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

CIVIL APPEAL CASE NO. 10 OF 2015

BETWEEEN: **PATRICK MERCIER & MARIE HELEN**
(APPELLANTS)

AND: **ERIC BOB**
(FIRST RESPONDENT)

AND: **MARTIN MAHE**
(SECOND RESPONDENT)

AND: **THE ESTATE OF MAKLIN LOPEZ**
(THIRD RESPONDENT)

Coram: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon Justice Daniel Fatiaki
Hon Justice Dudley Aru
Hon Justice Stephen Harrop
Hon Justice David Chetwynd

Counsel: ***Mr R E Sugden for the Appellants***
Ms M P Vire for the Third Respondent
First and Second Respondents not appearing

Date of Hearing: ***9th November 2015***
Date of Decision: ***20th November 2015***

JUDGMENT

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1. This appeal concerns events which began in 2008 in Luganville. They resulted in a judgment being entered against the Appellants on the Third Respondent's counterclaim and ended up with enforcement proceedings. Following sales of the Appellants' property as a result of those latter proceedings an appeal was lodged against the judgment and the orders made in the enforcement proceedings. The appeal was filed some two years after judgment had been entered and the first task the Appellants have is to obtain leave to appeal out of time. A decision on the grant of leave was reserved and the Appellants were invited to address the court on the merits of the appeal.

2. A full history of events is not necessary as the judgment under appeal sets it out in detail. It is apparent that in January 2008 the then recently married Appellants had a falling out and the husband, Mr Patrick Mercier, commenced proceedings in the Magistrates' Court which led to an order being made that property, including a Mitsubishi pick-up truck registration number 6075, was to be

stored in a safe place. The vehicle (and other property) was so seized and stored. In February 2008 Mr Mercier wrote to the Magistrates' Court withdrawing the case. All the property was then released by the Court to both Mr and Mrs Mercier.

3. They said not all the property seized was returned to them and they filed a claim in the Supreme Court on 3rd July 2008. That was the start of Civil Case No. 26 of 2008. The Appellants were the Claimants and they were asking for an order their property be returned to them. The First Respondent ("Mr Bob") was the First Defendant. The Second Respondent ("Mr Mahe") was the Second Defendant and Maklin Lopez ("Mr Lopez") was the Third Defendant. Mr Lopez died in 2012 and Mrs Kaye Lopez ("Mrs Lopez") was appointed his Administratix. His Estate is named as the Third Respondent in the appeal. The defendants all filed defences and Mr Lopez also filed a Counterclaim.

4. The counterclaim arose in this way. Prior to the Claim being filed there had been a series of transfers which resulted in Mr Lopez becoming the owner of vehicle Reg. No. 6075. Before that, in April 2008, Mr Mercier poured 20 litres of "acid" in and over the engine of the vehicle. Mr Lopez knew that before he bought the vehicle and he knew he would have to carry out extensive repairs. He was counterclaiming for the cost of repairs and the VT 850,000 he paid for the vehicle.

5. On 4th July 2008 the Appellants (as Claimants in 26 of 2008) obtained an order pursuant to Rule 7.6 of the Civil Procedure Rules preserving the disputed property (including Mitsubishi 6075) pending the hearing of the claim. A copy of the Mareva order was not produced in this appeal but there is no dispute the Appellants gave an undertaking in damages when the order was granted.

6. The proceedings in Civil case No. 26 of 2008 stuttered on for a good while but on 11th June 2010 Mr Bob and Mr Mahe, supported by Mr Lopez, applied for an order dismissing the Appellants' claim on the grounds the proceedings were frivolous and vexatious. The application was heard on 4th February 2011 with judgment being given in favour of the defendants. Written reasons were published on 9th February. In them the judge said:

> *"The really sad thing about the Claimants' claim is the credibility of their evidence given by sworn statements filed in support of their claims"*

His Lordship then related how a statement and a letter from the Second-named Appellant *"caused substantial damage"* to the claims. His remarks about the case presented to him by the Claimants were quite scathing and he clearly had no difficulty in finding for the Defendants. In his oral decision on 4th February he declared Mr Lopez to be, *"the bona fide purchaser of the vehicle Mitsubishi L200 Reg 6075 and thus the legal owner of it....."*. His Lordship dismissed the Appellants' claim, discharged the Mareva order and gave directions for dealing with Mr Lopez's counterclaim.

7. The trial of the counterclaim was delayed because of changes to legal representation and other "logistical" difficulties. Eventually the Judge agreed to deal with the counterclaim on the basis of written submissions. Those were lodged

and a written judgment on quantum was handed down on 6th February 2013. It is that judgment and the consequences which flowed from it which are the subject of this appeal. There are no copies of any written submissions with the appeal papers. Given the grounds filed those submissions should have been in the appeal bundle. By recourse to the Supreme Court file this court has been able to see the submissions relied on by the judge and it is possible to see how he may have been misled.

