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

Civil
Case No. 20/1773 SC/Civil

BETWEEN: **Kristian Russet**
Claimants

AND: **Li Ya Huang**
First Defendant
John Warmington
Second Defendant

Dates of Trial:	25, 26 and 31 May, and 3 and 17 June 2022
Before:	Justice G.A. Andrée Wiltens
Counsel:	Mr H, Heuzenroeder with Mr M. Hurley for the Claimant
	Mr A. Jenshel instructed by Ms L. Raikatalau for the First Defendant
	Mr M. Fleming for the Second Defendant (Excused)
Date of Decision:	30 June 2022

Judgment

A. Introduction

1. This Claim, between the only son and widow of the deceased, involves a dispute as to who should inherit the deceased's estate, in the circumstance of there being no last will and testament setting out the deceased's wishes.

2. The dispute arose following the death of Mr Henri-Edmond Marie Andre Russet ("the deceased") on 17 December 2019.

3. At the time of his death, the deceased was married to Ms Li Ya Huang ("Ms Huang"), the Defendant in this proceeding. They had first met in around 2010, and subsequently lived together for approximately 18 months, before being married on 23 September 2017. The couple had no children together.

4. At the time of death, the deceased owned substantial assets in the order of VT 900 million, the majority of which derived from a farming operation at Tagabe, not far from Port Vila. That was where the deceased and Ms Huang resided at the date of his death.

5. The leasehold interest in the land had been purchased by the deceased's paternal grandfather in 1938. Over time, the farm was handed down from grandfather to father, and then to the deceased. The property had been held by the Russet family for 79 years at the time of the deceased's death.

6. Mr Kristian Russet ("Mr Russet"), the Claimant, is the deceased's only progeny. He is the son of the deceased's previous marriage, which ended in divorce in 1984. Mr Russet was born in Australia but spent the first few years of his life in Vanuatu. After his parents separated, he resided primarily with his mother in Australia, returning regularly, during school holidays, to visit his father.

7. In 2009, Mr Russet came to Vanuatu from Australia with his then fiancée, now wife, to live in Vanuatu and commence to work on the deceased's farm as the Operations Manager. This was at the request of the deceased, repeated numerous times over a number of years. Mr Russet continues to manage the farm today.

8. At the date of his father's death, Mr and Mrs Russet and their young family resided in a second home on the farm property.

9. A further significant fact is that despite dying intestate, the deceased had executed a pre-nuptial agreement with Ms Huang on 22 September 2017, immediately prior to their wedding, the purported effect of which was to ostensibly keep their individual properties separate post marriage and following the demise of either before the other.

B. <u>History of Litigation</u>

(i) Pre-Nuptial Agreement

10. The appropriate distribution of the estate was raised in Civil Case No 20/332, wherein Mr Russet, by Claim dated 13 February 2020, sought to enforce the pre-nuptial agreement entered into between the deceased and Ms Huang. Justice Saksak, in a decision of 4 June 2020, declined to strike out the Claim, or to stay the proceeding pending the outcome of the second litigation, Probate Case No. 20/1182, which had been filed by then. He also determined that the case dealing with the pre-nuptial agreement should be resolved first, prior; and, that the two cases should not be joined but remain separate.

(ii) Administration

11. The second litigation arose when Ms Huang applied, on 25 May 2020, for letters of administration of the deceased's estate in Probate Case No. 20/1182. Mr Russet opposed this, and sought instead that he be granted the right to administer the estate. Probate matters are ordinarily dealt with by the Master, but as legal issues were involved, the file was transferred to Justice Saksak. This case proceeded all the way to the Court of Appeal on a disputed preliminary issue.

12. Ultimately, on the urgings of the Court of Appeal, by consent, the Second Defendant, Mr Warmington, was appointed as an independent administrator. The issue of administration is no longer in dispute.

13. Although having filed a sworn statement in this litigation, and generously offered such assistance as the Court might seek, Mr Warmington has indicated that he will abide by the decision of the Court.

14. In the course of the litigation as to who should administer the estate, pursuant to section 42 of the Queen's Regulation No. 7 of 1972, a number of legal questions were posed to the Court by the contesting parties, and subsequently, also by Mr Warmington. The Deputy Master referred the legal questions to this Court, due to her lack of jurisdiction.

15. In a separate decision by Justice Saksak of 14 April 2021, 4 of the legal questions were addressed. The decision, which has not been appealed, held that:

    - The UK 1925 Estates Administration Act applies in Vanuatu;

    - Where there is conflict between the UK 1925 Estates Administration Act and Regulation 7 of the Queen's Regulation No.7 of 1972, Regulation 7 will prevail;

    - The pre-nuptial agreement entered into between the deceased and Ms Huang was not a testamentary document as it did not comply with the Wills Act; and

    - The pre-nuptial agreement does not override the application of Regulation 7 of the Queen's Regulation No.7 of 1972 or the 1925 Estates Administration Act.

16. Justice Saksak concluded that the pre-nuptial agreement was "...not valid and cannot have any validity to the administration of the estate...".

17. A further 7 legal questions had been put forward for resolution, but Justice Saksak deferred responding to those. The answers to those questions will hopefully be obvious from this decision.

(iii) The Current Claim

18. Mr Russet's claim, filed on 2 June 2021, seeks equitable relief in the form of an order that the entire farming operation should pass to him following his late father's intestacy, not Ms Huang, the deceased's lawful wife at the time of his death. The farming operation claimed includes the land, dwelling houses, fixtures and chattels.

(iv) Causes of Action

19. The claim is based firstly on the proposition that promises were made to Mr Russet by the deceased during his life time, consistent with the history of keeping the farming operation in the family over several generations. Mr Russet maintains that he subsequently acted in the belief that the entire farming operation would pass to him on his father's death; and further, that contrary to his interests, he left behind his life in Perth, Australia to take up the farm managerial post at Tagabe, Vanuatu. The manner in which this aspect of the Claim is pleaded, in legal terms, is that there is an enforceable proprietary estoppel.

20. Secondly, it is contended that by entering into the pre-nuptial agreement, Ms Huang made a representation to Mr Russet, that subject to certain conditions, in the event of the deceased predeceasing her, she would not make a claim to the farming operation. Ms Huang is said to be bound in conscience to not resile from that representation. However, since at least October 2020, it is claimed, Ms Huang has sought to assert an entitlement to the farming operation. The principle of promissory estoppel is accordingly contended to have application, preventing Ms Huang making any claim to the residuary estate.

21. Thirdly, it is contended that Mr Russet is able to hold Ms Huang to the contents of the pre-nuptial agreement, despite not being a signatory to the agreement himself. This is said to be due to him being the direct beneficiary of the agreement. Ms Huang's promise is claimed to be an asset of the deceased's estate, which Mr Russet is able, as the ultimate assignee of the deceased's property at the point of distribution, to enforce under equitable principles. This is sometimes referred to as a *Himalaya* clause.

22. Fourthly, in the alternative, the Claim pleads the long history of the Russet family as a Francophone family in Vanuatu is indicative that the disposition of the deceased's estate should be governed by the provisions of the French Code Civil.

23. There are in addition to these pleadings, a number of factual allegations, many of which were considered to have relevance, but in reality, are of little consequence.

(v) Defence

24. In summary, Ms Huang does not acknowledge the various representations said to be made by the deceased to Mr Russet – she maintains she had no knowledge of that. In her opinion, Mr Russet was well paid for the work he did, with and for, the deceased. She has no opposition to the farming operation at Tagabe passing to Mr Russet, on condition that the value of the same be taken into consideration at the final distribution of the estate. As the deceased's widow, she feels she is entitled at law to a certain share of the estate.

25. Ms Huang challenges the existence of the equitable interests claimed and does not accept that such can be maintained in light of Regulations 5 and 6 of the Queen's Regulation No. 7 of 1972.

26. In relation to the pre-nuptial agreement, Ms Huang contends that the agreement can have no affect on the distribution of the estate, due to it having already been decided, by Justice Saksak in Civil Case No. 20/1182, that the agreement has no legal effect. The agreement is said to be void, or unenforceable due to being contrary to public policy.

27. Ms Huang contends that the agreement was signed by her under duress, without full comprehension of the contents of the document; and accordingly, that it could not amount to a representation by her such as is alleged.

28. Ms Huang further contends that Mr Russet has waived reliance on French law by his earlier actions.

29. Ms Huang disputes many of the factual allegations made, and asserts several alternative allegations of her own. Again, many of these matters proved to be of but little consequence.

C. Applicable Vanuatu Law

(i) Common Law

30. No specific legislation has been passed in Vanuatu dealing with inheritance/intestacy since Independence. Consequently, the fallback position, as necessitated by Article 95(2) of the Constitution of Vanuatu, is that the common law as to inheritance/intestacy in the Republic of Vanuatu relies on both received British and French authority as at 29 July 1980.

31. The authority of *Banga v Waivo* [1996] VUSC 5, establishes that the received English and French laws now form part of the laws of Vanuatu and apply to everyone in Vanuatu irrespective of creed, colour or nationality. Where there is conflict between those laws, by my reading of Article 47 of the Constitution, the court must resolve such conflicts according to "substantial justice". An earlier pre-trial decision of the Court dealt with this.

32. The provisions of both the Code Civil (French law) and the Queen's Regulation No. 7 of 1972 (British law) are accordingly critical to understand the common law position as to inheritance and intestacy in Vanuatu.

33. The British rules as to inheritance, as set out in the Queen's Regulation No.7 of 1972, remains today as it was in July 1980. The relevant French Code Civil provisions have, for what is submitted by Mr Jenshel to be very good reasons, been radically changed to deal with perceived previous gross unfairness towards surviving widows. Mr Jenshel urged the Court to consider those amendments. He submitted that the law is not ossified or frozen in time, and that developments in Vanuatu and elsewhere may be taken into account to ascertain the present position. Mr Heuzenroeder did not demur, and indeed, pointed to the case of *Swanson v Public Prosecutor* [1998] VUCA 9 as Court of Appeal authority for the same proposition, which I accept.

34. Accordingly, I am assisted by having regard to Mr Jenshel's provision of 3 documents, provisionally permitted into evidence as Exhibit D 12, namely Senate 2001, Senate Information Report, and Amendments Law 2001-1135. I am satisfied they have relevance, which disposes of Mr Heuzenroeder's objection to their admissibility. They are now, together, admitted as Exhibit D 12.

