period, and (usually) where a purchaser has been let into possession pending completion. Unless the parties agree that the tenancy shall be rent-free, ... the land lord is entitled to compensation for the 'use and occupation' of the land, which will be the ordinary market value of the premises."
(my underlining)

42. Furthermore "*(The Claimant) ... possessing exclusive possession is able to exercise the rights of an owner of the land, which is in the real sense his land albeit temporarily and subject to certain restriction.*" per Lord Templeman in *Street v. Mountford* (1985) 1 AC 809 at p. 816.
43. The validity of the Claimant's tenancy agreement with Sam Mahit was also accepted in the Magistrate's Court proceedings [op.cit] as evidenced by an order that Sam Mahit "*vacate the (claimant's) property by 30th March 2008*" and "*pay (the claimant) the sum of VT350,000 forthwith*".



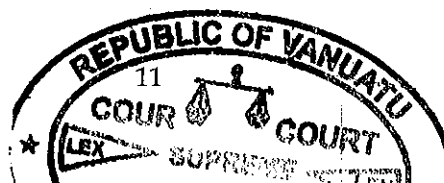
44. From the foregoing I reach the firm conclusion that the during the time that the Claimant's exclusive possession of the property continued he was entitled to sublet part of the property or create a periodic tenancy in favour of Sam Mahit and to demand and receive rental payment from him.
45. Accordingly the answer to this issue is yes the Claimant was entitled in law to demand monthly rental payment of VT150,000 from Sam Mahit for his occupation of the store on the property.

Issue (4): Whether or not the Defendant can deduct from VT2,500,000 any outstanding rent owed to him from the Claimant.

46. The Defendant's counterclaim is framed as follows:-

"7. The Counter Claimant (defendant) treated the Defendant's (claimant) occupation and possession of the property as a tenant on a monthly basis with a monthly rent of VT150,000."

47. The evidence in support of this is to be found in the Defendant's letter of 27 December 2007 (KM9) which reminds the Claimant to pay the outstanding purchase price of VT2,3 million "... or I will invoice you because you've been living on the land since you moved in. One month rental will be VT150,000 as agreed between you and Sam Mahit."
48. The letter gives rise to several inferences, firstly that the Claimant's initial occupation of the property was tacitly agreed to by the Defendant and further, such occupation was "rent-free". The second inference is that there was never any agreement by the Claimant to pay rental for his occupancy or by how much.
49. The next item of evidence is the Defendant's letter of 15 April 2008 to the Claimant (KM12) in which he rendered an invoice for a total rental of VT780,000 being 13 months rental at VT60,000 per month back-dated to March 2007. Why the monthly rental charged should be so-reduced from the earlier mentioned figure of VT150,000 is unclear other than to serve as a further illustration of the unilateral and arbitrary nature of the Defendant's demands for rental.
50. Although under ordinary circumstances the Defendant would be entitled to some compensation for the use and occupation of the property by the Claimant, I am satisfied and so find that the Claimant's initial occupation of the property was mutually agreed and intended to be both "rent-free and for an indefinite period."
51. I answer issue 4: the Claimant does not owe the Defendant any rental and none can be deducted from the sum of VT2,500,000 ordered to be repaid to the Claimant.




52. In summary, I dismiss the Defendant's counterclaim in its entirety and enter judgment in favour of the Claimant as follows:-

- (1) The sum of VT2,500,000 with interest of 6% per annum with effect from 19th December 2008;
- (2) The sum of VT500,000 with interest of 6% per annum until finally paid;
- (3) The sum of VT18,550 with interest of 6% per annum with effect from 9th March 2007; and
- (4) Costs which are summarily assessed at VT150,000.

DATED at Port Vila, this 1st day of July, 2010.

BY THE COURT


D. V. FATIAKI
Judge.

