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

Civil Appeal
Case No. 22/1964 COA/CIVA

BETWEEN: **LI YA HUANG**
Appellant

AND: **KRISTIAN RUSSET**
First Respondent

JOHN WARMINGTON
Second Respondent

Coram:	***Hon Chief Justice V Lunabek*** ***Hon Justice R Young*** ***Hon Justice D Aru*** ***Hon Justice R White*** ***Hon Justice S Harrop***
Counsel:	***Mr A Jenshel with Ms L Raikatalau for the Appellant*** ***Mr H Heuzenroeder and Mr M Hurley for the First Respondent*** ***No appearance for the Second Respondent (excused)***
Date of hearing:	***11 November 2022***
Date of Decision:	***18 November 2022***

JUDGMENT OF THE COURT

Introduction

1. The late Henri-Edmond Russet (the deceased) died intestate on 17 December 2019, aged 71. That circumstance has given rise to substantial litigation between his widow (the appellant) and his only child, Kristian Russet (Mr Russet), who is the first respondent. One aspect of the litigation was resolved by the parties' acceptance of a suggestion of this Court that an independent person be appointed as administrator of the deceased's estate: *Li Ya Huang v Russet* [2020] VUCA 37. The second respondent is that administrator.

2. The deceased's estate is substantial, being said to have a value of approximately VT 900 million. The farming operations conducted by the deceased at Tagabe, near Port Vila, and businesses associated with it, constitute more than half of this value. The

remaining estate (the residuary estate) comprises shares in a company owning property at Dumbea in New Caledonia, vacant land in Vanuatu, term deposits and money held in bank accounts. There were suggestions at the trial that the residuary estate may be of the order of VT 400 million.

3. In the litigation giving rise to the present appeal, Mr Russet made several claims, some in the alternative. First, he claimed that in 2009, he and his wife had moved from Australia to Vanuatu to live and work on the deceased's farming property at Tagabe, and had continued to do so, in reliance on representations and promises that he would inherit the Tagabe farming operations. The failure of the deceased to fulfil that expectation meant that he had suffered a detriment giving rise to an equity which meant that the legal interest in the farming operations was subject to a constructive trust in his favour. This form of equity is said to arise from a proprietary estoppel.

4. The second claim was that the appellant had, by her execution of a pre-nuptial agreement (the PNA) before marrying the deceased on 23 September 2017, represented to the deceased that, subject to a right of continued residence in the marital home, she would make no claim to any interest or benefit in his property. Mr Russet claimed that the deceased's reliance on that representation by proceeding with the marriage gave rise to an equity in the deceased's favour which he was entitled to enforce. The Judge characterised this as a claim of promissory estoppel.

5. Mr Russet also claimed that the "promises" made by the appellant in the PNA were property of the deceased at his death, that the second respondent held those promises on trust for him, and that he was entitled to have them enforced against the appellant as a *Himalaya* clause.

6. Mr Russet's fourth claim was that he himself had acted to his detriment in relying on the representations made by the appellant in the PNA. He said that had it not been for those representations or promises, he would not have given his "blessing" to his father's marriage to the appellant and that these circumstances gave rise to an equity which he was entitled to enforce directly against the appellant.

7. The first claim was said to give rise to a constructive trust in favour of Mr Russet over the whole of the Tagabe farming operations (subject to the appellant's right of continued residence in the marital home) and the remaining claims were said to give rise to a constructive trust in his favour over the whole of the intestate estate, again subject to the appellant's right of continued residence in the marital home. Mr Russet sought declarations in a variety of forms (some in the alternative) to give effect to these claims.

8. Finally, and in the alternative to all of these claims, Mr Russet sought a declaration that the intestate estate should be distributed in accordance with Articles 731 and 767 of the *French Civil Code*, and not in accordance with Reg 6 of the *Succession, Probate and Administration Regulation 1972* (Queen's Regulation).

9. The appellant opposed the grant of any of the relief sought by Mr Russet but did not make any counterclaim. Her position is that the whole of the intestate estate of the deceased (and not just the Tagabe farming operations) should be distributed in accordance with the Queen's Regulation, which provides (relevantly):

> *"5. **Distribution of estate of intestate***
>
> *Notwithstanding anything to the contrary contained in any laws in force in New Hebrides at the date of commencement of this Regulation, the property of an intestate dying on or after the date of commencement of this Regulation shall be distributed in accordance with the provisions of this Regulation, and no person shall have any right, title, share, estate or interest in such property except as provided in this Regulation.*
>
> ***6. Succession to property on intestacy***
>
> *(1) Subject to the provisions of the last Proceeding part hereof, the administrator on intestacy ... shall hold the property as to which a person dies intestate on or after the date of commencement of this Regulation on trust to pay the debts, funeral and testamentary expenses of the deceased and to distribute the residue as follows:*
>
> *(a) if the intestate leaves a wife, or husband, with or without issue, the surviving wife or husband shall take the personal chattels absolutely, and –*
>
> *(i) if the net value of the residuary estate of the estate, other than the personal chattels does not exceed $10,000 the residuary estate absolutely; or*
>
> *(ii) if the net value of the residuary estate exceeds $10,000, the sum of $10,000 absolutely; or*
>
> *(b) ...*
>
> *(c) if the intestate leaves issue, the surviving wife or husband shall, in addition to the interest taken under paragraph p(a) of this subsection, take one-third only of the residuary estate absolutely, and the issues shall take per stirpes and not per capita the remaining two-thirds of the residuary estate absolutely;*

10. As is apparent, if Reg 6 is applicable, the appellant will be entitled, in addition to the sum of $10,000, to one-third of the intestate estate.

