

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Civil Appellate Jurisdiction)

**Civil Appeal
Case No. 17/2008 CoA/CIVA**

BETWEEN: OLIVER WIKELEY
First Appellant

AND: JENNY LOUISE DE VINE
Second Appellant

**AND: TRUSTEES INTERNATIONAL LIMITED ATF
BILLABONG TRUST**
First Respondent

AND: NEIL ANDREW SLATER
Second Respondent

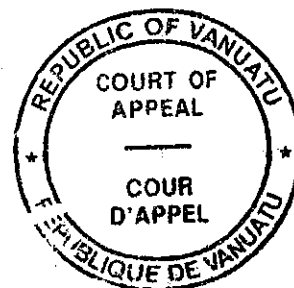
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan*

Counsel: *Appellants appears in person
Mark Hurley for the First Respondent
Second Respondent – no appearance*

Date of Hearing: 14th Nov. 2017
Date of Judgment: 17th Nov. 2017

DECISION

1. This is an appeal against a ruling made in the Supreme Court on 7th July 2017 in Civil Case 117 of 2010. The ruling dismissed an application dated 16th December 2013 to stay the enforcement of a consent order entered on 24th October 2013. The ruling also dismissed a counterclaim that had been filed in those proceedings.
2. We note that the ruling is an interlocutory decision and leave to appeal from it is required. However no point is taken by the respondent on this issue, and in the circumstances of this case we consider we should proceed to deal with the intended appeal on its merits.



3. The consent order is in the following terms:

"By CONSENT the Court makes the following orders:

1. *THAT the first Defendant and his immediate family, servants or agents and any other person claiming through him are restrained from remaining on or continuing in occupation of the said leasehold property contained and described in title 11/OB31/011 located at 2nd Captain Cook Avenue, Port Vila;*
2. *THAT the claimant has possession of the said land and premises;*
3. *THAT these orders shall be stayed until 1st January 2014;*
4. *The stay order at Order 3 herein-before may be extended by further order of this court in the event the First Defendant presents evidence of a Notice of Appeal filed and serve by Jenny Louise De Vine to appeal the Judgment and Orders of Justice Bender including the judgment which Justice Bender made on 30 August 2013 in file No. (P) MLC 3048/2010;*
5. *Liberty is reserved to the parties to restore this matter on 48 hours notice;*
6. *Each party shall bear their own costs.*

DATED this 24th day of October, 2013.

SEAL OF THE COURT

(Signed)

Solicitor for Claimants

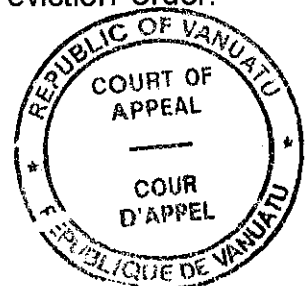
*(Signed)
Judge."*

(Signed)

Solicitor for 1st and 2nd Defendants

Background

4. The first appellant (Mr. Wikeley) is the son of the second appellant (Mrs. De Vine). From 2003 until 11 December 2009 Mrs. De Vine was in a defacto relationship with the second respondent (Mr. Slater). When the relationship ended there was dispute over property interests, including the leasehold property at Captain Cook Avenue, Port Vila (the property) which is the subject of these proceedings. Mr. Slater, apparently unbeknown to Mrs. De Vine, transferred the property into a trust of which the first respondent (TIL) is trustee, and committed the property to the ANZ Bank as security for a loan.
5. Two proceedings were commenced in the Supreme Court in Vanuatu. In the first, claim CC117 of 2010 commenced on 17th August 2010, TIL claimed possession of the property. Initially the only defendant was Mr. Wikeley who was then (and continues to this day to be) in occupation of the property. Later both Mrs. De Vine and Mr. Slater were joined as defendants on application by Mrs De Vine. She and Mr. Wikeley filed a defence opposing the eviction order.



Mrs. De Vine also filed a counterclaim against Mr. Slater. Mr. Slater was served with the counterclaim but he resides overseas and has never responded to it.

6. The second claim, CC153 of 2012 was commenced on 4th September 2012 by ANZ Bank which sought orders against Mr. Slater to enforce its security against the property and also against other properties in Mr. Slater's name.
7. Both these claims were ultimately settled. In CC117/2010 the consent orders set out above were entered. It will be noted that the parties to it are TIL, Mr. Wikeley and Mrs. De Vine. Mr. Slater is not a party.
8. In CC153 of 2012 the settlement had the consequence that the ANZ Bank was granted an irrevocable power of attorney over the property, and in exercise of that power is now seeking in the name TIL to enforce the consent orders.
9. After the defacto relationship came to an end, property claims were commenced in the Matrimonial Causes jurisdiction of the Australian federal courts. It is to those proceedings that Order 4 in the consent orders relates.