35. This leaves the Court having to resolve the following conundrum if this case is to be determined according to the common law as applied in Vanuatu:

- The Queen's Regulation No. 7 of 1972, as set out in Regulations 5 and 6, provides that Ms Huang would be entitled to the deceased's personal chattels, plus $10,000; as well as one-third of the residuary estate absolutely. Mr Russet would be entitled to two-thirds of the residuary estate;

- As at July 1980, the French Code Civil provides, per Articles 731 and 767, that Ms Huang would be entitled to the usufruct of one-quarter of the residuary estate for her lifetime, which on her demise, would pass to Mr Russet. Mr Russet would be entitled to inherit the remaining three-quarters of the residual estate outright;

- As at 2019, the French Code Civil now provides for Ms Huang, at her choice, to be entitled to the usufruct of the entire residuary estate, or ownership of one-quarter of the residuary estate. Mr Russet would be entitled to the balance.

(ii) Equity Generally

36. Mr Jenshel queried whether the law of Vanuatu did or could incorporate the equitable principles claimed, due to the fact while undoubtedly there were such in British law, there were no similar provisions in French law. In my view, as well as there being many examples where equitable principles have been held to apply in Vanuatu, the notion of "substantial justice" entitles this court to have regard to what is fair in all the circumstances. As well as the many cases referred to by counsel in their submissions, I have regard to what the Court of Appeal said in *Family Kalmet v Kalmet* [2017] VUCA 20 and *Nalpini v President of the Republic of Vanuatu* [2019] VUCA 68. I also have regard to *Nalau v Mariango* [2007] VUCA 15. In conclusion, having regard to these authorities, I accept that the principles of equity have general application in Vanuatu.

37. Mr Jenshel was critical that the authorities cited in support of the Claim were largely from jurisdictions other than England, with a certain reliance on Australian cases. He urged the Court to be slow to follow precedent authority from Australia and/or New Zealand, as he maintained the laws as to equity in those jurisdictions had diverged markedly from that in Britain. He submitted the court should look mainly to British authority as to the equitable principles that have application in Vanuatu; this despite also citing Australian authorities himself.

38. However, even accepting Mr Jenshel's analysis, it is trite that Vanuatu can look to any other jurisdiction for assistance in determining principles of common law – see *Swanson v Public Prosecutor*. I note also the Court of Appeal's extensive consideration of overseas authorities in *Zuchetto v Republic of Vanuatu* [2014] VUCA 17.

39. The relevant primary principle in equity that I perceive has application to this case, is that to ignore alleged promises made and the detrimental altering of position in reliance of the same would be unconscionable: *Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133. I consider this principle to be part of Vanuatu's received law.

40. I have regard to the more recent restrictive statements as to principle in *Muschinski v Dodds* (1985) 160 CLR 583 and *Commonwealth v Verwayen* (1990) 170 CLR 394, as I consider them apposite to this case and reflective of the current understanding of the laws as to equity throughout common law jurisdictions, including Vanuatu. In particular I note as follows:

- An equitable remedy is available only when warranted by established principles, or legitimate processes of legal reasoning, commencing with a proper understanding of the conceptual foundations of such principles.

- Proprietary rights must fall to be governed by principles of law and not some mix of judicial discretion, subjective views or individual moral opinion.

- "Unconscionable" is to be understood as referring to what one party ought not to be allowed to do, in conscience, as between that party and other parties involved. In other words, a party should not be allowed to do what is unreasonable or oppressive to an extent that affronts ordinary minimum standards of fair dealing.

41. I accept that a court of equity must take a wide and comprehensive view of the overall circumstances of the case to ascertain the justice of the matter, and must be flexible as to possible relief measures.

(iii) The Present Claim

42. Bearing in mind the above legal considerations, the Court must consider whether the three equitable causes of action, as set out earlier, have been established by the evidence presented to the Court, both in support of and in opposition to the Claim. If not, the common law conundrum earlier described will have to be resorted to so as to determine the outcome of this case.

43. In this regard, it is convenient to consider each of the causes of action in the reverse order to that in which they are pleaded, as they can be dealt with relatively briefly, and will considerably narrow the scope of the court's further considerations.

(a) Pre-nuptial Agreement.

44. I do not consider there is scope for Mr Russet is able to hold Ms Huang to the contents of the pre-nuptial agreement. Not being a signatory to the agreement himself, this contention offends the rule against privity of contract.

45. The execution of the agreement was the subject of considerable evidence, much of it addressing concerns regarding Ms Huang's willingness to sign and her understanding of the contents of the document. However even if those considerations were to be ignored, at best, Ms Huang's signature was an acknowledgement to the deceased, not to Mr Russet. Mr Russet had no part in the execution of the document, albeit that he was the beneficiary. There is accordingly no consideration on his part for Ms Huang's signature.

46. This aspect of the Claim therefore cannot succeed in my view.

(b) Promissory Estoppel.

47. The principle of promissory estoppel is usually regarded as a shield, not a sword.

48. In any event, Ms Huang is not contesting this trial on the basis that she is entitled to the residuary estate or the entire farming operation. She is simply submitting that the law ought to be followed, which should result in her being entitled to some part of the estate. She does not want the farm property, but considers the value of the farming operation should be taken into account on distribution of the estate.

49. The promise or assurance that leads to promissory estoppel must be clear and unequivocal, even in a family context.

50. It must also be intended to affect the legal relations between the parties. There were no legal relations between Ms Huang and Mr Russet.

51. Further, Mr Russet did not act in the belief of Ms Huang's disputed promise, nor did he act to his detriment in reliance on it.

52. This aspect of the Claim also cannot succeed in my view.

(c) The Alternative Claim

53. The alternative cause of action pleads the long history of the Russet family as a Francophone family in Vanuatu is indicative that the disposition of the deceased's estate should be governed by the provisions of the French Code Civil.

54. This aspect of the Claim offends against Article 95, which requires the court to also have regard to British law.

55. Further, the received law of Vanuatu deals with every citizen in the same way, whether they be French or other nationality.

56. Accordingly, this aspect of the Claim also cannot succeed.

(d) Proprietary Estoppel.

57. I perceive this to be the main thrust of the Claim.

58. This is based on the many promises made to Mr Russet by the deceased during his life time, consistent with the family history of keeping the farming operation in the Russet family over several generations.

59. Mr Russet maintains that he subsequently acted in the belief that the operation would pass to him on his father's death when he left behind his life in Perth, Australia to take up the farm managerial post at Tagabe, Vanuatu.

60. Further, he contends that such act was contrary to his interests at the time.

61. In my view, this is a plausible cause of action.

(iv) Propriety Estoppel Legal Issues

62. The *Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] Q.B. 133 case sets out the elements required to be proved to establish proprietary estoppel, as follows:

> "If A, under an expectation created or encouraged by B that A shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation."

63. From that, it is clear Mr Russet will need to establish, so that it is more likely than not, that (i) his father made him a definite promise relating to land, (ii) he acted in reliance of his belief in the promise, (iii) such act was to his prejudice/detriment, and (iv) there is no express statutory bar to the equity.

64. Relevantly, I note that the notion of interest in land has been held to include a farming operation in *Gillett v Holt* [2001] CH 210. Mr Heuzenroeder also pointed to the similarities between the authorities of *Morton v Morton* (1999) 201 LSJS 277 and *Sidhu v Van Dyke* (2014) 251 CLR 505, which are to be contrasted with *Giumelli v Giumelli* (1999) 196 CLR 101. These are useful comparative authorities.

65. In terms of relief, it is noted that a subsequent authority has clarified that the equitable relief to be granted must be proportionate: *Jennings v Rice* [2002] EWCA Civ 159 – such that "...the minimum equity to do justice" is the ideal. This follows on from the "minimum equity" principle: *Crabb v Arun DC* [1975] EWCA Civ 7. I regard this as an important qualification.

66. By his Claim, Mr Russet asks the Court to provide an equitable resolution of this conflict rather than rely on the common law remedies available pursuant to received British and French law.

67. It is trite that equity does not override the common law; that a court of equity is as bound by the common law as is a court of law, and can as little justify a departure from the common law. However, when there is an important circumstance disregarded by the common law rules, equity may permit a different result to follow. It has long been a tenet of equity that equity follows the law, but not slavishly nor always. There is accordingly scope for discretion.

68. I have no doubt that equity can, and has, usurped statute in the right circumstances. In support of that contention, I was referred to *Rivers v Rivers* (2002) 84 SASR 426 and *Lowe v Pascoe (No 9)* [2021] NSWSC 163, which authorities I accept.

69. Mr Jenshel maintained that Regulation 5 of the Queen's Regulation No. 7 of 1972 has priority over any equitable relief. He submitted the ordinary meaning of the introductory and concluding words of Regulation 5, namely: "Notwithstanding anything to the contrary contained in any laws in force ... no person shall have any right, title, share, estate or interest in such property except as provided in this Regulation." were clear and unambiguous. He urged the Court to take into account the purpose of the intestacy rules to provide consistency and certainty, as well as the presumption that the drafter of the same was aware of the doctrines of equitable estoppel and must be presumed to have taken that into account in the drafting. He urged the court to not provide equitable relief.

70. Mr Heuzenroeder invited the court to read down the words used, and to interpret them not as "legal" right, title etc, but as "legal and equitable" rights, title etc. He further argued that do otherwise could result in a breach of Article 5(1)(j) or (k) of the Constitution. While not necessarily accepting the latter argument, the earlier argument is sound in my view.

71. I come to that conclusion because Regulation 5 of the Queen's Regulation No.7 of 1972, does not take into account, and disregards, the situation where a promise to deal with property in a certain way has been made and acted upon to detriment – the very ingredients which establish equitable proprietary estoppel. Further, Article 95 of the Constitution requires the court to consider both received British and French law. Mr Jenshel's submission anticipates applying only received British law to the matter at hand, which must be an incorrect approach. The "substantial justice" test the court is bound to apply suffices to satisfy me that I cannot accept Mr Jenshel's arguments.

72. Accordingly, I am satisfied that an equitable resolution of this conflict on the basis of proprietary estoppel is available in Vanuatu.

D. Evidence

(i) Analysis

73. I now go on to consider the evidence, to see if the Claim has been made out. There are 93 pages of hand-written notes which records, as best as possible, the opening and closing addresses and the viva voce evidence of all the witnesses. As well, each of the witnesses has made at least one written statement, which is their evidence-in-chief. Having regard to the volume of material presented, my comments that follow must be seen as a summary at best of the evidence as it struck me during the hearing.

