IN THE SUPREME COURT

OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil Case No.106 of 2005

BETWEEN: THOMPSON NALAU

Claimant

AND: ANNA MARIANGO

Defendant

Coram: Justice C. N. Tuohy

Counsel: Mr. Daniel Yawha for Claimant

Mr. Hillary Toa for Defendant

Dates of Hearing: 23 February 2007

Date of Judgment: 29 March 2007

RESERVED JUDGMENT

Introduction

1. The claimant and the defendant lived together in a de facto relationship for some years. During that time a rent house was built on a leasehold title registered in the names of the defendant and her former husband. The claimant says that it was mostly built by him. He seeks judgment for half

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of VT 2.224.500, the valuation of the building, as recompense for his contribution to it.

Facts

2. The parties were living in a de facto relationship in 2001. When exactly the relationship began is not clear from the evidence, which was generally vague in relation to dates. Although their ages were not disclosed in the evidence, neither was young. The claimant left school in 1979, the defendant in 1970. She has adult children.

3. When they began living together they intended to marry. They were living at Teouma Bush in a house which was the defendant's. She had a garden nearby and sold produce at the market. The claimant was working as a security guard at Au Bon Marché.

4. They decided to build a house on a leasehold property at Beverly Hills in Port Vila owned by the defendant and her former husband (with his consent). There is dispute as to exactly what was agreed.

5. The claimant said that they reached a verbal agreement to start the business of a rental house. Because the claimant was a professional builder, he would construct the house at no charge and the defendant would provide her savings of VT1.3m to purchase materials. According to him, the purpose of the venture was for their future benefit by providing a monthly income for them.

6. The defendant stated that this was not how it happened. She said that the claimant said to her:

> *Naoia yu oldfala nao, yu nomo strong enough blong work long garden bagegen, bae yu letem mi mi buildim wan rent house blong*

yu long ground blong yu mo bae yu stap and bae long every manis bae yu stap kasem money long hem.

(You are getting old, and you are no longer strong enough to work in the gardens. If you can allow me I can build you a rent house on your piece of land that will enable you to collect some money at the end of each month).

While the claimant agreed that he said that, his evidence was that the house was to be for their joint benefit as a couple.

7. She said that she never agreed to contribute VT1.3m and did not tell the claimant how much money she had in her bank accounts. However she said that she did pay for all the materials used in the construction.

8. The claimant drafted the plans for the house in order to obtain a building permit and construction was carried out over an extended period from 2001 – 2003 (approximately). There was a predictable dispute in evidence about how much of the work was done by the claimant on the one hand and the defendant's son, Christian, and her relatives on the other hand.

9. The relationship between the parties hit serious difficulties in August 2003. The defendant had arranged for a church marriage to take place between them on 26 August 2003 but just before the marriage date, the claimant made it clear that he would not be going through with it. Naturally this caused severe distress and embarrassment to the defendant.

10. Within a relatively short time of that event, the claimant formed another relationship with a woman from Tanna called Emma although this has not lasted. While it seems that the claimant still came to see the defendant at Teouma and there were some unsuccessful efforts at a custom reconciliation, they were no longer living with each other. Certainly the

relationship seems to have broken down altogether by July 2004, when the defendant accompanied a European man on a yacht to Indonesia.

11. It seems that the house took at least 2 years to complete. The claimant was working shifts at Au Bon Marché, so he could not spend all his time working on the house. After a time, he built a shelter there where he stored his tools and he stayed overnight sometimes. It is closer to Au Bon Marché than Teouma is.

12. As far as can be deduced from the vague evidence on the point, the house was sufficiently completed to let to tenants before the abortive wedding. The rent was collected by the defendant's son, Christian, and paid into her bank account. The claimant stated that that was only because they were unable to open a joint bank account.

13. As to the value of the building, the only evidence is a very brief valuation from "*Go-Eden Professional Services*", whose letterhead describes its business as "*Engineering Design, Construction and Supervision*". It is dated 22 February 2005 and gives an estimated market value of VT 2.224.500. It was not challenged.