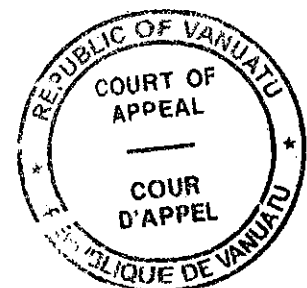
The Ruling under appeal

10. Before the trial judge, Mr. Wikeley, who appeared for himself and for Mrs. De Vine, sought to support the application for a stay by relying on observations that had been made by another Supreme Court judge in earlier interlocutory proceedings where they had successfully appealed against an order of the Master which had ordered Mr. Wikeley to vacate the property. That appeal had been allowed as the judge considered the hearing before the Master was unfair because the stay application filed on 16th December 2013 had not been heard by the Supreme Court and he considered there were questions raised by that application which needed to be resolved. For that reason the judge considered the proceedings before the Master were premature. The outstanding issues identified by him for decision by the Vanuatu Courts were:

"Have all issues raised in Civil Case 117 of 2010 and Civil Case 128 (sic) of 2015 been fully heard and determined as regards the rights of all the parties named in those two cases or who have expressed or implied interests in them?"

Have all those parties been named in those cases to enable the Court to make decisions fairly and effectively in accordance with Rule 3.2 of the Rules?"

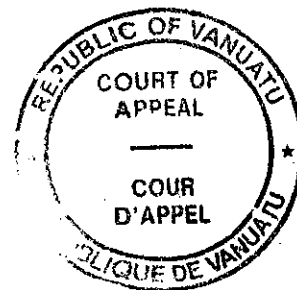
Are there live pleadings and applications pending to be heard by the primary judge in Civil Case No. 117 of 201?"



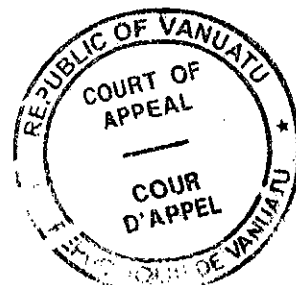
11. The proceedings were returned to the Supreme Court, and to the trial judge who had managed the matter from its inception. The trial judge embarked on a hearing of the long outstanding stay application. He considered each of the questions posed by the judge in the appeal proceedings. He held that there were no live issues remaining in either CC117 of 2010 or CC158 of 2015, and that all necessary parties had been named in those cases. In particular he held that ANZ Bank was not a necessary party in CC117 of 2010.
12. The trial judge further held that unless and until in separate proceedings Consent Orders 1 and 2 were overturned, the orders remain final as between TIL, Mr. Wikeley and Mrs. De Vine, and were quite unrelated to the counterclaim against Mr. Slater. No remedy had been sought by TIL in the proceedings against Mr. Slater. The trial judge held that it was of no relevance to the binding nature of the consent orders that Mr. Slater was not named as a party and had not signed them.
13. Whilst the consent orders did not in terms refer to the counterclaim, and there had been no trial of the counterclaim, the trial judge held that no live issue remained to be determined in it and it should therefore be dismissed.
14. Having dealt with the issues posed by the judge in the appeal proceedings from the Master the trial judge turned to the merits of the application to stay the enforcement of the consent orders. The stay granted in Order 3 had expired on 1st January 2014. There had been no application under Order 4 to further extend that stay, and in any event the evidence before the Court was that an appeal by Mrs. De Vine against the judgment and orders of Justice Bender had been heard and determined adversely to Mrs. De Vine on 10th December 2014. The trial judge held that Order 4 did not envisage or permit applications to dissolve the consent order to vary its terms. The application for a stay was therefore dismissed.

The grounds of appeal

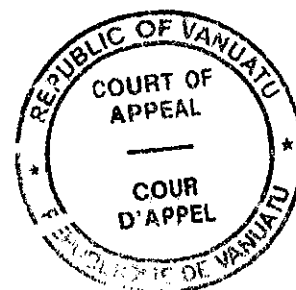
15. The proceedings before this Court were commenced by Notice of Appeal filed by Mr. Wikeley on 4 August 2017. However on 13 November 2017 Mrs. De Vine filed lengthy written submissions which sought to raise further grounds. The notice of appeal did not challenge the validity of the Consent Orders, but in her submissions Mrs. De Vine did so by arguing that the Consent Orders were the result of a conspiracy between TIL and Mr. Slater to deprive her and her son of the family home to which she was entitled under the defacto relationship. She contended that the trial judge failed to consider that the consent orders were agreed to by them because of misrepresentations by TIL and Mr. Slater.



