

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

*(Civil Jurisdiction)*

**Civil Case No. 61 of 2011**

**BETWEEN: ANDREW WELWEL as representatives of FAMILY  
RORIRI**  
*Claimants*

**AND: JEHU BOGNAIM AND FAMILY, JIMMY JEHU AND  
FAMILY, BENJAMIN LEWA AND FAMILY, JAMES  
JEHU AND FAMILY, BATO JEHU AND FAMILY,  
RICKSON SAMSON AND FAMILY, LEONARD  
LEINKONE AND FAMILY, JESSY HIVIR AND FAMILY**  
*First Defendants*

**AND: WORWOR GABRIEL AND FAMILY, FREDDY  
MAXWELL AND FAMILY, JONATHAN HULHUL AND  
FAMILY, SARIPAN WALWAL AND FAMILY, ALILI  
MOL AND FAMILY**  
*Second Defendants*

**AND: ANDREW BEONGKON, JUSTIN RAMEL, BONG  
MAROM LAAN WILLIE AND ELI TIWOR**  
*Third Defendants*

***Hearing: 28 April 2014***

***Reserved Judgment: 8 May 2014***

***By: Justice Stephen Harrop***

***Distribution: George Boar for the Claimants***

***James Tari for the First and Second Defendants***

***Florence Williams (SLO) for the Second Defendant***

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**RESERVED JUDGMENT**

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**Introduction**

1. The claimants lodged their claim on 13 April 2011. They say they are the legitimately declared custom land owners of the Melwei/Metamli Land in North Ambrym, the boundaries of which include the Fanjever and Faliliu Villages. They say the declaration

was made by a properly constituted Fanjever Land Tribunal on 18 February 2010 and that there was no appeal or claim lodged in the Supreme Court challenging that decision.

2. The claimants seek an order directing the first defendants to vacate the land and a further order that they and the second defendants return to a village in South East Ambrym. Mr Boar accepts on reflection that the Court cannot direct the defendants to live in a particular place; they are entitled to live anywhere in Vanuatu where lawfully permitted to do so.
3. In addition to the claim for an eviction order, there is a claim for substantial damages relating to damage allegedly caused to the claimant family's crops, gardens and other property.
4. The claimants sought summary judgment on their claim and this was granted by Justice Spear on 14 August 2012. His Lordship upheld the claim that the claimants had been properly established as custom owners of the land in question and that consequently the first and second defendants were trespassers.
5. The defendants however successfully appealed to the Court of Appeal.
6. The Court of Appeal recorded in paragraph 7 of its judgment; *"The appeal is advanced on the principal ground that the Court below erred in law and fact in deciding to give summary judgment based on a decision of the Fanjever Land Tribunal dated 18 February 2010 whereas the land tribunal system has not yet been set up on the island of Ambrym and in particular there were no appointments of adjudicators in accordance with the provisions of the Customary Land Tribunal Act [Cap. 171]."*
7. The Court noted that the key provision for the purposes of the appeal was section 37 (1); *"A chief or elder is not qualified to be a member of a lands tribunal unless he or she is included in a list approved under section 35 or 36."*
8. The Court of Appeal noted that this issue had not been argued before Justice Spear and that the particular section had not been drawn to his attention. In paragraph 12 of its judgment the Court of Appeal said: *"In the present case, there was no evidence of an approved list of adjudicators as required under section 31 (1) of the Act. Mr Boar considered that there*

*was no such list of approved adjudicators. It is a mandatory requirement. So what appeared to be a customary land tribunal was not so constituted that it could be treated as such.”*

