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

Civil Appeal Case No. 29 of 2013

BETWEEN: JACQUELINE DE GAILLANDE
First Appellant

AND: GERARD DE GAILLANDE
Second Appellant

AND: PAUL DE MONTGOLFIER
First Respondent

AND: JENNIFER PREVEL
Second Respondent

AND: CHRISTOPHE PREVEL
Third Respondent

AND: MICKAEL OHLEN & JULIA OHLEN
Fourth and Fifth Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru

Counsel: The Appellants in person
Robert Sugden and Marie Noelle Ferrieux Patterson for the Respondents

Date of Hearing: Wednesday 20 November, 2013

Date of Judgment: Friday 22 November, 2013

JUDGMENT

BACKGROUND

1. Jacqueline de Gaillande (JG) and Isabelle Ohlen (the deceased) had known each other for many years. The deceased died on 24 December 2005, aged nearly 78 years.

2. JG had substantially assisted the deceased in her banking and in managing her finances, and in other ways, from about 2003. On 29 October 2005, in Noumea, whilst the deceased was there for treatment of a serious illness, she gave JG a Procuration speciale – Representation (a Special Power of Attorney) over her affairs.

3. The deceased left a Will dated 4 November 2005. JG was named as her executrix, and was appointed to that role and set about administering the deceased estate. After some time, issues arose about whether the Estate was being administered correctly. That led to two sets of proceedings:-

(1) Probate Case P8 of 2006, in the course of which JG withdrew as executrix and Paul De Montgolfier (PM) was appointed as executor of the estate of the deceased in her place on 13 October 2009.

(2) Civil Case 206 of 2007, which is the matter which went to trial and from which judgment this appeal has been brought. Sensibly, the parties agree that the two proceedings should be heard together, although really the issues tried were in the Supreme Court case.

4. The lawyer representing JG and her husband Gerald de Gaillande (GG) regrettably died shortly before the proposed hearing in mid 2012, and the matter was adjourned for some months. During that period and at the trial they were represented by another lawyer. They have instituted and conducted this appeal in person.

THE ISSUES AT TRIAL

5. As it arises as a ground of appeal, it is necessary to note one matter of practice. In accordance with the usual practice, sworn written statements of all parties were filed before the hearing. The sworn statements filed by JG and GG included assertions about a number of inter vivos gifts made by the deceased, and about the operation of a number of joint bank accounts established by the deceased and JG. It was not clear how all that evidence related to the issues as defined by the pleadings. Counsel for the respondents applied for those parts of the sworn statements to be struck out. The trial judge Sey J made an order to that effect, except to the extent that they were relevant to the issues raised in the pleadings.

6. The pleaded issues which were alive and to be tried were:-
(1) The identification of the deceased's bank accounts at the time of her death;
(2) The identification of the deceased's chattels and real estate at the time of her death;
(3) Whether JG had applied any of the monies in the deceased's bank accounts, or any other assets other than in accordance with her Will;
(4) If so, the extent of such unauthorized application of monies or other assets, and on the other hand, the extent of the legitimate expenses incurred by JG in administering the estate and the extent of payments to the four heirs of the deceased (who were the children of her nephew Gilles and of her niece Dominique) who equally share in the estate under her Will. They are the other respondents.

7. JG said that she had acted only in accordance with the deceased's Will.

8. The other major issue in the case concerned whether JG should be required to account for two payments made from accounts of the deceased by her during the life of the deceased. The first was a payment of Vt 500,000 on 11 November 2005 to GG, said to be a birthday present, and second payment of Vt 5 million was made on 2 December 2005, and was said to be for the purposes of fulfilling a wish on the part of the deceased to make such a payment to a charity to establish housing for elderly people.

THE FINDINGS AT TRIAL

9. The trial judge found that the deceased held 3 ANZ bank accounts at her death. It is not necessary to refer to one of them, as the evidence clearly shows that the funds in that account were paid to the four heirs equally as required by the Will. The remaining two accounts were ANZ Account No. 768856, with a credit of AUD 293,577. and ANZ Account No. 792958 with a credit of Vt 101, 201 at the time of the deceased's death.

10. The trial judge found that JG had wrongfully drawn money from one or other of those accounts, mostly to herself and her family, based upon admissions in JG's sworn statement and in her cross examination. Two particular payments were referred to, namely a payment of AUD 61,023 taken directly from Account No. 768856, and a further payment of Vt 5,166,305 transferred from Account No. 768856 to ANZ Account No. 1062397 (JG's personal account) and then on paid to PM. It may well be that that transfer related to the charitable gift made during the life of the deceased, as asserted by JG.

11. The trial judge found that some chattels of the deceased at her death had not been applied in accordance with the Will, but were held by JG. Nearly all of the jewellery of the deceased had been passed to the beneficiaries, but six particular items of jewellery were found to have been retained by JG when they should have been included in the deceased's estate. There was a motor vehicle and a safe of the deceased which were still held by JG or GG and should have been included in the estate.

12. The trial judge also found that some of the deceased's furniture had been sold for Vt 181,000. JG said that the monies received had been applied to make payments to the deceased's former employees, but she did not claim that those amounts were strictly payable as debts of the deceased.

