

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

CIVIL CASE NO. 206 of 2007

BETWEEN

PAUL DE MONTGOLFIER
Executor of the Ohlen Estate

First Claimant

AND

JENNIFER PREVEL

Second Claimant

AND

CHRISTOPHE PREVEL represented
by his Litigation Guardian, **MRS.
DOMINIQUE PREVEL**

Third Claimant

AND

MICKAEL AND JULIA OHLEN represented
by their Litigation Guardian, **MR. GILLES
OHLEN**

Fourth and Fifth
Claimants

AND

JACQUELINE DE GAILLANDE

First Defendant

AND

GERARD DE GAILLANDE

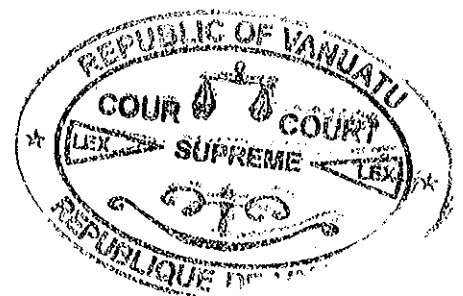
Second Defendant

Coram: Justice Mary Sey

Counsel: Mr Robert Sugden for the Claimants
Mr Less Napuati for the Defendants

Date of Hearing: 7th March 2013

Date of Decision: 21st March 2013

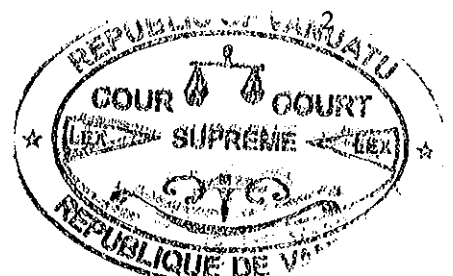


RULING

1. This is an application in which the Defendants have applied for orders that the issues in the case be determined according to the French Civil Code.
2. In order to place the reader in a position to understand the substratum of this application, I deem it apposite at this stage to chronicle the background facts to the case.

Background

3. Mrs. Isabelle Ohlen died in Port Vila on 24 December 2005 leaving a Will dated 4 November 2005, probate of which was declared sometime in March 2006.
4. The First Defendant was the Executrix of the Estate of the deceased from the time of Mrs. Ohlen's death until the First Claimant was appointed as Executor by Court Order of 13 October 2009 in Probate Case No. 8 of 2006.
5. The Second, Third, Fourth and Fifth Claimants are the sole beneficiaries under the said Will of the late Mrs. Ohlen.
6. In paragraphs 4, 5, 6 and 7 of their Further Amended Supreme Court Claim filed on 30th March 2010, the Claimants alleged that the First Defendant acted in breach of her duties as trustee and executrix under the deceased's Will.
7. For ease of reference, paragraphs 4, 5, 6 and 7 of the said pleadings are reproduced hereunder as follows:

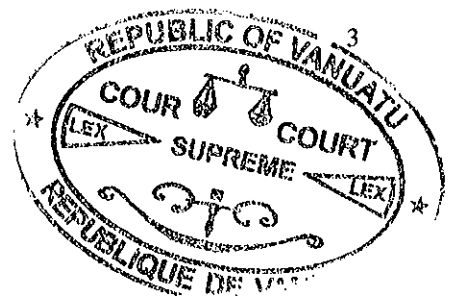


- "4. At her death, the Deceased possessed real estate, chattels, and substantial moneys in Bank accounts all of which became the Estate.
5. The Estate included but is not limited to:
- (i) A registered leasehold property at Ohlen.
 - (ii) Jewellery and chattels unknown as to extent or amount.
 - (iii) Large sums of money deposited in a number of accounts with the ANZ Bank at Port Vila, (the ANZ) including the a large sum of money belonging to the deceased that was on fixed deposit at the ANZ and the bank identified, in its system, as account No. AUD768856 (hereinafter 768856).
6. While she was Executrix of the Estate the First Defendant, in breach of her duties as Executrix made payments of moneys from 768856 to a number of people who were not beneficiaries under the Will.

