IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL CASE NO. 28 OF 2015

BETWEEEN: **THE ESTATE OF MACLEAN LOPEZ**
(APPELLANT)

AND: **BESSIE LOPEZ**
(FIRST RESPONDENT)

AND: **REPUBLIC OF VANUATU**
(SECOND RESPONDENT)

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd

Counsel: ***Mr R E Sugden for the Appellants***
Ms E Blake for the First Respondent
Ms F William for the Second Respondent

Date of Hearing: ***11th November 2015***
Date of Decision: ***20th November 2015***

JUDGMENT

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1. This is an appeal from orders made in the Supreme Court on 25th November 2014. The orders followed a reserved judgment when the Court concluded that the transfer of a lease from Mrs Bessie Lopez into the name of her son Maclean Lopez was obtained through fraud by reason of undue influence. Additionally, and although it felt it was not strictly necessary, the Court also found the transfer had occurred by mistake.

2. The full facts which gave rise to the decision are set out in the reserved judgment. By way of background, the lease at the centre of the claim is numbered 03/O182/002 and is a residential lease initially registered on 23rd September 1986. The original lessees were Bessie Lopez and her late husband John. In February 2008 the Minister (of Lands) consented to an inter-family transfer to Maclean. John passed away in December 2008 without the transfer being completed. Nearly two years later Maclean lodged an application for transfer and six months after that, in April 2011, a transfer signed by Bessie was also lodged. The transfer from Bessie to Maclean was registered on 12th May 2011. On 8th December 2012, Maclean also passed away. His widow Kaye and two others were granted the administration of his estate in May 2013. A year later in May 2014 the claim was filed in the Supreme Court by Bessie.

3. Without reciting the full detail of the claim, Bessie asserts she was visiting Santo and was on her way back to Maewo where she lives. Maclean was giving her a lift to the airport. On the way to the airport, and without any warning, Maclean stopped off at the Lands Department office. There he produced a document and asked her to sign it by

putting her thumb print on it. She is illiterate and had no idea what she was signing. Maclean did not explain to her what the document was either. After that they continued to the airport and she flew back to Maewo. Maclean did not make any payments to her in respect of the transfer of the lease.

4. Prior to judgment, there was a hearing where Bessie and Mrs Kaye Lopez, on behalf of the Estate, gave extensive evidence. There was another hearing when further evidence was heard. Following that, detailed submissions from all parties were lodged. This was in addition to sworn statements filed by the parties in support of the claim and defence.

5. After due consideration of both the oral and written evidence and the submissions by the parties, the Court found that there was a relationship between the parties which gave rise to a presumption of undue influence. The relationship was of mother and son. The Judge noted that the usual way in which a presumption arises as between a parent and child is where the child has made a gift to the parent. Such a relationship was based on the likely inexperience of the child. In the case before him the Judge found, "*it was the other way round*". Nonetheless he was in no doubt that a relationship between the son, "*as an adult donee*", and, "*his elderly illiterate mother as donor*" qualified as a relationship where the presumption arises. He went on to say the context where the mother had transferred her only substantial asset reinforced his belief in that respect. His Lordship also acknowledged the concession made by counsel representing the Estate in this regard and said the concession had been rightly made.

6. The Judge then went on to set out what the Estate needed to show by way of rebuttal of the presumption. After careful consideration of the evidence, which he set out in full, the Judge found that that the presumption had not been rebutted and that the Estate could not satisfy him that Bessie both knew the nature and effect of the document she signed in 2011 and that when she signed it she was entirely free from any influence from Maclean.

7. Following the judgment in November 2014 an appeal was lodged. As it was filed in August 2015, nearly 9 months after the date of the judgment, the Appellant was also required to make an application for an extension of time in which to file the notice. This Court reserved its decision on that application and the Appellant was invited to address the Court on the merits of the appeal.

8. The Appellant submits that the claim of undue influence was not raised in the pleadings; there was no mention of undue influence in any of the Minutes published by the Judge before trial and that the first time the presumptive relationship and undue influence was raised was in the Claimant's synopsis of opening statement. As a result it is said that counsel in the trial before the Supreme Court was ambushed into making the concession noted by the Judge. She was not given any time to file evidence to rebut the presumptive relationship. The evidence that had been produced was intended to deal with the only pleaded claim of *non est factum.* In any event the Appellant argues, the Judge's findings were based on the erroneous premise that the relationship of mother and son, of itself, gave rise to such a presumptive relationship.

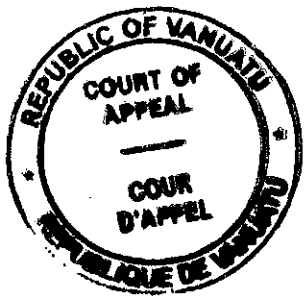
9. Taken as a whole there is no doubt the Claim does raise the issue of undue influence. It clearly sets out the allegations that; without any warning Maclean took his mother to the Lands Department Office in Luganville (paragraph 12), she did not realise where she was (paragraph 13), documents were produced for her to sign and as she is unable to read or write she did not know what the document was (paragraphs 14,15 and 16), she did not know why she was being asked to sign a document, she only signed it because her son told her to do so (paragraph 17), she has never received any money from her son for the transfer (paragraph 22). As His Lordship noted, counsel for the estate had rightly made the concession that in the circumstances set out in paragraph 18 of the judgment (referred to in paragraph 5 above) the presumption of undue influence was present. The Appellant is fixed with that concession and nothing in his submissions to us have persuaded this Court that it was wrongly made or was given only because counsel in the Court below was ambushed.

10. Nothing in the submissions put to us has shown that the Judge was wrong to set out what was required by way of rebuttal in the way he did at paragraph 21 of the judgment. He said the Estate was required to establish that Bessie knew the nature and effect of what she was signing *and* that she was entirely free from any influence from Maclean when she appended her thumb print. Nothing put to us has persuaded this Court that on the evidence before him and in light of the submissions made to him, the Judge was wrong when he concluded that the Estate had failed to do that. He was right to find that there was fraud by way of undue influence.

11. Having made that determination, we have no need to consider any of the other appeal points. There is no merit in the appeal and it must fail. That being so the application to extend the time for filing the notice of appeal is refused.

12. There is no reason to conclude that costs should do anything other than follow the event and so the Appellant shall pay the First Respondents costs, such costs, if they are not agreed, are to be taxed by the Master on a standard basis.

DATED at Port Vila this 20th November, 2015



Vincent LUNABEK

Chief Justice