9. In paragraph 14 the Court of Appeal concluded: *“Accordingly the appeal must be allowed and the orders made by the Supreme Court on 14 August 2012 are set aside. The matter is remitted back to the Supreme Court. For this dispute to be resolved, it is important and urgent that the council of chiefs for the particular area of North Ambrym establish a land tribunal and appoint adjudicators in accordance with the relevant provisions of the Customary Land Tribunal Act [Cap. 171].”*
10. When the matter returned to Justice Spear in the Supreme Court, a sworn statement from Chief Leingkone Gideon of Fanjever Village was filed on behalf of the claimants. He confirmed that not only did an approved list of chiefs to be members of the land’s tribunal on Ambrym exist but it had been registered with the office of the Customary Lands Tribunal. This was in direct conflict with evidence given by Mr Tari himself at an earlier stage of the proceedings which in part had been relied on by the Court of Appeal in allowing the appeal.
11. In a Minute dated 8 April 2013, Justice Spear recorded that the case had taken another twist. He explained that the official on whose information Mr Tari’s earlier affidavit had been based had now resiled from what he had said. That official was Mr Gordon Arnhambat. Mr Tari was recorded as accepting that his earlier evidence ,on which the Court of Appeal decision had in part been based, could no longer be relied on. Justice Spear recorded that the appropriate course would then appear to be the rehearing of the summary judgment application though it would be necessary for evidence to be given by a senior member of the office of the Customary Lands Tribunal *“so that the position is clarified to the Court for once and for all.”*
12. In a Minute of 24 May 2013, Justice Spear recorded that a sworn statement from Mr Arnhambat of the Customary Lands Tribunal Office had been filed and that it appeared to confirm that the decision of the relevant Land Tribunal on 18 February 2010 was lawful and confirmatory of the custom ownership of the land in question.

13. Justice Spear set the application for summary judgment down for hearing on 2 July 2013 and recorded: *“Unless Mr Tari is able to provide evidence which raises a legitimate question about the legality of the Village Land Tribunal Decision, it would appear that the outcome of that summary judgment application is inevitable and it will require the Court to make the appropriate orders.”*
14. On 2 July 2013, Justice Spear recorded that Mr Tari had raised another issue to do with the legality of the Land Tribunal decision. It was now contended that the land tribunal was not established according to the Customary Land Tribunals Act as one of the preliminary requirements was not completed , namely that pursuant to section 35 (1) of the Act, no single or multiple custom areas were established on the island of Ambrym. Justice Spear recorded that this challenge to the legality of the decision ought to be the subject of a separate judicial review proceeding. The summary judgment application was adjourned awaiting the outcome of the judicial review proceedings. It is clear however that had this new issue not been raised Spear J would “inevitably” have entered summary judgment.
15. A judicial review proceeding was duly launched and given case number 12 of 2013.
16. At the rule 17.8 conference on 30 September 2013 to determine whether that case should proceed to a hearing Justice Spear determined that the claimant (the first defendant in this proceeding) did not have an arguable case and dismissed the claim. His Lordship’s reasons were published on 19 December 2013.
17. Justice Spear noted that the only evidence filed in support of the claim was from the claimant Mr Jehu who simply asserted his belief that the island of Ambrym has not been divided into custom areas and that those persons who served on the tribunal had not been lawfully appointed from an approved list. There was no supporting documentation or other evidence. The evidence filed for the State in this proceeding, which was read in the judicial review proceeding, established that indeed Ambrym is divided into 3 customary areas including North Ambrym and that the members of the Metamli (Fanjever) Land Tribunal who determined custom ownership by its decision of 18 February 2010, including the Secretary, were all drawn from an approved list compiled under procedures prescribed by the Act.

18. In these circumstances, Justice Spear concluded that the evidence for the claimant was completely insufficient to establish that the question of the lawfulness of the decision under review was arguable.
19. As a result the application for summary judgment application was again revived by Mr Boar and submissions have been filed on each side.
20. At a conference/chambers hearing on Monday 28 April 2014 at 10 am, counsel agreed that I could proceed to make a decision on the summary judgment application on the basis of the numerous papers already filed and they did not seek to supplement their written submissions orally. I accordingly reserved my decision.