PARTICULARS

Until an account is given by the First Defendant the full extent of such payments is not known to the Claimants but with the Claimants' knowledge is:

- (i) Substantial payments to herself;
- (ii) Substantial payments to the joint benefit of herself and the Second Defendant (who is her

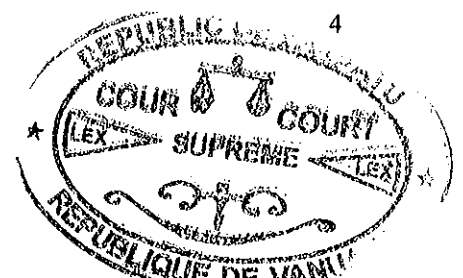


husband) including payments of their children's expenses and the transfer to their joint names of a large part of the money in 768856.

7. *While she was Executrix of the Estate, the first Defendant gave substantial quantity of the chattels belonging to the Estate to people not named as beneficiaries under the Will."*
8. In the Defendants' Further Amended Defence filed on 15th October 2010, the First Defendant denied the allegations contained in the Claimants pleadings as aforesaid. However, before the trial can proceed, the Court needs to determine the preliminary issue raised by the Defendants as to the applicable law to be applied to the case.

The Application

9. It is the submission of Mr. Napauti of counsel for the Defendants that the French Civil Code should apply on the basis that:
 - i) Most of the parties to the proceedings are French.
 - ii) The deceased was a French citizen registered with the French Embassy under No 05051101 and she acted under French law.
 - iii) All documents referring to the estate of the late Mrs Isabelle Ohlen were made in the French language.
 - iv) The First Claimant, Paul De Montgolfier, who advised the deceased on the provisions of her Will, is a French Notary.
 - v) The sole beneficiaries under the Will are French citizens residing in Noumea and France.
 - vi) The issue of donations made by the deceased is an ancestral



French tradition which is systemized by the Code Civil and that there is no law in Vanuatu governing donations. Counsel further submitted that the "inter vivos gifts" were made under the French law and accordingly this issue shall be considered in accordance with the enactments of the French law and its jurisprudence.

10. In opposing the application, Mr. Sugden contended that this Court has been proceeding under procedural law as determined by the Common Law and the Civil Procedure Rules since the case began in 2007 with the full acquiescence and active cooperation of the Defendants. Counsel further submitted that it is now too late for the Defendants to claim to be governed by French law and that the change to substantive law after almost 5 years' delay would cause immense expense and waste of time.
11. It is counsel's further submission that this proceeding to a large extent concerns the discharge by the first Defendant of her duties as Executrix and that those duties and their discharge are to be determined under the Probate Rules which are a re-enactment of the Queen's Regulations and they are to be interpreted according to Common Law principles.

The Applicable Law

12. The background development of the laws of Vanuatu is fully discussed by His Lordship **Vaudin d'Immeccourt CJ in Banga v. Waiwo** (1996) VUSC 5 Civil Appeal Case No. 1 of 1996. See also **Joli v. Joli** (2003) VUCA 27 Civil Appeal Case 11 of 2003 where the Court of Appeal stated as follows:

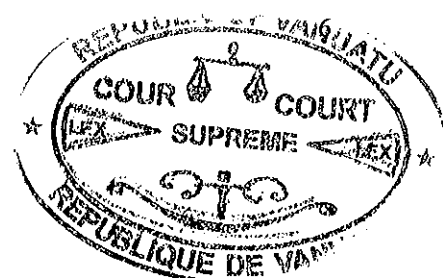


"Immediately before the Day of Independence on 30 July 1980, laws which applied in Vanuatu included statutes of general application in force in England on 1st January 1976 as well as the principles of the English common law and equity: see the High Court of the New Hebrides Regulations 1976. Under the terms of the Anglo French Protocol of 1914, those laws would not have applied to French citizens and "optants" to the French legal system. Their rights were governed by French law under the parallel legal system then in force. At Independence, laws in force immediately beforehand were continued in operation by Article 95 of the Constitution which provides:

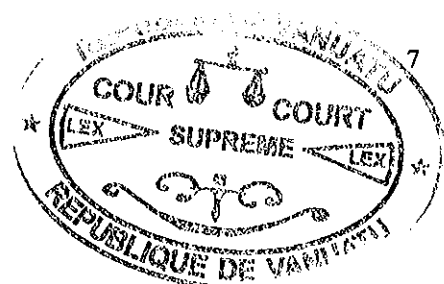
"(1) Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution.

(2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.

(3) Custom law shall continue to have effect as part of the law of the Republic of Vanuatu."

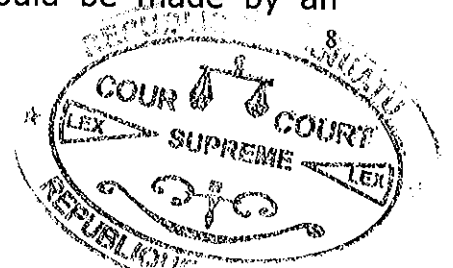


13. By implication and in line with the words 'until otherwise provided by Parliament' in Article 95, provisions of the Vanuatu legislation which cover substantially the same ground as the legislation in force at independence will supplant the latter. Where this is not the case, however, and there is no provision made in national legislation to deal with a matter, then, in line with the transitional arrangements stipulated in the Constitution, pre-independence laws may apply.
14. In her paper entitled "FAMILY LAW AND FRENCH LAW IN VANUATU: AN OPPORTUNITY MISSED?" [2004], Ms. Sue Farran stated that:
- "Where there is no national law on the matter, then it would seem that there is the option, stated in **Banga v. Waiwo**, for the courts to proceed under the existing Vanuatu English or French laws. If there is a conflict, or perhaps a choice of two alternative paths to follow, then the Courts have a Constitutional duty to resolve the matter and do substantial justice".*
15. In the present case, most of the Claimants are French citizens. The Defendants are also both francophone and culturally came from a French background although they are now naturalised Ni-Vanuatu citizens. The Defendants have applied for their rights to be determined according to principles of French law that may still operate in Vanuatu under Article 95 (2) of the Constitution.
16. Now, it is common cause that one of the issues which calls for the Court's determination in this case is that of the validity or otherwise of the "inter vivos gifts" and the donations which were made. There



are no provisions of the Vanuatu legislation dealing with inter vivos gifts. However, the French Civil Code makes extensive provisions for "Des donations entre vifs" in Art. 894 - Art. 1100 [SOIXANTE-QUINZIÈME ÉDITION.]

17. It is also common cause that there are other diverse issues raised by the parties in their pleadings which have to be decided under Common Law principles. It appears to me that, in a bid to resolve the matter and do substantial justice, I would need to take a pluralistic approach to this case and apply both the Common Law and French Civil Code as and when necessary. With reference to the contentious area of "Des donations entre vifs," I am of the considered view that a more vigorous inquisitorial approach using French law may be useful in determining the issue.
18. In the circumstances, I hereby make the following Orders:
 - a) The sole issue of "Des donations entre vifs" (inter vivos gifts) shall be dealt with in accordance with the enactments of the French Civil Code and its jurisprudence if it comes to be an issue in the trial through relevant amendment of the pleadings.
 - b) With reference to all the other issues raised in the pleadings, the Court shall continue its proceedings in accordance with the Civil Procedure Rules 2002 as interpreted according to Common Law Principles.
 - c) English translations of the original authorities in French and relevant Articles of the Code Civil should be made by an



official translator and filed by the Defendants in Court within 14 days from the date that the relevant issues become issues in the trial.

DATED at Port Vila, this 21st day of March, 2013.

BY THE COURT



M.M.SEY
Judge