74. This case, as is usual, involved assessing the accuracy and veracity of the witnesses where there was a dispute between the positions adopted by the claimant and the defendant. No one witness is more important than any other, and each witness should be regarded in the same manner. This task was somewhat more difficult than usual, due to the fact that counsel and several witnesses appeared from overseas via AVL; plus the fact that various interpreters were required to assist the court.

75. Rather than focus on how the witnesses appeared in the witness box, I looked for consistency within their evidence, and also when comparing their evidence with that of other witnesses, and with the exhibits produced. I also had regard to the inherent probabilities of the situation. In this manner I concluded what parts of the evidence to accept and what to not accept.

76. There are two main witnesses in this case, namely Mr Russet and Ms Huang. I will shortly turn to them. There are but few relevant exhibits to consider.

(ii) Less Significant Witnesses

77. The numerous supporting witnesses for the Claimant warrant but brief discussion. The thrust of their evidence is to confirm the fact that the deceased made mention, on many occasions and to different people, that he wanted the Tagabe farm to stay in the Russet family, and in particular, that he wanted his son Mr Russet to inherit the farm and his other assets after his death. The evidence included that the deceased had said to a number of persons that he had brought his son from Australia to work on the farm.

78. These witnesses were cross-examined at some length. The attack was to their credit by and large, so that it could be put that the witnesses were merely supportive of Mr Russet and that they were tailoring their evidence accordingly. This suggestion was denied by all the supporters of the Claimant's case, not surprisingly.

79. I need not name and identify each of this group of witnesses. I accepted their denials of invention as truthful, and accepted that the evidence each gave, was accurate.

80. On their evidence alone, there was more than sufficient evidence to establish that the deceased had expressed his clear wish that his son inherit the Tagabe farming operation; and that the deceased wanted his son to come to Vanuatu and work on the farm with him.

(iii) Pre-nuptial Agreement

81. The other matter that can be deal with briefly is the pre-nuptial agreement.

82. There was considerable evidence relating to how the agreement came into being, with particular emphasis as to the process adopted in relation to the execution of the agreement. The number of versions of the document was also examined, as there was contended confusion as to which version was the final executed version. This assault on the Claimant's case was aimed at challenging the validity and enforceability of the agreement.

83. However, the relevance of all that evidence, apart from again going to credit, is now of limited value given my earlier assessment that the claim for relief in relation to promissory estoppel is not available on the facts of this case. Following on from that, it is clear that this case does not turn on the validity or otherwise of the pre-nuptial agreement. In the circumstances, I consider I do not need to resolve the numerous areas of contention, as described above, between the parties regarding the preparation and execution of the pre-nuptial agreement.

84. However, some core facts relating to the pre-nuptial agreement remain of significance. Firstly, Mr Russet testified that he made an appointment for the deceased to give instructions to Geoffrey Gee & Partners relating to preparation of the document. He was challenged as to this, it being suggested that it was his initiative to compel his father and his fiancée to secure Mr Russet's future by entering into the agreement. That was flatly denied. Mr Russet was adamant that the agreement was the deceased's idea, not his; and that he was the mere intermediary, as he was for most administrative matters to do with running the farm business. I accepted that evidence and find that the pre-nuptial agreement was the deceased's idea. The fact that it was only attended to so late in the piece was apparently typical of the deceased.

85. The agreement provides for the assets of the deceased and of Ms Huang to remain separate property post-marriage, rather than amalgamate into matrimonial property. Provision was made, in the event of the deceased leaving Ms Huang as his widow, for her to be able to reside in the main homestead on the farm at Tagabe so long as she remained single or unmarried, and also for all the costs associated with the running and maintaining of the homestead to be met out of the farming operation earnings. I consider it most unlikely that Mr Russet would have proposed such an arrangement. That provision is evidence which supports the finding that the pre-nuptial was the deceased's initiative.

86. In addition, when further e-mailing Geoffrey Gee & Partners with some details of the individual properties owned by the deceased and Ms Huang, Mr Russet advised that his father wanted to include another provision whereby Ms Huang was to also receive a monthly allowance of VT 300,000 from the farming operation's earnings. Again, I consider it highly unlikely that Mr Russet would have initiated such a proposal. I note from the evidence of Mr Warmington, that this provision is currently still being made out of the estate's assets.

87. Ms Huang suggested the entire pre-nuptial process was rushed, the agreement being prepared and perfected just days before the wedding ceremony, and executed only the day before the wedding. Ms Huang challenged that she had a clear or complete understanding of the contents of the document, despite the fact that it had been translated to her line by line from English to Mandarin by Ms Yip, a mandarin interpreter. She maintains that she was upset, overcome with emotion, and that she had been forced to sign against her will.

88. Clearly the day before the wedding is a very late stage to address issues of the kind the pre-nuptial agreement addressed. While there is clear evidence to demonstrate her upset at the time, I concluded that the evidence relating to Ms Huang's inability to understand the document

and her inability to read and/or understand English, have been exaggerated. I was unconvinced that her evidence in this regard was truthful or reliable.

89. The most important fact flowing from the pre-nuptial agreement, even if it was Mr Russet's initiative, which I do not accept, was that the deceased freely executed the agreement and wanted his fiancée to do the same. This reflected his intentions at that time, which can be seen to be consistent with his earlier statements that he wanted the farm property and associated operations to remain in the Russet family, and for his son to inherit the same.