13. The estate was also found to include SODEP shares, sold by JG for Vt 38,812. The proceeds of that sale had been paid into JG's personal account.

14. JG, in the probate case, filed an affidavit of 23 November 2007 setting up the expenses she had paid as the executrix of the Will of the deceased. They totaled Vt 13,913,529. The trial judge found that Vt 7,557,254 were not properly expenses in the administration of the estate.

15. The primary judge then decided that the best way to determine the extent of the misapplication of funds in the estate of the deceased was to award the difference between the two Accounts No. 768856 and 792958 at the time of the death of the deceased, and when JG ceased to be the executor of the estate. The calculation produced the figure of AUD 227,140 (after allowing for the proper expenses incurred by JG as executor of the estate). It is now accepted that there was an arithmetical error in that calculation as it did not give credit for the amount held in Account No. 768856 at the time JG ceased to be the executrix of the estate. That amount is AUD 72,905, so the amount ordered to be paid should be reduced by that amount.

16. As to the inter vivos gifts, the trial judge correctly recognized that, because of the special relationship of trust between JG and the deceased, those gifts should be looked at carefully. It was for JG to prove that they had been made without any inappropriate influence on her part towards the deceased. See **Daly v. South Sydney Stock Exchange Ltd** (1986) 160 CLR 371. The trial judge remarked that, given the long and close relationship with the deceased, the deceased could readilly have included such gifts in her Will if she had intended to make them. In case of the gift for the charitable purpose, JG was found to have a direct personal interest in the transaction, because she had long supported the particular charity and had acted as its president. Consequently, JG was unable to satisfy the Court that either of those gifts was made without undue pressure on her part. In the normal course, where a person in JG's circumstances is to receive the benefit of an inter vivos gift, it is wise to ensure that the giver is separately advised, preferably by a lawyer, about the wisdom of making the proposed gifts. That is then recorded. There can then be no suggestion that the gift has been made by any improper pressure on the part of the recipient of the gift.

THE ORDERS

17. As a result of those findings, because JG had to account for the wrongful distribution of certain assets of the deceased's estate, the Court ordered that she repays the estate:-
    (1) AUD 227140, being the calculation made in relation to the two bank accounts referred to in para 15 (it is now accepted that that figure should be AUD 154,235);
    (2) Vt 181,000 for the sale of furniture;
    (3) Vt 38,812 for the sale of SODEP shares;
    (4) The value of the safe and motor vehicle at the date of death of the deceased, and the return of the 6 items of jewelry specified or their value.

18. It was also ordered that GG repay the sum of Vt 500,000 received on about 11 November 2005, as a gift inter vivos, apparently for his birthday, and further that PM repay the sum of Vt 5 million held by him, apparently on behalf of the charity. The evidence was that JG had received that sum and then paid it directly to PM as the trustee or representative of the charity, and that PM then held that sum for the charity.

19. Both JG and GG were awarded to pay interest in costs to the proceeding.

GROUNDS OF APPEAL

20. The grounds of appeal were quite extensive, but became confined in the course of submissions.

21. Firstly, JG and GG complained about the conduct of the hearing. It is hard to determine on what basis. Firstly, the trial judge properly restricted the admissible evidence to that which had been identified by the pleadings. It would have been improper to have acted in any other way, especially where counsel for the respondents at the hearing complained that the respondents would otherwise have prepared their case in a different way to resist the allegations relating to matters that had not been pleaded.

22. There is no suggestion that admissible evidence was not properly received, or that JG and GG were prevented from presenting such admissible evidence as they wished to do, and to test such of the evidence of the respondents as they chose.

23. There is no merit in that ground of appeal.

24. Secondly, JG and GG complained that the trial judge improperly identified the applicable law, which they said was French law, for the purpose of assessing the validity or otherwise of the two inter vivos gifts. There was little material to support the assertion that French law in relevant respects was any different from the common law applied by the trial judge. The Court of Appeal was taken to some clauses of the French Civil Code, but they did not relate directly to the circumstances where there is a special relationship of trust and confidence between the donor and the recipient of the inter vivos gifts. It would be surprising if French law were, in that respect, any different from the common law. In any event it was not shown to have been different. That ground of appeal must also fail.

25. Although the next ground of appeal related to a general attack upon the findings of fact made by the trial judge, in submission the findings of fact which were challenged were confined. There is, clearly, a difference between asserting that there is evidence upon which a different finding of fact might have been made and asserting that a finding of fact made by the trial judge should not have been made. In addressing those matters raised by JG (who appeared for herself and her husband on the appeal) the Court has not overlooked the material to which she referred relating to the long standing relationship between herself and the deceased, and to her claim that in the administration of the estate she had in general terms been guided by PM as a French Notary. We do not think the contentions by JG went beyond pointing to alternative evidence which might have supported a different conclusion. They do not show the judge was in error.

