

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

Civil
Case No. 20/2639 SC/CIVL

BETWEEN: Susan Noel
Claimant

**AND: Marie-Pierre Malere as Administratrix
of the Estate of Raymond Malere
(deceased)**
Defendant

AND: Ameren Rowalere Delagroux
First Interested Party

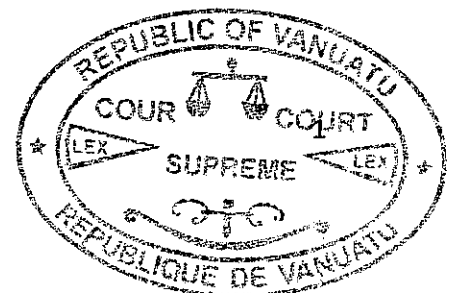
AND: BRED (Vanuatu) Limited
Second Interested Party

Date: 5 August 2024
Before: Justice V.M. Trief
Counsel: Claimant – Ms V. Muluane
Defendant – Mr L. Tevi
First Interested Party – Mr D. Yawha
Second Interested Party – Mr J.C. Malcolm

JUDGMENT AS TO THE RELIEF FOR THE CLAIMANT

A. Introduction

1. This was a contested claim against the Defendant Marie-Pierre Malere as administratrix of the estate of her husband Raymond Malere (deceased) alleging that she breached her fiduciary duties. The property at the heart of the dispute is a leasehold property at Sarakata area in Luganville on Santo island.



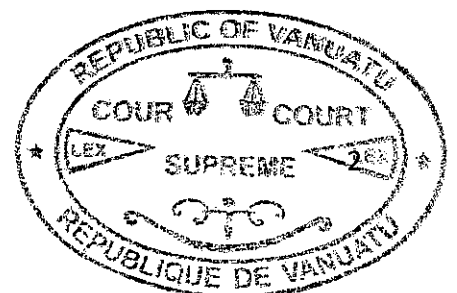
2. By Judgment dated 20 February 2024, Mrs Malere was found and declared to have committed a breach of trust and of her fiduciary duties as administratrix of her late husband Raymond Malere's estate: *Noel v Malere* [2024] VUSC 180.
3. As the subject property is under a mortgage with the Second Interested Party the BRED Bank, I then ordered that the BRED Bank was joined as a party to the proceeding and invited all parties' submissions as to what relief to order in the Claimant Mrs Susan Noel's favour.
4. Even after an extension of time was given, I have received submissions from only the BRED Bank and Mrs Noel.
5. This is the decision as to the relief in the Claimant's favour.

B. Background

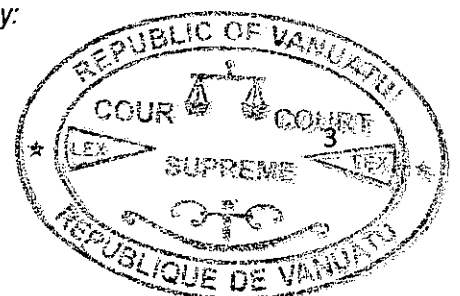
6. Raymond Malere (deceased) and his wife and widow Defendant Marie-Pierre Malere lived in a house at leasehold title no. 03/O172/012 at Sarakata area at Luganville on Santo (the 'property'). The Claimant Susan Noel lived at the same property, in a different house.
7. Mrs Noel and the First Interested Party Amerene Rowarele Delagroux (maiden name "Noel") are sisters.
8. Mr Malere became the registered proprietor of the lease in 1996. In 2000, he filed Supreme Court Case No. 09 of 2000 ('CC 2000/09') for an eviction order against Mrs Noel. After the matter proceeded to the Court of Appeal, on 4 June 2003, counsel for Mr Malere, Mrs Noel and Mrs Delagroux signed Consent Orders/Agreement to settle in CC 2000/09 in which they agreed as follows (the 'Consent Orders'):

a) *[To] settle the matter by:*

- i) *The plaintiff [Mr Malere] agree that the first respondents [Mrs Noel and Mrs Delagroux] shall have the plot of land within leasehold title no. 03/O172/012 surveyed and registered in the names of Susan Noel and Amarene Warele Delagroux, in the current state of the boundary marks;*
- ii) *The plaintiff and first respondents agree that upon completion of survey a new title will be created to indicate rights and interests to be possessed by the plaintiff and Susan Noel and Amarene Warele Delagroux;*
- iii) *Civil Case No. 9 of 2000 is hereby discontinued; and*
- iv) *Each parties [sic] meet their own costs.*



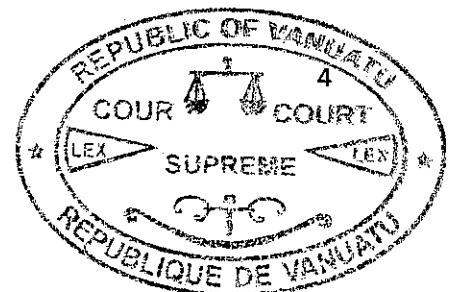
9. The Consent Orders have not been challenged or set aside or quashed by a Court Order.
10. On 27 September 2009, Mr Malere passed away without complying with the Consent Orders.
11. On 19 April 2012, the Supreme Court in the Probate Case appointed Mrs Malere as administratrix of Mr Malere's estate.
12. On 4 April 2014, the lease was transferred by transmission to Mrs Malere (that is, from the deceased to the surviving joint proprietor).
13. By the Further Amended Claim in the present matter, Mrs Noel alleged that Mrs Malere's administration of the estate was subject to the Consent Orders/agreement to settle signed on 4 June 2003 in CC 2000/09 including to subdivide the lease into two and transfer one of the derivative titles to Mrs Noel. It was alleged that Mrs Malere had breached her fiduciary duty in a number of respects including because she had not complied with the Consent Orders to subdivide and transfer one of the derivative leases to Mrs Noel.
14. The following relief was sought:
 1. *Make a declaration that the Defendant committed a breach of trust;*
 2. *Make a declaration that the Defendant has committed a fraud;*
 3. *For the Defendant to account for the mortgage and the use of the monies obtained through it;*
 4. *Order the Defendant to:*
 - i) *Surrender the leasehold title 03/OI72/012 and create two new leases at the estate's costs or the Defendant's costs;*
 - ii) *Do all necessary steps to register one of the new [derivative] leases... in the Claimant and Interested Party's names at the estate's costs;*
 5. *If the Defendant does not proceed with order 4 within the Court's Judgment, or if the lease cannot be subdivided into two because of the mortgage on the lease, the Court must order the sale of the lease as follows:*
 - a) *That the Sheriff of the Supreme Court of Vanuatu immediately seize and sell the lease;*
 - b) *That the proceeds of the sale be put into the Chief Registrar's Trust Account and should be distributed as follows:*
 - i) *Firstly, pay off the mortgage;*
 - ii) *Out of the balance, as priority to pay:*



- a) *The value of half of the lease (i.e. 512 m²) to Mrs Noel and Mrs Delagroux;*
 - b) *Any other damages as granted by the Court;*
6. *That if the Court finds that the Defendant breached her trustee's duties, that the trustee's costs of this proceeding and any other disbursements incurred by her in connection with the lease should not be taken out of the Estate.*
 7. *Punitive damages in the amount of VT500,000.*
 8. *General damages in the amount of VT10,080,000 for the loss of enjoyment of the land and Mesne profits.*
 9. *Special damages in the amount of VT8,283,800 for the cost of removing the roof and damaging the house on the part of the lease which the claimant and Amerene Rowarele Delagroux were entitled to.*
 10. *Costs of this proceeding on an indemnity basis because of the breach of Trustee duties.*
 11. *Order any other appropriate relief as deem (sic) just by the Court.*
15. The matter proceeded to trial, then by Judgment dated 20 February 2024, I found and declared that Mrs Malere had committed a breach of trust and of her fiduciary duties as administratrix of her husband Raymond Malere's estate, and caused Mrs Noel to suffer loss and damage: *Noel v Malere* [2024] VJSC 180.
16. The question now is what relief to order in Mrs Noel's favour?

C. Submissions

17. On 23 April 2024, the BRED Bank filed Synopsis of Submissions of Second Interested Party. Its counsel Mr Malcolm submitted that it will abide a Court order and that it believes there are three realistic options to resolve the matter, namely:
- a) Subdivision of the property and each party get 50%. It was submitted that this is not practicable as Mrs Noel would not get compensated for the loss of her house, the BRED Bank's security would get cut in half regardless that it is an innocent party, and the costs, plans, new leases, stamp duties and release of the current leasehold title would cost so much money and time as to be impractical;
 - b) Seizure and sale of the property by the Sheriff, then after payment out of the BRED Bank's mortgage, that the balance be paid to the parties equally. It was submitted that this would, in the Bank's view, adversely impact Mrs Noel's entitlement to half the value of the property prior to Mrs Malere refusing her any right to re-enter the property and repair; and
 - c) Issue a money judgment. That is, if Mrs Noel could provide evidence of the value of the share of the property (prior to the destruction of the

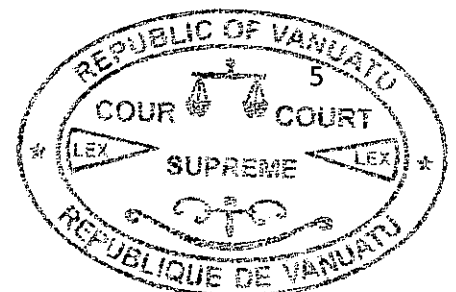


house), a judgment as a money order could simply issue against Mrs Malere. It was submitted that the BRED Bank wholly supports this option as it would avoid the costs and time of subdivision and sale, it would not adversely affect the Bank's security for its mortgage, Mrs Noel would have the ability to enforce the judgment debt, and it would put the onus on Mrs Malere to repair the damage caused solely by herself.

18. Finally, the BRED Bank sought its full costs on an indemnity basis against Mrs Malere due to the breach of fiduciary duties caused solely by herself.
19. Despite the opportunities given, Mrs Malere has not filed any submissions in response.
20. On 30 April 2024, Mrs Noel filed Claimant's Synopsis Reply to the Second Interested Party's Synopsis of Submissions dated 23.04.24. Claimant's counsel Ms Muluane submitted that after reviewing the 3 options set out by the BRED Bank, Mrs Noel no longer wants to pursue the option of subdivision of the property. She referred to para. 6 of the Claimant's closing submissions filed on 5 May 2023 and submitted that the most practicable option for Mrs Noel and the Interested Parties was for Mrs Noel to be given the right to sell the property and distribute the proceeds of sale (in terms set out in the submissions) and that if the proceeds of sale were not sufficient to cover all the damages awarded to Mrs Noel, then the remaining balance of the damages should be paid personally by Mrs Malere out of her other personal assets.

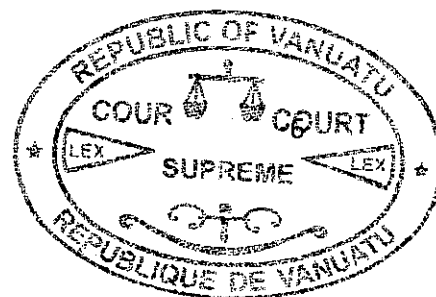
D. Consideration

21. The two options now pressed by Mrs Noel in her submissions filed on 30 April 2024 are as follows:
 - a) Sale of the property and distribution of the proceeds of sale by Mrs Noel; and
 - b) If the proceeds of sale were not sufficient to cover all the damages awarded to Mrs Noel, then the remaining balance of the damages should be paid personally by Mrs Malere out of her other personal assets.
22. What the BRED Bank proposed (and that Mrs Noel sought in the Claim) was seizure and sale of the property *by the Sheriff*. However, in her recent submissions, Mrs Noel sought sale of the property and distribution of its proceeds by herself. However, Mrs Noel is not the owner of the property therefore I consider that I cannot make an order that she sell the property and distribute its proceeds.
23. I also take into account that in the normal course, the Court could make an order for seizure and sale of a property by the Sheriff as part of the enforcement process. That is, judgment has issued containing a money order and if the judgment debtor has not



complied with the money order, then the matter would proceed to enforcement during which the Court may make an order that the Sheriff seize and sell the property to satisfy the money order.

24. Accordingly, I consider that the Court should issue a judgment containing a money order and if Mrs Malere does not comply with it, then the matter can proceed to enforcement during which seizure and sale of the property can be sought if the money order (for a judgment sum) is not complied with (is not paid).
25. What damages is Mrs Noel entitled to?
26. In the Judgment dated 20 February 2024 at [105], I held as follows:
 105. *Accordingly, I consider that the damage to the house constitutes loss and damage suffered by Mrs Noel as a result of Mrs Malere's breach of duty in refusing to subdivide the property and register one part in her and Mrs Delagroux's names. I accept and find the cost of repairing the house to an inhabitable condition is VT8,283,800 as set out in the quotation that Mrs Noel obtained [Annexure "SN4", Exhibit C2].*
27. There is no evidence as to the value of the house. However, it follows that the value of the house must be more than the amount that it would cost to repair it to an inhabitable condition.
28. I consider that given the cost of repairing the house to an inhabitable condition is VT8,283,800, it follows that the value of the house must be at least VT10,000,000. I consider therefore that Mrs Noel is entitled to general damages of VT10,000,000 flowing from the loss and damages that she suffered as a result of Mrs Malere's breach of duty in refusing to subdivide the property and register one part in her and Mrs Delagroux's names.
29. Mrs Noel sought in the prayer for relief in the Claim special damages in the amount of VT8,283,800. However, special damages may be awarded only where the claimant has actually expended monies and can prove those expenditures. In the present matter, Mrs Noel has not actually expended VT8,283,800 therefore special damages cannot be awarded in that amount.
30. Given Mrs Malere's deliberate and egregious conduct resulting in her breach of fiduciary duties, I consider that she is also liable for punitive damages in the sum of VT500,000. This is for the dual purposes of compensating Mrs Noel for the loss and damage she sustained flowing from Mrs Malere's deliberate acts and also to deter her and others not to do the same intentional acts in future, namely, deliberate breach of duties as administrator or administratrix of an estate: see *Nasse v Lui* [2021] VUSC 4 at [67] and [69].



E. Costs

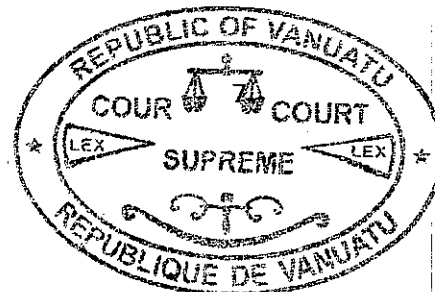
31. I held in the Judgment dated 20 February 2024 at [95] that Mrs Delagroux came to the Court with unclean hands. Accordingly, she is to bear her own costs of the proceedings.
32. Otherwise, costs are to follow the event for Mrs Noel and the BRED Bank. Given the breach of fiduciary duties by Mrs Malere, she is to pay their costs on an indemnity basis.

F. Result and Decision

33. For the reasons given, the Defendant is to pay the following sums to the Claimant totalling VT10,500,000 (the 'judgment sum'):
- a) General damages of VT10,000,000; and
 - b) Punitive damages of VT500,000.
34. The Defendant is to pay the Claimant interest of 5% per annum on the judgment sum until fully paid.
35. As previously ordered in the Judgment dated 20 February 2024 at [111(b)], the Defendant is prohibited from deducting any of her legal costs of this proceeding and/or any other disbursements incurred by her in connection with the lease out of or from the estate of her husband Raymond Malere (deceased).
36. Costs shall follow the event. The Defendant is to pay the Claimant costs on an indemnity basis due to the breach of fiduciary duties caused solely by herself, which costs are not to be taken out of the Estate of Raymond Malere (deceased) as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.
37. The Defendant is to pay the Second Interested Party the BRED Bank costs on an indemnity basis due to the breach of fiduciary duties caused solely by herself, which costs are not to be taken out of the Estate of Raymond Malere (deceased) as agreed or taxed by the Master. Once settled, the costs are to be paid within 28 days.
38. The First Interested Party is to bear her own costs.

G. Enforcement

39. This matter is listed for Conference **at 1.15pm on 10 September 2024** for the Defendant to inform the Court: (i) that she has paid the judgment sum or (ii) to explain



how she intends to do so. If there is no satisfactory conclusion, the file will be transferred to the Master for enforcement action.

40. For that purpose, this judgment must be personally served on the Defendant and proof of service filed.
41. I record my thanks to Mr Malcolm and Ms Muluane for their helpful submissions in relation to the relief in the Claimant's favour.

**DATED at Port Vila this 5th day of August 2024
BY THE COURT**

VM Trief

Justice Viran Molisa Trief