- ~~16. Mr. Wikeley and Mrs. De Vine were legally represented at the time the orders were made and they were executed by their lawyer. The orders became the formal orders of the court. The validity of the consent orders has not been challenged at any stage in subsequent proceedings. There is not now and never has been any application filed in the Supreme Court to set them aside.~~
17. As members of this Court endeavoured to explain to the appellants during oral argument the only issue before the Court of Appeal is the challenge to the ruling of the trial judge. The validity of the consent orders were not challenged in the Supreme Court proceedings before the trial judge and for that reason cannot be challenged in this appeal. The mass of material which the appellants seek to rely on as evidence of alleged conspiracy and misrepresentations is not relevant to issues raised by the stay application before the trial judge, and is not relevant to the issues before this Court. Both the trial judge and this Court must consider the merits of the stay application on the footing that the consent orders bind the appellants according to their terms.
18. If the appellants wish now to challenge the validity of the consent orders, they must do so by separate proceedings brought for that purpose.
19. The arguments advanced by Mrs. De Vine in her written and oral submission are based wholly on the alleged conspiracy and misrepresentations and for the reasons just explained, do not assist the appellant in this appeal.
20. The first substantive ground in the Notice of Appeal is that the trial judge failed entirely and unreasonably to give weight to observations made by the judge who allowed the appeal from the Master. That judge had listened to Mrs. De Vine at length and in his view she was crying out for substantial justice to make good unfair transactions and conduct by Mr. Slater who in his view had used *"legal creatures and individuals stand behind corporate veil and use that privilege or opportunity to obtain or take short cuts to obtain quick justice. The well-known saying that 'justice delayed is justice denied' can also be true on the reverse side 'faster or quick justice is justice denied'. This is one such case."*
21. These observations were made in relation to an argument that the ANZ Bank could have been joined as a party to CC117 of 2010, and if it had been Mrs. De Vine would have had the opportunity to raise many issues that concerned her about the unfairness of Mr. Slater's dealings with the ownership of the property. These observations led on to the judge posing the three questions he did. The first two of those questions were squarely directed to whether the ANZ Bank should have been joined as a party in CC117 of 2010.



22. We consider the trial judge was entirely correct to hold that the ANZ Bank was not a necessary party to the proceedings. The necessary party to claim possession of the property and to seek Mr. Wikeley's evidence was TIL. That the ANZ Bank was directing the prosecution of TIL's claim pursuant to the power of attorney is irrelevant to the legal issues raised in the claim in CC117 of 2010.
23. The observations of the appeal decision judge reflected his view that Mrs. De Vine was unfairly treated by Mr. Slater transferring the property to TIL and mortgaging it. Whether or not the unfair treatment alleged by Mrs. De Vine would have provided a defence to the claim made by TIL in CC117 of 2010 ceased to be a live issue once the consent orders were entered. Those orders finally determined the legal rights and obligations of the parties in relation to possession of the property.
24. Mrs. De Vine's unfairness arguments, which are repeated in great length in materials placed before this Court, are simply irrelevant to the question whether the consent orders are binding on Mr. Wikeley and Mrs. De Vine, and to whether TIL is entitled to enforce them.
25. The next substantive ground of appeal raises the same issues again. It is that the trial judge failed to take into account substantial evidence of domestic violence committed by Mr. Slater and fraudulent behaviour by him in relation to his dealings with Mrs. De Vine, the proceedings in the Australian Matrimonial Causes litigation and in his tax affairs. The trial judge made no error in not taking this material into account. In law he simply could not do so. The material is irrelevant to the binding effect of the consent orders and their enforcement.
26. The remaining grounds of appeal challenge the dismissal of the counterclaim in CC117 of 2010. The reliefs claimed in the counterclaim were for the dismissal of the claim to evict Mr. Wikeley, and for orders restraining TIL and Mr. Slater from taking any steps to evict Mr. Wikeley from the property, or to sell it, until Mrs. De Vine's claim against Mr. Slater, the subject of proceedings before the courts in Australia, are finally determined.
27. A consideration of the counterclaim was not necessary to decide the stay application under consideration by the trial judge. The decision to dismiss the counterclaim is unrelated to the decision to refuse the stay, and in deciding the present appeal the fate of the counterclaim is irrelevant. But as the issue was treated as significant in the grounds of appeal we deal with it.

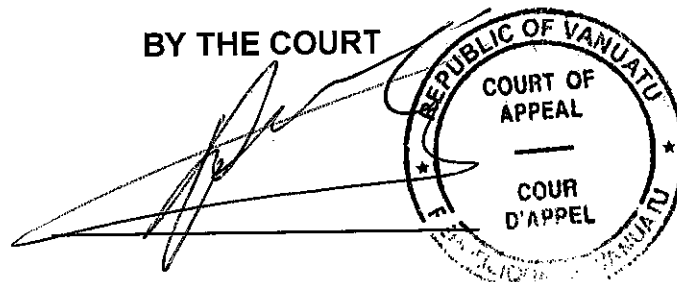


28. In so far as the counterclaim sought restraining orders against TIL, the issues ~~between the appellants and TIL were settled by the consent orders. In so far as the reliefs claimed in the counterclaim seek restraining orders against Mr. Slater those claims on their face appear to raise a claim that has not yet been ruled on.~~ However the trial judge after analysing the long narrative history of events which constitutes the pleadings in the counterclaim concluded that no substantive cause of action was pleaded that could support the reliefs claimed. It was on this basis that he decided to dismiss the counterclaim so that it could no longer be argued that there was any live issue remaining in CC117 of 2010. We do not think he was wrong to do so, but as we have already said, this part of the ruling has no bearing on the outcome of the application for a stay.

29. In our opinion the conclusions reached by the trial judge in his ruling were correct. There is no merit in the grounds raised in the Notice of Appeal and the appeal must be dismissed with costs. We fix the costs at VT75, 000 payable jointly and severally by the appellants.

DATED at Port Vila, this 17th day of November, 2017

BY THE COURT



Hon. Chief Justice Vincent Lunabek