90. In this regard, the evidence of the pre-nuptial agreement is very strong and compelling – and supportive of the Claim.

(iv) Mr Russet's evidence

91. Mr Russet told the Court he was frequently told by the deceased that the farm at Tagabe and his other assets would go to his son and his four grandchildren. The deceased considered the farm to be his legacy. Mr Russet told me that the deceased wanted the farm to stay in the Russet family, and he wanted Mr Russet to ensure that that occurred by passing the property on to his children, two of whom were thought to be ideally suited to carry on the family history. It was suggested, many times, that Mr Russet was embellishing this evidence, but that was denied.

92. It was his evidence that in 2003, while working on the farm during a holiday period, the deceased asked Mr Russet to not return to Australia, but to stay and continue to work on the farm with him and to then eventually take over the farm operation. The deceased was concerned to ensure that his only son would be able to run the farming operation when the deceased was no longer able to do so due to infirmity, and also when the deceased was no longer alive. Mr Russet said that he had promised his father that he would return, but he first had matters to complete in Australia. His evidence was that the request of the deceased was repeated to Mr Russet in Australia, at the time of Mr Russet's engagement in May 2009. These matters were challenged and suggested to have been invented to improve the Claim, but that was denied.

93. Mr Russet pointed to the fact that the homesteads on the property are on the same legal title. He attributed this to the fact that it was always the deceased's intention to ensure the property remained entire and was not broken up into smaller lots. If separate titles had been issued, then keeping the property entire would have been more difficult.

94. Mr Russet completed his studies in 2001, and after some overseas travelling, settled down in Perth where he purchased a Pet Shop business, which he operated with Elizabeth, later his fiancée and now his wife, and the mother of his 4 children. Mr Russet and Elizabeth decided to make good Mr Russet's promise, sell up their assets in Perth and move permanently to Vanuatu. The children were all born in Vanuatu.

95. While alive, the deceased and Mr Russet worked closely together, and increased the value and productivity of the operation of the farm, and also an associated quarry. Mr Russet gave evidence of several projects undertaken together, which Mr Russet considered enhanced the value of the farming operation. He candidly agreed that he fought/was at loggerheads with the deceased frequently, and that the deceased could be very difficult. Many examples of such disagreements were examined in cross-examination.

96. Mr Russet told the Court that Ms Huang had actively sought his support prior to the marriage, and that she had confided in him that she was marrying for love and had no interest in the farm or the deceased's assets. He maintained that Ms Huang had told him on several occasions that she knew the deceased wanted the farm and his other assets to pass to Mr Russet. He was vigorously challenged as to this, but remained unmoved.

97. The cross-examination of Mr Russet traversed many areas, largely attacking his credibility.

98. Of course, the events prior to and surrounding the pre-nuptial agreement featured prominently. I will not again deal with that.

99. Of the more significant areas, Mr Jenshel concentrated on the lack of evidence provided by Mr Russet about his circumstances in Perth, prior to his coming to Vanuatu in 2009. The thrust of the questioning was designed to undermine the contention that Mr Russet had acted contrary to his interests in leaving Australia for Vanuatu. Mr Russet maintained that the decision was a significant step - he had sold up a growing and profitable business in Perth, and sold his other assets as well, cutting all ties with Australia. He stated that he had done so due to his belief that what the deceased had promised was true, and so the return to Vanuatu was in his words "...predicated on his inheriting the farm". Mr Russet offered to provide further information/material to Mr Jenshel, but that offer was not taken further. Mr Russet also pointed to the effluxion of time, and that the financial records relating to the Pet Shop business were no longer available. His explanations were reasonable in the circumstances.

100. In an attempt to embarrass, Mr Russet was challenged on what basis he had acquired Vanuatu citizenship. It was suggested that he hadn't been in Vanuatu sufficiently long to apply; and, as he already held dual nationality (French and Australian) he was ineligible to also be given Vanuatu citizenship. Impressively, in terms of his credit, Mr Russet explained that while strictly correct, cumulatively over time he had been in Vanuatu sufficiently long; and again, while correct, he simply ignored the requirement to subsequently relinquish either French or Australian citizenship as have many others. I did not see these matters as undermining his credibility.

101. While some areas of his evidence were dealt with extensively, it was noticeable that the suggestion put that the pre-nuptial agreement was in fact Mr Russet's idea, which suggestion was denied, did not warrant the same extensive attention. I accepted that Mr Russet was doing the deceased's bidding; and that the lateness of the arrangements was in fact due to the deceased and not due to Mr Russet attempting to "ambush" Ms Huang immediately prior to her wedding. The other relevant point to note, is that Mr Russet maintained that Ms Huang's English was "quite good", and accordingly it did not occur to him as necessary to instruct Geoffrey Gee & Partners to obtain the services of an interpreter for Ms Huang. He was not seriously challenged as to that.

102. Mr Jenshel challenged Mr Russet as to some of the factual issues that were included in the pleadings. Whether such events, such as the brandishing of a gun and/or holding of the deceased by the neck in the course of arguments, had occurred or not could not affect the ultimate decision the Court was asked to consider. They affected the credit of the witnesses only. While Ms Huang's observations may have been correct, as much of what went on was in a language (French) she maintains she could not understand, her understanding of such incidents must have been incomplete. What is clear is that, as Mr Russet admitted freely, that at times things between father and son became heated. At times there were over-reactions. However, such events occur within families. I found this part of the evidence largely irrelevant

and also unhelpful; and I make the same comment in relation to the similar cross-examination later in the trial of Ms Huang.