### **Discussion and Decision**

21. Mr Boar simply submits that given all of the history which I have outlined in this judgment, the first and second defendants have no real prospect of defending the claim. The application for summary judgment is limited to the eviction order. As I have already noted Mr Boar abandons the application for an order that the first and second defendants move to particular areas in South and West Ambrym respectively. Mr Boar also said at the hearing on 28 April that if summary judgment were granted as to eviction and the first and second defendants left the claimant's land promptly and in an orderly fashion then the claimants would not pursue their claim for damages. Costs however would be sought.
22. For the first and second defendants, Mr Tari filed a brief written submission in which he submitted that the Court of Appeal had already cancelled the decision of the land tribunal made on 18 February 2010 and he highlighted the Court of Appeal's statement that "*For this dispute to be resolved, it is important and urgent that the council of chiefs for the particular area of North Ambrym establish a land tribunal and appointed adjudicators in accordance with the relevant provisions of the Customary Land Tribunal Act [Cap. 171].*"
23. Mr Tari submitted that the Court of Appeal had effectively directed that the council of chiefs for the area appoint a new tribunal to rehear the dispute and that because the chiefs have not followed that order the Supreme Court could not now grant summary judgment in favour of the claimants.

24. With respect, Mr Tari's submission is misconceived. The Court of Appeal did not cancel the decision of the land tribunal. It "cancelled" the decision of the Supreme Court to grant summary judgment on 14 August 2012. It did so on a limited basis, namely that there was no evidence that an approved list of adjudicators had been prepared and that the Tribunal members had been drawn from that list. That conclusion was in part based on the original affidavit of Mr Tari and indeed Mr Boar himself conceded that there was no such list of approved adjudicators. Because this issue had not been argued before Justice Spear on 14 August 2012 the Court of Appeal had to allow the appeal.
25. What the history of the matter, since its return to the Supreme Court, shows is that the factual basis on which the Court of Appeal allowed the appeal has now been shown to be incorrect as Mr Tari has himself conceded on more than one occasion before Justice Spear and in a sworn statement dated 2 April 2013.
26. As Justice Spear noted, once that was clarified then the outcome of the summary judgment application appeared to be inevitable. What then followed was an application for judicial review in which a different challenge to the legality of the tribunal's decision of 18 February 2010 was mounted but this was dismissed out of hand by Justice Spear at the rule 17.8 conference. There has been no appeal against that decision.
27. In these circumstances, I have no hesitation in rejecting Mr Tari's submissions and upholding those of Mr Boar.
28. The application for summary judgment must and does succeed because the first and second defendants have no real prospect of successfully defending the claim.
29. The first and second defendants are ordered to leave the claimant's customary land within one month of the date of this judgment and if they fail to do so they may be forcibly evicted. They are currently trespassing onto the land. Once they have left they are not to re-enter that land except with the express permission of the Family Roriri who are the custom owners and the successful claimants in this proceeding.
30. The claimants are awarded costs against the first and second defendants on a standard basis to be agreed or taxed. Any application for taxation is to be filed by 8 July 2014, failing

which it will be assumed that no costs order is sought and the file will be closed without further notice or prospect of reopening.

31. The balance of the claims by the claimant (his claims for damages) remain to be pursued to trial if necessary but as Mr Boar indicated, in the event that the claimants leave the land promptly and in an orderly manner then I understand the proceeding will be discontinued.
32. Mr Boar is to file a draft order covering the orders made in this judgment for my consideration and with an order for sealing.
33. If the case is not discontinued , Mr Boar is to file a memorandum by 8 July 2014 informing the Court what has occurred and what the claimant wishes to do regarding the balance of his claims.
34. For completeness, I mention that the third defendants, who collectively comprise the area council of chiefs and who were added as a party by Justice Spear on 8 April 2013, were through Ms Williams of the State Law Office given leave to withdraw at a conference before me on 8 April 2014. That was because the State had filed appropriate evidence from Mr Arnhambat. After that the primary protagonists advanced their arguments based on that and the other evidence.

**BY THE COURT**