14. The Court asked a number of questions of the claimant in an effort to find a basis for assessing the value of the labour he contributed to the building of the house, but without success. The claimant's counsel in re-examination had no better success.

15. The primary issues on which the Court must make factual findings are the basis on which the parties agreed to construct the rent house, and the extent of the claimant's contribution to its construction.

16. I consider that the parties had a common understanding when they decided to construct the rent house. This common understanding was:

- that they were intending to legally marry each other in the future.
- that they would use their joint resources to build a rent house.
- that the claimant's contribution would be primarily the labour and skill necessary. The defendant's contribution would be primarily the money needed to buy materials and the land on which the house would be built.
- that the defendant only would be the owner of the house. It was built on land which she part-owned.
- that while they were together the rental income would be used for their joint benefit.

17. I do not think that they ever had any common understanding about what would happen if they separated.

18. As to the extent of the claimant's contribution to the building, I accept his evidence that he was the main person who built it, and that the help he received from Christian and other relatives of the defendant was relatively minor. I accept his evidence about this because he gave a detailed account of what he did, and also because it is logical and probable that he would do the great part of the work. He was the one who was intending to marry the defendant and he was an experienced builder. Christian was only a youth at the time and had his own job.

19. I am also satisfied that the defendant provided nearly all the money for materials. This was accepted by the claimant. He may have contributed directly by buying items from his salary as a security guard and indirectly by helping the defendant in growing produce for sale by her at the market. But these contributions were quite minor.

The Law

20. There is no Vanuatu legislation relating to division of property between de facto partners. Nor is the Court aware of any Vanuatu case law about the subject. Counsel were of no assistance to the Court in this regard. When asked by the Court for submissions as to the law to apply, one mentioned the word "equity" and the other had no submissions on this point.

21. It is necessary to fall back on Article 95 (2) of the Constitution and look to the English common law in force at Independence in the absence of any submissions relating to French law. Fortuitously, the common law relating to division of property in de facto relationships was extensively traversed within a decade of Independence by the Court of Appeal of New Zealand in the landmark judgment of **Gillies –v- Keogh** [1989] 2 NZLR 327.

22. The leading judgement was that of Cooke P who at the outset provided some advice which this Court will try to follow:

> *There is a plethora of contemporary judgments in this field, largely saying much the same thing in different words. I shall try not to add to it unnecessarily and to follow T.S. Eliot's maxim that one should write as little as one can, which seems to be as good advice for Judges as for other professional writers.*

23. In **Gillies –v- Keogh** itself, there were, if not a plethora of judgments, separate ones from each of the four appeal judges. In deference to Cooke P and TS Eliot but at the risk of over-simplification, this Court has extracted the following principles from the judgments:

- although the Courts have used different legal concepts to address de facto property cases (constructive trusts, unjust enrichment, common intention, estoppel), ultimately the same factors must be taken into account.

- the essential issue is the reasonable expectations of persons in the shoes of the parties taking into account contemporary social attitudes. In assessing that, several factors have to be taken into account.
- the first factor is the degree of sacrifice by the claimant, the extent to which he or she has given up other opportunities.
- the second factor is the value of the contributions made to an asset by comparison to the benefits he or she has received. These contributions may be direct or indirect.
- even if sacrifices and contributions have been made, a claimant cannot succeed if a reasonable person in his or her shoes would have understood that the other party had beforehand positively declined to agree to any sharing of the property or payment of compensation.
- a simple monetary award, rather than the recognition of any interest in property, may be the appropriate way of giving effect to reasonable expectations.
- a careful analysis of the facts is always important.

Discussion

24. The facts of this case have been detailed above. It has to be said that the evidence of the parties related very much to the construction of the rent house rather than to wider aspects of the relationship which were only sketchily touched on. That itself may be an indication of the expectations of these parties. They see the claimant's rights as very much linked to his involvement with the construction.

25. The only significant "external" factor brought into the argument was Mr. Toa's strong submission that the claimant lost any claim to an interest by refusing to marry the defendant and leaving her for another woman. He submitted that the joint venture of constructing the rent house was only undertaken because the defendant believed that the claimant would marry her.