103. There was much made of Mr Russet's hobby or business, depending on which perspective is used, of keeping and selling tropical fish. There were allegations he had used the deceased's accounts to partly at least fund this hobby, and assertions that the deceased considered the enterprise unwise. I considered this also to be beside the point. In terms of credit, I believed Mr Russet's explanations, that this was merely a minor distraction for him.

(v) Ms Huang's evidence

104. The vast majority of Ms Huang's evidence dealt with the circumstances surrounding the pre-nuptial agreement. She was consistent in alleging that she had not wanted to sign it as she did not understand it; and she did not resile from that position during her evidence. Part of her claimed difficulty stemmed from not knowing well the English language, being overwhelmed when she understood what she was being asked to do, and the suddenness of it all, just a day prior to the wedding. She ultimately signed the agreement as she did not want to embarrass the deceased by causing him to call off the wedding at the last minute.

105. She rightly pointed out that the agreement was between herself and the deceased, but she remains of the view that Mr Russet was instrumental in the drawing up of the document. She states the document does not include any representation by her to Mr Russet. I accept that view.

106. Ms Huang gave evidence about a number of situations where she had observed serious discord between the deceased and Mr Russet. She suggested a difficult and turbulent working relationship existed between them, such that it is unlikely the deceased would have wanted his son to inherit the farm. While I did not accept this evidence, as previously stated, I consider this to be of little assistance in arriving at my decision.

107. She maintained that she was unaware that the deceased had ever stated to anyone that he intended to leave the farming operation to his son – she stressed that he had certainly not said so to her. She stated further that she had no knowledge of the Russet family history at that location. This strikes me as inherently unlikely. The deceased was proud of his family history. I cannot conceive of a scenario whereby he maintained complete silence about that to his friend, then girlfriend, then fiancée and finally wife. This denial beggars belief, especially when compared with the large amount of credible evidence to the contrary.

108. In my assessment, Ms Huang was an unimpressive witness. She was hesitant and circumspect. She required a translator when she gave evidence, which is perfectly understandable. However, she did not require a translator when other witnesses gave their evidence, and was equally as relaxed when the final submissions were presented in English and at normal speaking speed. She appeared (on the screen) to be paying attention, and I can only assume she was taking in at least some of what was submitted, if not the majority. I also take note of what Mr Russet had to say about her ability to speak and understand English. The inconsistency between those stances is stark.

109. It is relevant that she is highly qualified, as an anesthetist. She has resided in Vanuatu for over a decade, lived together with the deceased for some 5 years prior to their wedding, and a further 2 years or so thereafter. He had no ability to speak or understand Mandarin; and she had no French. The only way the couple could communicate was by hand/facial gestures and

a common language, which was most likely to be English, possibly Bislama. It cannot have been the situation that there was a wall of silence between them.

110. Ms Huang is currently in China, due to her mother's health. However, she remains in business in Vanuatu, with her partner Mr Bayer. While there is evidence that Ms Huang used her i-phone as a translation device to convert French to Mandarin, her own written evidence contains passages in English – this demonstrates that she understood what was said and has retained it in her memory. It is inconceivable that her language ability is as poor as made out. Had it been, she would not have been able to work as an anesthetist, nor conduct business here in Vanuatu.

111. I consider it more likely than not that her level of English was better than she was prepared to admit.

112. It was clear to me that her becoming overwhelmed in relation to the pre-nuptial agreement is exaggerated. It is significant that she became overwhelmed, on her account, when she came to understand the effect of the agreement. I consider she well knew what an attendance at the solicitors prior to marriage could have meant, and I accept that she had prior knowledge of the requirement for such an agreement to be concluded before the wedding – as evidenced by Mr Russet.

113. The words in the document are not complicated. There is no hidden meaning in a document setting out that assets are to remain separate property following marriage. I have little doubt that Ms Yip, despite not being legally trained, would have had no difficulty in translating those words such that the meaning was abundantly clear. These issues address her credibility, and in my mind undermine it.

114. Mr Heuzenroeder has pointed to a number of matters in his final submissions where Ms Huang has made mention of matters for the first time in her viva voce evidence. This despite filing 3 previous sworn statements, which make no mention of these matters. I do not need to deal with those matters individually, as a reading of the record makes them obvious. The inconsistencies between her written evidence and her viva voce evidence are damaging to her credibility. Further damaging is her inconsistent responses in cross-examination.

115. I determined I could not rely on Ms Huang's evidence where it differed from that of other reliable witnesses.

E. <u>Discussion</u>

(i) Claim

116. To prove his Claim of propriety estoppel, Mr Russet needed to establish, so that it is more likely than not, that (i) his father made him a definite promise relating to land, (ii) he acted in reliance of his belief in the promise, (iii) such act was to his prejudice/detriment, and (iv) there is no express statutory bar to the equity.

117. When Mr Russet left Australia to travel to Vanuatu and commence his role as Operations Manager at Tagabe, he did so bringing his Australian fiancée to an unfamiliar world. While they had previously visited, only Mr Russet had actually lived in Vanuatu, and that was when he was very young.

118. Mr Russet had sold his home and business in Perth, Australia, permanently cutting off his immediate ties. He came to a vastly different environment and to a different vocation – instead of operating a Pet Shop, he was to now be the Operations Manager of a large rural farming business. Instead of being his own master, he was now required to work with and for a universally accepted difficult overseer. Instead of reaping all the profits from his endeavours, he was now on a fixed salary.

119. Mr Jenshel addressed this aspect directly. He submitted that there was insufficient evidence of detriment. He was critical that Mr Russet had not supplied the name of the Pet shop in Perth, nor provided figures to support the bald statements that it was a growing and more profitable business over time. Mr Russet answered those points well, and in an unruffled manner. It was submitted further that Mr Russet was actually better off in Vanuatu as he was receiving a significant salary. However, these points did not impress me.

120. The conclusion I drew, is that the change of lifestyle was to Mr Russet's immediate detriment, as well as his partner's, regardless that they were afforded housing and that he received a substantial salary by way of compensation.

121. Mr Russet chose to alter his way of life on the express repeated invitation of his father. He did so in the expectation that when his father passed away, he would inherit the entire farming operation – he had been informed of that on numerous occasions over a lengthy period.

122. Mr Jenshel was concerned that the promise allegedly made was gratuitous and that it required no reciprocity on the part of Mr Russet. He also pointed to Mr Russet's candid admission that he expected to inherit the faming operation regardless of coming to Vanuatu or not. However, that does not in my view undermine the promise, which has been established by many witnesses.

123. There can also be no doubt that the deceased was well aware of the basis for Mr Russet's decision to move from Australia. Indeed, it is clear that the deceased intended that Mr Russet act on his promise. Mr Jenshel pointed to the requirement of knowledge, but did not cause me to doubt the logic of the situation.

124. As previously discussed, I am satisfied there is no statutory provision to prevent proprietary estoppel.

(ii) Relief

125. I am satisfied that in 2009, when Mr Russet came to Vanuatu, the promises leading to Mr Russet's understanding that he would ultimately inherit, coupled with his acting in reliance of that promise to his detriment to the knowledge of the deceased, meet the test for proprietary estoppel.

126. Had the deceased at that time, or later, sought to resile from his promise, the principle of equitable estoppel would have prevented him from doing so.

127. Accordingly, from 2009, when Mr Russet came to Vanuatu permanently, the deceased effectively held the entire farming operation on trust for his son – it was an equitable constructive trust.

128. At no time did that position change, even following the advent of Ms Huang moving in to live with the deceased on the farm property. The evidential value of the pre-nuptial agreement is not so much that it indicated Ms Huang's understanding of her position regarding eventual inheritance. What the instructions to Geoffrey Gee & Partners and the subsequent preparation and execution of the agreement by the deceased shows, is that the day prior to marrying Ms Huang, the deceased was maintaining his promise that his son would inherit the farm operation in its entirety, but subject to certain conditions in favour of Ms Huang.

129. There was a suggestion by Ms Huang that, in order to get her to execute the agreement, the deceased had told her that he was prepared to make amendments to the agreement post-marriage. However, there was a complete absence of evidence suggesting that any such further discussions occurred.

130. Right up until his death-bed, the deceased's only known intention, was that his son should inherit the farm, as he and his forebears had. The marriage had altered the deceased's intentions only by the provision of certain benefits to Ms Huang in the event that the deceased passed away before her, which were set out in the pre-nuptial agreement and in Mr Russet's e-mail to Geoffrey Gee & Partners.

131. The entire farming operation at Tagabe, held by way of an equitable constructive trust by the deceased at the time of his death, must now in law pass to the Administrator as an asset of the estate, for the Administrator to ultimately distribute the entirety of it to Mr Russet.

132. However, equity's resolution must be limited to the bare necessity. Accordingly, I find that Mr Russet holds the farming operation subject to the deceased's promise to Ms Huang to provide for his widow beyond his lifetime. Equity requires Mr Russet to respect the deceased's wishes in that regard – he is bound by the deceased's promissory estoppel. If Mr Russet attempts to assert otherwise, Ms Huang is able to use this as a shield to prevent disentitlement.

133. I am satisfied that this is applicable despite there being no counter-claim, due to the need to fashion appropriate relief that takes all the circumstances into account and the requirement that the minimum equity must be done to achieve justice.

F. Result

134. The farming operation at Tagabe, and all that it includes by way of land, dwelling houses, fixtures and chattels is to be distributed to Mr Russet on the winding up of the administration.

135. Mr Russet is to observe and comply with the deceased's wishes and make appropriate arrangements so that:

(a) Ms Huang is permitted to reside in the main homestead on the farm at Tagabe so long as she remains single or unmarried;

(b) All the costs associated with the running and maintaining of the homestead are to be met out of the Tagabe farming operation earnings; and

(c) Ms Huang is to also receive a monthly allowance of VT 300,000 from the Tagabe farming operation's earnings.

136. Costs are to follow the event. Ms Huang is to pay VT 750,000 towards Mr Russet's legal costs. This is to be paid within 28 days. In the event of non-payment, Mr Warmington is to use the monthly VT 300,000 payments to meet this order.

137. There is no order in respect of costs in relation to Mr Warmington.

Dated at Port Vila this 30th day of June 2022
BY THE COURT

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Justice G.A. Andrée Wiltens