26. The particular matters she raised in her submissions can be shortly dealt with. Firstly, she said that the furniture which she sold to generate Vt 181,000 was applied to pay

former staff of the deceased. She did not claim that those payments were made pursuant to the liabilities of the deceased at the time of the deceased's death, although she said that they would have been supported by the deceased. As they were not made properly as debts of the deceased at the time of the deceased's death, the finding of the trial judge that they were not authorized to be made by her as executrix was a correct one. That applies more generally to her claim that a number of payments totaling some Vt 800,000 were made to Suzie, a woman who worked for the deceased. JG did not say that those payments were made as a liability of debt of the deceased at the time of her death.

27. In the case of the jewellery which JG has been ordered to return, she claimed that the respondents (other than PM) who are the heirs under the Will of the deceased had agreed that the six pieces should be returned to her. There was some evidence to which JG directed the Court of Appeal which may have supported that conclusion. It was an inventory of the jewellery of the deceased, prepared by JG and on which the wife of the deceased's brother and the mother of two of the heirs had written that they were to be given to JG. However, there was other evidence which did not support that claim. That illustrates the point made earlier in these reasons for judgment. It is not enough to set aside the decision of the trial judge that there was some evidence, which the trial judge is not shown to have overlooked, which might have supported a conclusion different from that which was reached. In our view, the trial judge has not been shown to be wrong in reaching the view which she did. It was the available conclusion.

28. JG and GG did not make any submissions to attack the orders of the trial judge in relation to repayment of the monies in the two bank accounts (although they accepted that there was an arithmetical error which should be adjusted in their favour) or in relation to the SODEP shares. They also did not contend that the safe and the motor vehicle, or their value at the date of death, should not be paid to the estate. JG pointed out the value of the motor vehicle at the date of death may have been very little, and that to some extend GG had worked on it to improve its value after that motor vehicle had been stored on their property.

29. Accordingly, we do not consider that the attacks upon the findings of the primary judge about the assets of the estate of the deceased, or the extent to which JG had misapplied them, should be set aside (subject to the arithmetical correction referred to above).

30. Nor do we consider that the decision of the trial judge that the two inter vivos gifts should be set aside is shown to have been wrong. We respectfully agree with the reasons for decision of the trial judge on these issues. In the case of the inter vivos gift which was for the birthday of GG that amount was ordered to be repaid. That order should stand. In the case of the inter vivos gift of Vt 5 million passed through JG to PM for the charitable purpose, the determination of the trial judge that that gift should also be set aside stand. The trial judge ordered PM to repay, or to account to the estate, for that amount as the

evidence showed that JG had passed that amount in full to him. It is not a direct liability of JG.

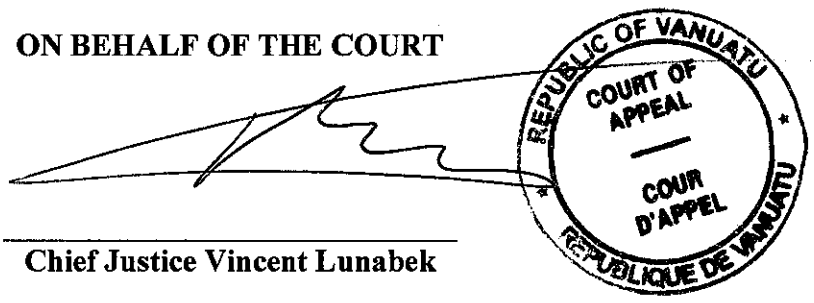
31. There are two other matters to refer to. Counsel for the respondents accepted that, given the very limited role of GG in the conduct under enquiry in the Supreme Court proceeding, it was probably inappropriate that an order for costs of the whole of the trial should have been made against him. We will discharge that order, so that JG should pay the costs of the Supreme Court proceedings. Secondly, one expense of administration of the estate of the deceased which JG claimed, and which was disallowed, was a sum of Vt 2,955,000 expended from her own resources and those of GG to improve the house of the deceased prior to its being sold as part of the administration of the estate. PM, as the subsequent administrator of the estate, has indicated that he accepts that, to the extent to which there was reasonable expenditure incurred by JG or GG from their own resources to improve the house and increase its value, it is appropriate that they be reimbursed for that amount. He was cautious about receiving and accepting that claim on their behalf on the material provided to him. The Court notes that PM, as the executor of the estate, accepts that there is a liability to pay to JG and GG such amount as they establish has properly been expended by them in improving the house property of the deceased before its sale. They will need to produce to him clear evidence of the amounts incurred, and of the work done for the benefit of that property.

32. For those reasons, in essence the appeal is to be dismissed with two qualifications. The first is to change the amount of the wrongful distribution out of the bank accounts by reducing it by AUD 72,905 to AUD 154,235 because of the arithmetical error referred to, and the second is to change orders 4 and 5, firstly to make it clear that all interest is to be paid by JG on amounts found to be owing by her, but to be paid by GG only on the sum of Vt 500,000 which he was found to have received wrongfully. The second is to change the order for costs so that JG only is to pay the claimants' (now respondents') costs to be taxed or agreed.

33. As JG and GG have succeeded on this appeal, perhaps somewhat fortuitously, in limited respects there will be no order as to the costs of this appeal.

Dated at Port Vila this 22nd day of November, 2013

ON BEHALF OF THE COURT



Chief Justice Vincent Lunabek