8. In the Appellants' submissions they said Mr Lopez went ahead and paid for spare parts and repairs *before* he had paid for the vehicle. His claim for damages should be against the person who owned Mitsubishi 6075 at that time. Counsel for Mr Lopez submitted that his client's claim was in the alternative. He was seeking declarations as to ownership and if he was successful with that argument he would forgo the claim for the price paid for the vehicle. He went on to say Mr Lopez's claim would only be for "the difference" that is sum claimed for "fixed damages" less the purchase price. What is apparent is that both counsel thought someone should be responsible for the cost of repairing the damage caused by Mr Mercier. The only difference between them was who that should be. Neither counsel made reference to the evidence accepted by the judge showing the vehicle was purchased by Mr Lopez "as is". The Judge awarded damages of VT 684,844 to Mr Lopez in respect of the costs of repair and associated labour. Whilst His Lordship refers to the basis on which the vehicle was purchased by Mr Lopez at paragraph 3 of his judgment he may well have been influenced by counsels' submissions into thinking that that had no bearing on quantum.

9. As Mr Lopez knew of the damage, and as he purchased the vehicle knowing he was going to have to carry out repairs, it would be wrong to allow him to recover the cost of those repairs from the Appellants. There is no suggestion some repairs might have been necessary because of damage occurring during the storage of the vehicle after 4th July 2008. Although the Appellants do not actually challenge the award of damages for the cost of repairs this court has to accept that in the circumstances the award of damages for the Counterclaim in relation to the cost of repairs (an amount of VT 684,844) cannot stand as it is not supported by the evidence.

10. The Appellants contest the award of damages claimed for the loss of use of the vehicle for the period 4th July 2008 to 4th February 2011 or 942 days. The Appellants originally challenged the length of time the claim covered. At the hearing of the appeal the Appellants acknowledged that if they were liable they would be liable for the whole of the period of 942 days. What the Appellants say though is because Mr Lopez has provided no evidence to say how or what he would have used the vehicle for during that period, he is not entitled to any damages for loss of use. That is not the correct approach. Mr Lopez only has to show that the vehicle was unavailable by reason of the Appellants' conduct in maintaining legal proceedings which were found by the judge to be frivolous and vexatious. Quantum for loss of use then falls to be determined by the type of use that Mr Lopez intended to put the vehicle to. In his evidence Mr Lopez bases his claim on the loss of use of the vehicle on a daily basis to go to the market, to the garden and for purposes connected to his garage business; in simple terms, normal everyday use. In the absence of specific proof of the expenses incurred by

Mr Lopez the judge was entitled to take a general and pragmatic view on quantum. If there were any particular uses the vehicle was going to be put to then evidence would have been required about those particular uses and losses. In the court below the judge rejected the Mr Lopez's daily rate of 3,000 VT and substituted a daily rate of 500 VT based on the cost of a tank of fuel. That was, with respect, the wrong approach. The cost per day would not depend on the cost of fuel it would have to be measured by the cost of hiring or otherwise acquiring a suitable alternative vehicle. Mr Lopez would have been entitled to hire a similar vehicle but of course would not be entitled to the cost of hiring a Rolls Royce because he was unable to use his Mini. The Appellants are fortunate there is no cross appeal by the Estate as they may well have ended up with a more substantial claim for loss of use to contend with.

11. In their written submissions the Appellants also attack the award of costs on an indemnity basis. That attack was not argued in the appeal. Nonetheless we would point out the judge found on the evidence before him that the Appellants, as Claimants in Civil Case 26 of 2008, *"...are not serious about their claims and that all they want to achieve is to cause annoyance to the Defendants*". He went on to say, *"The submission by the defendants that all the claimants wish to do is to drag the defendants into a legal battle which will only make them incur legal costs..."* His Lordship found the Supreme Court proceedings to be, *"an abuse of process"*. The Appellants do not challenge those findings which are an entirely reasonable basis for awarding costs on an indemnity basis.

12. Turning now to the consequences of the successful counterclaim, the Appellants argue they have suffered loss because vehicles they owned were seized and sold at an undervalue in order to settle the judgment debt and costs. The Appellants say the provisions of Part 14 of the Civil Procedure Rules were not followed and that any purported order made by the court was *ultra vires*. By way of appeal they seek to have the enforcement orders set aside. The fact of the matter is the vehicles have been sold and the proceeds distributed. There is no practical reason for this court to make any orders in respect of the enforcement proceedings.