26. He argued that when the claimant refused to do so, he lost the right to an interest in the rent house. If he had married, then he would have a recognised basis in law to make a claim.

27. I do not accept that submission. Although in Vanuatu, there is no legislation providing for de facto property claims, it does not follow that de facto partners have no legal rights in respect of property. In other countries sharing a common law background – England, Canada, Australia, New Zealand- there was previously no legislative provision but the Courts used equitable principles to do justice: see the survey in the judgment of Richardson J. in **Gillies –v- Keogh**. I think the community in Vanuatu would also expect the Courts to recognise that justice may require property rights to be adjusted on the breakdown of de facto partnerships, which are part of society in Vanuatu as elsewhere.

28. No do I think that a claimant will lose rights already acquired by sacrifice and contributions because the relationship breaks down, whoever may be at fault for the breakdown. It is only because the relationship has ended that claims are made. In none of the common law cases, does the Court venture to adjust rights to property on the basis of fault for the breakdown.

29. In my view, the reasonable expectations of persons in the shoes of the parties would be that, if the relationship broke down before marriage, the claimant's contribution to the construction of the rent house would be recognised by fair monetary compensation.

30. I do not think that the parties themselves ever expected that the claimant would become a part-owner of the property. He himself acknowledged that she would remain the owner. I think that this was also tacitly acknowledged by the banking of rent to her separate account. Although the claimant said it was only practical difficulties which stopped it going into a joint account, he appears to have been content for the defendant to retain the rent for herself. I think that had they remained together he

would have shared in the benefit of the rent directly or indirectly but of course that did not happen.

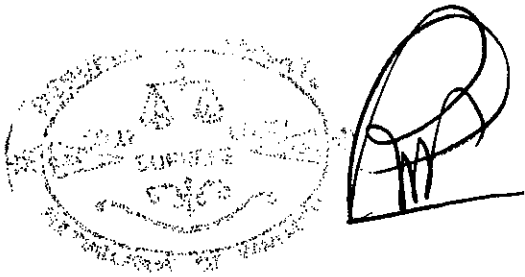
31. However, I do not think that anyone would expect him not to be compensated in the event of relationship breakdown. The extent of his sacrifice and his contribution was substantial. He must have expended a great amount of time, skill and energy over 2 years in constructing the house. He really got nothing in return because the relationship did not last.

32. Although he lived with the defendant at her house in Teouma at different times, the evidence was that he did work on that house and helped her in the garden. He does not claim for that, sensibly, because most people would see that as merely part of being in a relationship and living at her home.

33. But the construction of a rent house, mostly by him, is a different matter. It could not have been done without his contributions of skill and labour. It is a substantial permanent asset. The defendant would not be receiving the rents now unless he had made those contributions. As a professional builder, he could have spent that time earning income from building work. It is a reasonable expectation that he should be compensated by the defendant who retains the house and the income from it.

34. Unfortunately, there is a paucity of evidence to enable the Court to assess the amount of compensation. If the Court had had evidence of what a tradesman would have quoted to build this house, it would have provided a basis, but that is not available. The claimant's evidence was no help.

35. Mr. Yawha at least put forward something concrete by submitting that the Court could deduce that the labour cost would be about 40% of the valuation of VT 2.224.500 and submitted that the Court should award that sum.



36. The only figures which the Court has are the valuation and the figure of VT 1.3m as the amount spent on materials. On a very crude measure, that may mean that the labour cost of construction was in the vicinity of VT 1m.

37. Although an award of this nature will never be a mathematical calculation, the onus is on a claimant to provide the Court with sufficient evidence to support any award sought. As well as that, there is no doubt that Christian and, to a much lesser degree, other relatives provided some of the labour required.

Conclusion

38. Weighing all matters a best as I can on the skimpy evidence, I am satisfied that the defendant is entitled to an award of VT500,000.

39. There will be judgement for that amount in favour of the claimant. An enforcement conference will be held on 20 April 2007, at 10:00am to decide how the defendant will pay that. Any application for costs should be made at that time. It is not to be assumed that the Court will make an order for costs.

Dated AT PORT VILA on 29 March 2007

BY THE COURT

C.N. TUOHY

Judge