

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil

Case No. 18/2487 SC/Civil

BETWEEN: Corina Fogliani known as Corina Felix
Claimant

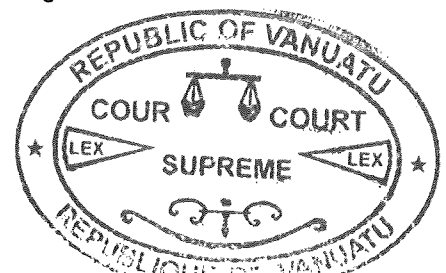
AND: Carina Marie Louise Fogliani
First Defendant
Republic of Vanuatu
Second Defendant

Date of Hearing: 10 June 2019
Before: Justice G.A. Andrée Wiltens
Counsel: Ms S. Mahuk for the Claimant
No appearance for the First Defendant
No appearance for Second Respondent

JUDGMENT

A. Introduction and Background

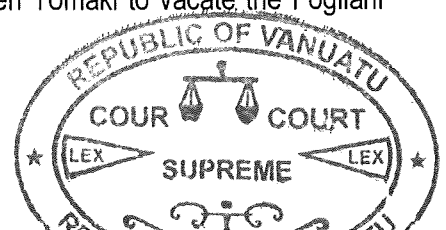
1. This is a dispute between a mother, Corina Fogliani, and her daughter Carina Fogliani. It involves the land on which Carina Fogliani's parents continue to reside, but in respect of which Carina Fogliani had assumed proprietorial control. There is also a commercial shop on the land, with rent paid to the parents as their only source of income.
2. Corina Fogliani claims that Carina Fogliani had, by fraud, achieved a power of attorney from the infirm and mentally incapacitated registered proprietor of the leasehold land (her father), which Carina Fogliani subsequently utilised in order to transfer ownership of the lease to herself. The shopkeeper was then required to pay an increased rental for the shop to Carina Fogliani, which resulted in a loss of all income for the parents. Additionally it was alleged that, for reasons which are unclear, Carina Fogliani then cut off essential services to her aged parents such as water and electricity.



3. Amongst other remedies, rectification of the title was sought, to return the father's name as the leaseholder.
4. Interim orders were urgently issued, at the request of Corina Fogliani, to return the parties to their respective previous positions and to reinstate the essential services which had been cut off.
5. Mr Yahwa had been acting for Carina Fogliani in the course of the litigation. However, at the final pre-trial Conference, he orally gave Notice of Ceasing to Act due to lack of instructions. By that stage of events, the only pleadings filed by or on Carina Fogliani's behalf were (i) a Response to the Claim, which indicated that the entire claim was disputed and that a counterclaim would be made; and (ii) an application to vary or revoke the interim restraining orders which was subsequently not pursued by Mr Yahwa. There was no defence filed, and no counterclaim. Carina Fogliani also did not appear at the trial, in person or through a legal representative.
6. SLO also did not appear at trial, but had filed a detailed Defence, relying on section 3 of the State Proceedings Act No. 9 of 2007 and the authority of *Republic of Vanuatu v Kwang Sing Sing* [2013] VUCA 35. The section requires notice to be given prior to proceedings against state commencing; and the Court of Appeal has held that failure to do so will operate as a complete prohibition to the commencement of such actions.
7. SLO further stated in the Defence that the transfer was unexceptional and undertaken and completed *bona fides* on the face of the documentation presented.

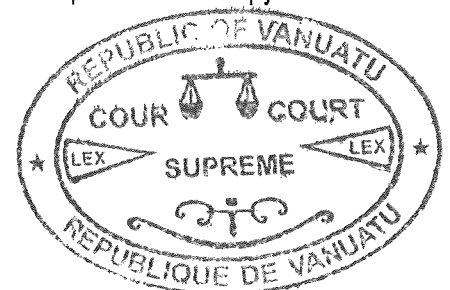
B. Evidence

8. No notice had been given of any requirement for the witnesses to be called for the purpose of cross-examination. Accordingly, I took note of the sworn statements filed in support of the Claim. There was nothing to gainsay them, but more importantly, they dove-tailed nicely to present a cogent picture for the claimant.
9. Corina Fogliani, in her statement, explained the family background; when she married Louis Fogliani and that Carina Fogliani is their only daughter. Mr Fogliani purchased the property at Freshwota 1, Title No 11/OF24/002 in 1980. Further, on 23 February 2016 Mr Fogliani gave Corina Fogliani a Power of Attorney over his affairs – that was relatively shortly before his health badly deteriorated, both physically and mentally.
10. Corina Fogliani set out that over the years her daughter Carina Fogliani had tried many times to take over her father's assets and property, as she felt she had a right to do as their only child.
11. Corina Fogliani considered the Power of Attorney from Mr Fogliani to Carina Fogliani, dated 28 August 2018, was achieved through a fabricated signature – she is unable to recognise it as that of her husband. She also considers that her husband was then incapable of signing at the date recorded in the document.
12. Corina Fogliani stated that Carina Fogliani used the 28 August 2018 Power of Attorney to cause Ridgeway Blake to write a letter requiring Mr Collen Tomaki to vacate the Fogliani



property; to further cause Unelco to cut off the supply of electricity and water to the Fogliani property; and to cause 2 Police Officers to accompany Carina Fogliani and force the tenant, the proprietor of J-Sawn Store, to sign a new enhanced rental agreement requiring Huang Ming Yong to pay the new monthly rent of VT 130,000 to Carina Fogliani.

13. Corina Fogliani produced copies of all the documents referred to as exhibits. The exhibits confirmed the contents of her statement.
14. Michel Tarip is a registered nurse. He stated in his sworn statement that he is a close friend of Mr and Mrs Fogliani. He commenced assisting Mrs Fogliani in caring for her husband as from 2013. He stated that from then Mr Fogliani had commenced to lose his memory and developed shakes, which made him clumsy. In mid-2017, Mr Fogliani's mental faculties declined significantly, and he required assistance with even menial daily tasks. Mr Tarip visits Mr Fogliani routinely at least once a week. He reported that Mr Fogliani cries a lot and is consoled by his wife. Mr Tarip opined that in 2018 Mr Fogliani was unable to render decisions about assets and finances. He also considered that Mr Fogliani was unable to sign his name, due to the shakes in his hands.
15. Dr Griffith Harrison is a medical practitioner. He medically examined 80-year old Mr Fogliani on 28 March 2019, and found him to have severe progressive memory loss and likely Stage 6 Alzheimer's disease (which indicates severe decline). He produced a 3-page report as to Mr Fogliani's various medical issues.
16. He opined that Mr Fogliani's mental and physical health were such that he would not have been able to sign his own name, read or form any comprehension of documents presented to him in the months prior to Dr Harrison's examination.
17. Dr Damon Ashworth is a specialist in clinical psychology. He assesses Mr Fogliani on 4, 10 and 24 April 2019. He produced a report of his medical findings as an exhibit. He confirmed that Mr Fogliani has severe brain damage and advanced dementia.
18. In his opinion, Mr Fogliani would not have had the cognitive capacity in 2018 to render any important decisions about assets and finances.
19. Timteo Kalmet also provided a sworn statement. He has been a friend of Louis Fogliani for over 40 years, since primary school. He stated in June 2018 Carina Fogliani and Ms Delaplane went to see him and asked if he could witness documents to effect the transfer of Mr Fogliani's control over the management of his property and assets. Mr Kalmet explained he would personally need to witness any documents being signed.
20. In July 2018, Carina Fogliani returned to see Mr Kalmet and requested that he witness a Power of Attorney signed by her father in her favour. She stated Mr Nigel Morrison had prepared the document and instructed her to get Mr Kalmet to witness it. Carina Fogliani was apparently insistent that Mr Kalmet witness the document as there was some urgency involved due to her father's health. Mr Kalmet acceded to Carina Fogliani's request and purported to witness the signature already on the page. He produced a copy of the document as an exhibit – it is dated 28 August 2018.



21. Mr Kalmet acknowledged that Mr Fogliani's signature was not appended in Mr Kalmet's presence. He accordingly wished to retract his signature as a witness.
22. Tom Bethuel gave a sworn statement. He stated that in about June 2018 Carina Fogliani asked him to witness a Transfer of Lease in respect of Title No. 11/OF24/002 from Mr Fogliani to Carina Fogliani. He was advised the signature already on the form was that of Mr Fogliani, who had appended his signature in Carina Fogliani and Ms Claudie Delaplane's presence. He believed what he was told, and he "...undertook the witnessing of the document". He produced a copy of the Transfer – it is dated 8 June 2018.
23. Mr Bethuel confirmed the document was not signed by Mr Fogliani in his presence, despite the appearance of the document. Having subsequently been told of Mr Fogliani's mental and physical incapacities, he sought to "...retract" his signature as witness on the Transfer.

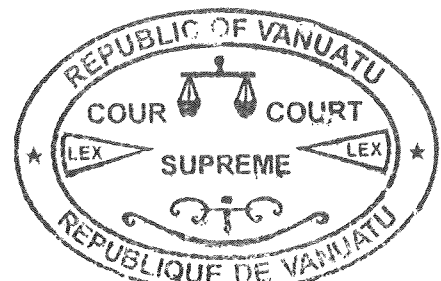
C. Discussion

24. The evidence presented indicates that Mr Fogliani was most unlikely to be the signatory to the Power of Attorney dated 28 August 2018 or the Transfer dated 8 June 2018. There is a grave suspicion that the documents are fraudulent in that it cannot be satisfactorily established that Mr Fogliani signed either document.
25. Both documents are certainly not properly witnessed; and they should therefore not be relied on in any way.
26. I place responsibility, for the two documents being presented as they are, squarely on Carina Fogliani. She persuaded Mr Kalmet and Mr Bethuel to "witness" the signature of Mr Fogliani – which they did contrary to their appointments as Commissioners for Oaths. Carina Fogliani then utilised the Power of Attorney to register the Transfer of the Lease into her name. That was done fraudulently, on the evidence presented.
27. The Claim against the Government was not properly commenced and is therefore of no effect. However, even if it were, I cannot see any fault on the part on the Government of Vanuatu. The officials acted in good faith on documents presented to them, which on the face of the documents had been correctly signed and witnessed.
28. I am directing the file be forwarded to the Office of the Public Prosecutor, for an assessment to be made if there is sufficient evidence to prosecute Carina Fogliani for criminal matters, or whether it should be first given to the police for investigation and collection of evidence. I am also forwarding a copy of the statements by Mr Kalmet and Mr Bethuel to the Chief Justice – he appointed them as Commissioners for Oaths, and neither is clearly a person suitable for such matters given their statements.

D. Orders

29. The following orders are made:

- I declare the Power of Attorney in the name of Carina Marie Louise Fogliani is invalid;



- I declare the Transfer of Lease into the name of Carina Marie Louise Fogliani is invalid;
 - The Registered Power of Attorney in Carina Marie Louise Fogliani's name is hereby cancelled;
 - The Transfer of the Lease into Carina Marie Louise's name is hereby cancelled;
 - The Lease is directed to be restored to the name of Louis Maurice Fogliani; and
 - I declare Corina Fogliani to be the guardian of Louis Maurice Fogliani.
30. Damages. All the rent money received by Carina Fogliani between 3 April 2019 and 10 June 2019 is to be paid to Corina Fogliani, which I calculate to be VT 292,500; together with damages for shutting off the water and electricity which I set at VT 130,000.
31. Interest on those sums at the rate of 5% pa is to run from 3 April 2019 until fully paid to the Claimant.
32. Costs of the action are awarded in favour of the Claimant, to be taxed by the Master.
33. The Claim against the Government of Vanuatu is dismissed. The Claimant is to pay VT 25,000 costs to State Law Office within 28 days.

**Dated at Port Vila this 19th day of June 2019
BY THE COURT**

G.A. Andree Wiltens
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Justice G.A. Andree Wiltens