13. However it may assist the Appellants, given the arguments raised, to look at of the provisions under the Civil Procedure Rules for dealing with the enforcement of Judgments and Orders as set out in Part 14. Using the terminology of Order 14.1(1), there is no doubt that the First Respondent (Mr Bob) and the Third Respondent (Mr Lopez) were enforcement creditors in Civil Case No. 26 of 2008. The Appellants were enforcement debtors. There can be no doubt that Enforcement Conferences were held in accordance with Rule 14.5. There clearly had been an order the enforcement debtors pay the judgment debt by instalments at some earlier date. An enforcement order had been made. There are Minutes on the Supreme Court file showing a series of attempts by the Court to assist both the Appellants and the Third Respondent with regard to the judgments awarded. On 31st October 2013 the second named Appellant Mrs Helene and Mrs Kaye Lopez the administratix attended the court in person. The Minute shows this hearing was treated more as an examination under Rule 14.7. Mrs Helene was asked about a bus. She asked the court if she be permitted time to sell the bus herself. The judge allowed her 4 months.

14. On 3rd February 2014 Mr Tevi of counsel appeared for Mrs Helene. Mrs Lopez did not appear. The court adjourned the hearing and prepared notices of hearing. The hearings took place in May. Prior to that Mr Stephens for the First Defendant applied for his client's costs to be taxed. On 8th May 2014 Mr Tevi appeared as did Mrs Helene, Mr Bob, the First Defendant, and Mrs Lopez. Mrs Vire of counsel also attended as the former solicitor of the Estate. Mr Tevi produced details of the ownership of two vehicles, a Toyota Landcruiser Reg No. 88 and a Toyota Hi-Ace bus B7350. The court issued orders for seizure by the Sheriff and sale of the Toyota Reg No. 88. Later that same day on the application of Mr Tevi the judge amended the order to seize and sell *just* the bus B7350.

15. On 26th June 2014 the judge taxed the First Respondent's costs at VT 354,598. On 29th August 2014 there was another enforcement conference at the request of the First Respondent. An instalment order was made in his favour. In October 2014 the Sheriff managed to sell B7350 for VT 500,000. On 5th December 2014 there was yet another hearing. The court ordered the seizure and sale of a Toyota vehicle belonging to Mr Mercier. Mrs Helene asked that the order be postponed for a period so that Mr Mercier could approach his daughter in Noumea for her assistance in paying off the debt. The Judge appears to have agreed to that request because no order was issued for the immediate seizure and sale of the vehicle.

16. The matter then came back to court on 24th February 2015. It must be remembered this was more than two years from the date of judgment. Mrs Helene appeared as did Mr Bob and Mrs Lopez. Mrs Helene proposed the transfer of bus Reg No. B5664 to Mrs Lopez. She said it was worth VT 1,600,000. She said she had been trying to sell it but had not manged to find a buyer. Mrs Lopez said she did not want the bus, she wanted cash. Mrs Helene agreed the bus could be sold for not less than VT 1,200,000.

17. Mrs Helene also mentioned the Landcruiser which she had been trying to sell. Mr Bob wanted settlement of his judgment debt and so he asked for the Landcruiser to be seized and sold. Mrs Helene agreed a sale for not less than VT 2,000,000. The result was the Order dated 24th February 2015. In accordance with that order the Landcrusier was seized by the Sheriff and sold for VT 2,000,000 on 2nd March and the bus too was seized and sold on 3rd March for VT 1,200,000.

18. The situation in this case is clearly distinguishable from that in *Financiere Du Vanuatu Ltd v Morin.* In that case the Supreme Court authorised the Judgement Creditor to take possession of the Judgment Debtor's leasehold property. On appeal it was held that such an arrangement was wrong. Their Lordships set out what was properly required under Rule 14. In this case the judge ordered the delivery of the vehicles into the custody of the Court and the Sheriff. (Rule 14.1 (1) defines the Sheriff or a police officer as an Enforcement Officer.) Bus B7350 was seized by the Sheriff pursuant to the order in May, he advertised it for sale and in October, 5 months later, sold it for the best price he could. In respect of the bus B5664 and the Landcruiser, for the reasons set out in his decision of the 20th April 2015, the judge directed the Sheriff, as enforcement

officer to seize and sell the vehicles in the manner set out in the orders. The proceeds of enforcement in both cases were to be paid to the Enforcement Officer and the judgment debts that discharged from those proceeds. This is what is required by the Rules as was set out by this Court in *Morin*.

19. In this appeal the Appellants are granted leave to appeal out of time. The judgment dated 6th February 2013 at paragraph 9 is varied by the deletion of the order made at 9 (a). The practical effect of this judgment is that the Estate of Maklin Lopez was overpaid by VT684,844 and this amount should be refunded. The Appellants should note the comments made by this Court in the Decision on Adjournment dated 23rd July 2015 at paragraph 4. Judgment was entered in favour of the Estate not the Administratrix personally. If the Estate has been fully distributed that will be an end to the matter.

20. In all the circumstances the most equitable order in respect of the costs of the appeal is that each side shall bear their own costs.

DATED at Port Vila this 20th day of November, 2015

BY THE COURT

Vincent LUNABEK
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU