

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

**CIVIL APPEAL CASE No. 9 OF 1996**

**Between :** **Mrs Alice Lo Po (Fung Kai Kwai)** of P.O.Box 21, Luganville, on behalf of her three children, Rene Lo, Grace Lo and Kenneth Lo as administrator of the estate of Mr Lo Po (deceased)

**Appellant**

**And :** **Andrew Lo** of Luganville, Santo

**First Respondent**

**And :** **Manina Packete** of Luganville, Santo

**Second Respondent**

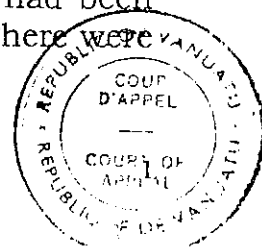
**Coram :** Hon. Justice Vincent Lunabek, Acting Chief Justice  
Hon. Justice Bruce Robertson  
Hon. Justice John von Doussa

**Counsel :** Ms Susan Bothmann Barlow for the Appellant  
Mr Saling Stephen for the Respondents

**JUDGMENT**

Following a hearing on Friday the 10th and Monday the 13th of October 1997, we advised that the appeal would be allowed, that the net balance of the fund would be paid to the estate and we would give reasons in due course which we now do.

Mr Lo Po died at Luganville, Santo on 15th July 1986. He had been married twice. First to Wong Kwai Fung who died in 1967. There were



three children of that marriage. Mary Lo now aged 44, Judie Lo 42 and the Defendant Andrew Lo who is aged 40. Mr Lo Po married a second time to the Plaintiff on 4th September 1969. There were 3 children of that marriage Rene Lo who is about to turn 27, Grace Lo who is nearly 25 and Kenneth Lo who will shortly be 19.

Mr Lo Po died partially intestate.

At the date of his death Mr Lo Po had interests in various pieces of land including one section in the main road of Luganville which was the subject of the hearing before the Court.

About a month after her husband's death his widow Alice Lo Po approached the Land Office requesting that her husband's land title be transferred to her. She was properly advised that could not be done without going to Court. She accordingly applied to Chief Justice Cooke for Letters of Administration which were granted in April 1988.

The relationship between the widow and the elder son of the deceased deteriorated. There is no need for us to catalogue the difficult problems but there has been no meaningful relationship between them during the ensuing period.

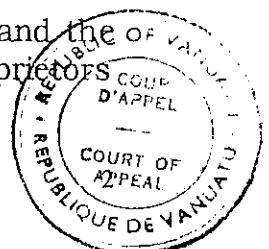
- Notwithstanding the problems, on 9th August 1991 both Alice Lo Po and Andrew Lo appeared before Justice Goldsbrough. It seems that the Judge was not told about the earlier grant of Administration, but eventually on 6th July 1992 he granted letters of Administration jointly to Mrs Alice Lo and Andrew Lo. Each of them at that time undertook solemn obligations on oath to administer the estate according to law. Among the items of property claimed to be in the deceased's estate there were four vacant pieces of land including the particular section which was the subject of this dispute.

Last year because there were problems about the affairs of the estate an originating summons was issued by Alice Lo in this case in which she sought the following declarations :

- 1.(a) That title No.03/OI83/028 be duly registered in the Applicant's name and the names of the Applicant's deceased husband's 6 children - with 1/3 ownership going to the Applicant and the other 2/3's to be divided among the 6 children equally.
- (b) That any funds received by Andrew Lo and Manina Packete from the Sale of Title No. 03/OI83/021 be declared as belonging 1/3 to the Applicant and 2/3 to the Applicant's deceased husband's 6 children in equal shares

or in the alternative

that Manina Packete's name be removed from the Title, and the Applicant's names be added to the Title as registered proprietors



on the grounds set out in the affidavit of the Applicant filed herein, and

2. that the costs of this application be costs in the cause.

For completeness we should note there have been disputes over pieces of land beyond the two mentioned in the Summons but they were not in issues before us and by the time of the appeal hearing the only matter which was in issue was the proceeds of sale of the section Title No.03/OI83/021.

In the previous months Chief Justice Vaudin d'Imecourt had granted an injunction restraining among other things either Andrew Lo or his Common Law wife Manina Packete from dealing with the sum 16.5 million Vatu which have been received from VNPF as payment of the purchase of that Title.

The matter eventually came for hearing before the Hon. Justice Kalkot Mataskelekele. In a judgment dated 10 October 1996 after a careful and sustained analysis of provisions and of the Land Reform Act [CAP 123] the Alienated Land Act [CAP 145] and certain constitutional provisions relating to the way in which land was to be treated after Independence Day, concluded that the particular section was not part of the estate of the late Mr Lo Po.

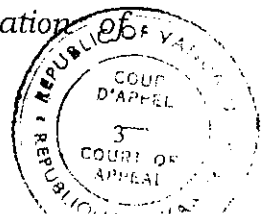
Accordingly the Judge decided that subject only to the payment to Mrs Lo Po as personal representative of the deceased's estate of the amount of ground rates & taxes paid by the deceased or the Plaintiff between Independence Day and the day of judgment, no other interests were available.

An issue then arose about the discharge of the preservation order which has been made by Chief Justice Vaudin d'Imecourt, as on the 17th of October 1996 a Notice of Appeal was filed in respect of the decision of the grounds that the Judge had been wrong in law in his finding that the subject section was not part of the deceased's estate and because of a failure to address issues to breach of trust and other matters which had been raised. There was a second judgment dated 13th November 1996 in which the preservation order was ordered to continue in force. In the course of that judgment, the learned Judge raised the question of the force and effective of section 4 of the Land Reform Act which it was suggested might preclude an appeal in the circumstances of the case.

Section 4 provides :

***"Referrals to Supreme Court on Identity of Alienator***

4.(1) *In any case where there is doubt as to who is an alienator in respect of the land or to what proportion of valuation*



*improvements an alienator is entitled, the matter shall be referred to the Supreme Court for decision either by an alienator, the custom owners or the Minister.*

(2) *A decision of the Supreme Court under subsection (1) shall be final and shall not be the subject of an appeal to the Court of Appeal.*

(3) *The Chief Justice may make rules of procedure for the purposes of this section."*

We are informed that the Chief Justice has not made any rules pursuant to subsection (3). Mrs Bothmann Barlow's submission was that because the proceeding before the Court was not a process initiated by an alienator, custom owner or the Minister for the specific purpose of determining who is the alienator in this piece of land, it had no application. We raised the question whether s.4 of the Land Reform Act may not in any event be inconsistent with the Constitutional provision relating to appeals [see s.50 of the Constitution] which provides that Parliament shall make laws for appeals from the Supreme Court to the Court of Appeal.

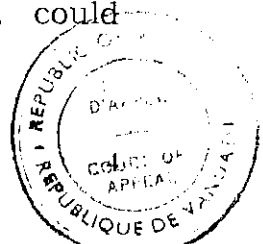
However, it was not necessary for us to reach a concluded view because of the manner in which we view the case as a whole.

Pursuant to the Letters of Administration granted by Judge Goldsbrough, Alice Lo Po and Andrew Lo jointly assumed the solemn responsibility and undertaking on behalf of the deceased to do all they could to protect the assets and interests in the estate for the benefit and advantage of those who by law were entitled to share in the estate.

We are told that in the course of the hearing, when it begun to emerge that there was an issue as to whether the subject section was really the property of the estate an offer to provide additional evidence and further documentation was declined. So the full details of what may or may not have been done by the respective parties is not clear.

What is absolutely undisputed and beyond any question is that section 21 pre-Independence Day was Mr Lo Po's property. Thereafter it was treated within the family as being theirs. Whether all the formalities of the land legislation were totally complied with is arguable. But actions were taken both before the death of Mr Lo Po and subsequent to it. When the Letters of Administration was sought it was one the pieces of land identified by the widow and son as an asset of the estate.

We do not believe that there can be any question that the technicalities of form could in those circumstances not be used by Andrew to suggest that on some formalistic basis there was a barrier or impediment to the estate having the section while he, having all this knowledge and experience from within the family, could



immediately acquire without difficulty a lease for himself which he subsequently sold for 16.5 million Vatu.

Mrs Bothmann Barlow took us through the evidence which had been available before the primary Judge. There were the clearest indications of the background and history in the mouth of Andrew Lo himself. There was no contrary evidence. Accordingly we concluded that in all he was doing in respect of that land, Andrew Lo must have been doing it in his capacity as one of the two administrators of his father's estate. It is not possible for a person who has that solemn obligation to obtain knowledge and have access to potential possibilities and then be allowed by some legalistic approach to use it as a vehicle for himself and take it for his personal use and advantage.

We were prepared to accept this may have been as a result of misunderstanding or mistake. But whatever his motives the effect of his actions cannot be in any doubt.

The only additional point which was raised was that at that time the lease was issued to him, he requested the land office to put the lease not only in his name but the name of his Common Law wife as well. She made no contribution. It was simply part of their domestic arrangement that this occurred. We are persuaded that he had no interest in the subject land except as a trustee for his father's estate. Therefore he was not in a position to transfer or make available to her anything.

Mr Stephens pointed out how there were fees and expenses which had to be paid at the time. Similarly there have been fees and costs incurred by Mrs Alice Lo Po, these are matters for which a credit is to be given to the person who has expended their own funds.

Accordingly, we were quickly persuaded that this was a simple case about the obligation of trustees who must at all times and in every way put their duty to the trust (and the ultimate beneficiaries of a trust) ahead of their own personal advantage or interests.

Whatever the technicalities of the land law might have been, attentive trustees carrying out their duty to the trust, without difficulty or problem could have perfected the steps to acquire an interest in the section for the ultimate advantage of all the beneficiaries. Andrew Lo proved how easy this was to do. He could not do it for himself in those circumstances. What he was doing the Court deems to have been done on behalf of the estate.

Accordingly the entire proceeds of the eventual sale of that land belong to the estate. Mrs Alice Lo Po, Mr Andrew Lo and Mrs Manina Packete are each entitled to be reimbursed from the fund for any personal money which they have expended in the preservation or acquisition of that land or in connection with that eventual disposal.



Similarly, we are of the view that the total costs of all parties before the primary Judges and in this Court should be a charge upon the trust fund. In most circumstances where there have been problems with a person in a position of trust acquiring or seeking to acquire something for their own personal advantage they could anticipate that the Order for costs will be made against them. We have decided that in all the circumstances, because in the end the estate has obtained the benefits of the actions of Andrew Lo, that it is proper that the total fund bear all costs.

It is hereby ordered that the parties shall be recompensed for any monies which they have personally and individually expended in the maintenance of the asset of the Estate, and further that all costs to date from either party shall be deducted from the fund before distribution and therefore,

The Plaintiff, ALICE LO PO shall be

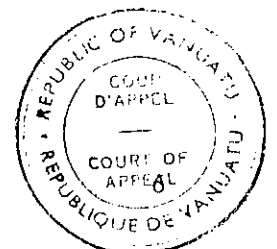
reimbursed the sum of

VT 854,560

being the outgoings paid by her

for ground rent and upkeep

of the property :



The Defendants jointly shall be

reimbursed the sum of

VT 215300

being the outgoings paid by them

for ground rent and registration of

the lease

And costs of

VT 1,622,470

shall be deducted from the fund

for the Plaintiff

And costs of

VT 1,363,720

shall be deducted from the fund

for the Defendants

Leaving a balance in the fund for

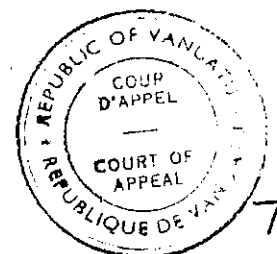
distribution of

VT 12,443,950

Plus all interest accrued on the

fund since the first orders in this

case made the 17 January 1996.



That balance shall then be distributed

so that ALICE LO PO receives the

sum of

AUD.\$10,000

from residue

And further ALICE LO PO shall receive

One Third of the balance ;

And further each of the Six Children shall

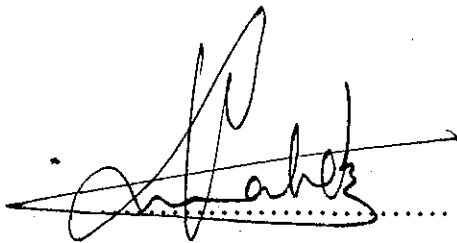
receive an equal share of the remaining

Two Thirds of the balance.

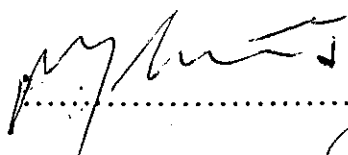
The Caution of the title shall be withdrawn.

DATED at PORT-VILA, this <sup>15<sup>th</sup></sup> of OCTOBER 1997

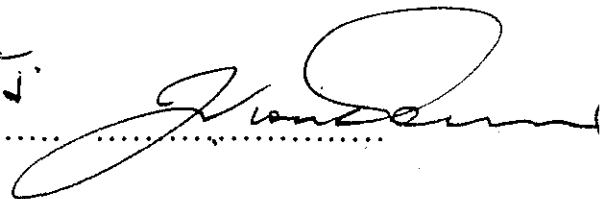
BY THE COURT



Vincent LUNABEK J.



J.B. ROBERTSON



John W. von DOUSSA