11. The primary Judge upheld in substance Mr Russet's first claim, saying:

> *"[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 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."*

12. The Judge rejected all of Mr Russet's claims based on the appellant's execution of the PNA (at [44]-[52]), and rejected the alternative claim that the distribution of the intestate estate should be in the manner for which the French Civil Code provided in 1980, at [53]-[56].

13. The orders of the Judge were as follows:

> *"[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 also to 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."

The appeal

14. The appellant appeals against this judgment and seeks in its place an order that the whole of Mr Russet's proceedings at first instance be dismissed. As we have noted, her position is that the intestate estate should be distributed in the manner required by Regs 5 and 6 of the Queen's Regulation. Mr Russet resists the appeal and raises by notice of contention two additional bases on which the primary judgment should be upheld.

The cross-appeal

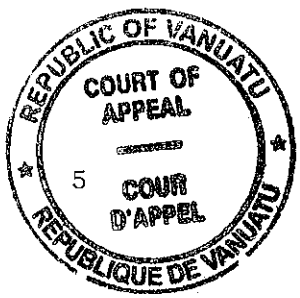
15. By way of cross-appeal, Mr Russet:

(a) appeals against the orders that he "make appropriate arrangements" for the appellant to receive a monthly allowance of VT 300,000 from the earnings of the Tagabe farming operations;

(b) seeks a declaration that, subject to the payment of the just debts of the deceased, and to his compliance with the orders in [134(a) and (b)] for the provision of the appellant, the whole of the residual estate is also held subject to the constructive trust in his favour and be distributed to him;

(c) seeks in the alternative, an order that the residual estate be distributed and applied in accordance with the French Civil Code as received French law in Vanuatu when first applied by Article 95 of the Constitution; and

(d) appeals against the order that the appellant pay costs of VT 750,000 in respect of the trial and seeks in its place an order that the appellant pay his costs to the amount of two-thirds of a full indemnity.



Factual setting

16. The leasehold interest in land at Tagabe had been purchased by the deceased's paternal grandfather in 1938. Over time, it passed down from grandfather to father and then to the deceased. The effect was that it had been held in the Russet family for 81 years at the time of the deceased's death.

17. In 2002, the deceased purchased the lease of an adjacent property and, in 2015, purchased the lease of a property at Undine Bay. Both these properties were (and are) worked in conjunction with the original property and, as we understand it presently, are encompassed by the term "the farming operation at Tagabe" used by the Judge in his order at [134]. Mr Russet said that the family farms were his father's pride and joy.

18. In the mid-2000s, the deceased started a commercial quarry on, as we presently understand it, the Tagabe farm. If so, it may well be that it too is encompassed by the term "the farming operation at Tagabe".

19. There was considerable evidence in the trial, accepted by the Judge, that the deceased wished the Tagabe property to pass to Mr Russet as his only son.

Mr Russet

20. Although the Judge did not say so expressly, it is evident from his rejection of the criticisms by the appellant's counsel that he accepted Mr Russet's evidence as generally honest and reliable.

21. Mr Russet was born in 1980 and is a child of the deceased's first marriage, which ended in divorce in 1984. The deceased had no other children. Although born in Australia, Mr Russet spent the first few years of his life in Vanuatu. After his parents separated, he lived primarily with his mother in Australia but returned regularly to Vanuatu during school holidays to visit his father. After completing his education in Western Australia, Mr Russet spent periods of approximately 6-8 months in each of 1997, 2001 and 2003 living at, and working with his father on, the Tagabe property. During one of these periods in 2003, Mr Russet announced his intention to go back to Australia. The deceased responded by telling Mr Russet that he wanted him "to stay and continue working with him and eventually take over". He reminded Mr Russet that "everything he owned would be mine one day" and said that he should "stay and build the farm with him". Mr Russet told the deceased that he would return eventually but that he had goals which he wished to

achieve first. The deceased also told Mr Russet that he wanted him to spend time on the Tagabe property so that he could teach him the proper management of the property.

22. Mr Russet completed his university course in the early 2000s and then spent some time travelling in Europe and elsewhere.

23. In 2004, Mr Russet and his then future wife commenced operating a pet shop business in East Fremantle, Western Australia. They did so successfully, building up the business and its turnover over time. By 2009, they had been so successful that they owned their house, the business and other assets outright, that is, with no outstanding loans. Mr Russet said that they were in "good financial shape" and living a comfortable lifestyle in Perth.

24. In May 2009, the deceased again pressed Mr Russet to move to Vanuatu and he and his wife agreed to do so. Mr Russet said that they had done so because of the promise he had made to his father in 2003, because he believed what his father had said about his wish that he (Mr Russet) inherit the Tagabe property, and because of his own emotional attachment to the property. Before moving to Vanuatu, Mr Russet and his wife sold the pet shop business and their home in Perth. The decision to move to Vanuatu involved a decision to bring up their children in Vanuatu instead of in Perth.

25. From the time of coming to Vanuatu in 2009 until the deceased's death in 2019, Mr Russet worked closely with his father in a "hands on" manner, running and developing the original property and the later acquired properties. Over time, Mr Russet began taking the greater role in administrative matters concerning the conduct of the farming operations and the quarry, while continuing his physical activities on the farm. Generally, he and his father worked 5½ days each week – being an average of 45 hours per week. Mr Russet was directly involved in the initiation and implementation of several improvements on the farm and its manner of operation.

26. In 2009, the deceased built a home for Mr Russet and his wife on the Tagabe property, describing it as their "forever home". Mr Russet and his father positively adverted to, but rejected, the notion of creating a separate title for this home. They considered it unnecessary, given their mutual expectation that the farm would pass to Mr Russet as sole heir in any event.

27. Initially, Mr Russet received VT 500,000 per month from his father. This was less than he and his wife had been earning in their pet shop business and less than he could have earned in Vanuatu in external employment. Mr Russet had pointed this out to his father at the time. Over time, the monthly payments from the deceased increased to VT 600,000

per month and then to VT 1 million per month, to take account in particular of the additional expenses he was incurring with the birth of his four children.

28. Mr Russet and his wife have continued to reside on the Tagabe property.

29. Mr Russet deposed that his father had said on many occasions to himself, and to others in his presence, words to the effect that:

    (a) the plantation property at Tagabe was to be retained within our family;

    (b) when he died I would inherit the plantation at Tagabe; and

    (c) I should ensure that ownership of the plantation property at Tagabe remained in our family.

30. Mr Russet also deposed to other occasions on which his father had "expressed his clear intention to me that the farm was to pass directly and smoothly to me and later to his grandchildren".

The appellant

31. The appellant, who was born in 1966, is a Chinese national who came to Vanuatu under an Assistance Program of the Republic of China. She is a qualified anaesthetist and worked in the Vila Centre Hospital. The appellant then commenced a business in Santo, and later in Vila, in partnership with a Mr Bayer.

32. The deceased first met the appellant at the end of 2010 when she was caring for his mother. Over time, a friendship commenced between them and, in about 2015, they commenced cohabiting on the Tagabe property. On 23 September 2017, they married.

33. The Judge regarded the appellant as an unreliable witness, holding that he could not rely on her evidence when it differed from that of reliable witnesses, at [115].

The pre-nuptial agreement

34. The appellant and the deceased signed the PNA on the day before they married. The Judge rejected much of the appellant's evidence about the circumstances in which the PNA was made. There was evidence indicating (and confirmed by the sequence of

events) that the deceased was not willing to proceed with the marriage scheduled for the following day unless the PNA was signed.

35. The PNA provided that the deceased and the appellant would retain their separate property owned at the time of the marriage and would not have any right, entitlement or interest in the property of the other. In particular, it provided:

> *"2. Separate Property*
>
> *2.1 Except as otherwise provided in this Agreement, the following property now owned by either party shall remain and be their Separate Property:*
>
> *(a) All property, including real and personal property, the income from such property, and the investment and re-investment of such property;*
>
> *(b) All property acquired by either Party by gift, devise, bequest or inheritance.*
>
> *2.2 The property currently owned by each Party is described on Schedule A and B to this Agreement, such Separate Property of each Party shall be subject exclusively to that Party's own individual use, control, benefit and disposition. Neither Party shall, before or after the contemplated marriage, acquire for himself or herself individually, nor for his or her assignees or creditors, any interest in the Separate Property of the other Party, nor any right to the use, control, benefit or disposition of such property.*
>
> ...
>
> *4. Marital residence*
>
> *The parties' marital residence will remain as non-marital, separate and individual property of the prospective Husband during and after the marriage.*
>
> ...
>
> *7. Termination of marriage*
>
> *7.1 ...*
>
> *7.2 In the event of death of the Prospective Husband the Prospective Wife will have the right to remain at the Marital Residence without charge save for household expenses for as long as she remains single or until she re-marries. She will have no proprietary right to the matrimonial home. Maintenance and repairs of the Marital home during this time will be funded by the Estate of the Prospective Husband.*

...

9. *This Agreement shall be binding on the parties in all circumstances including ... divorce or the death of one or both parties.*

...

12. *Jurisdiction*

The governing law of this Agreement is the law of Vanuatu excluding French law."

36. As is apparent, cl 7.2 of the PNA made provision for the appellant in the event that the deceased pre-deceased her. For reasons not disclosed in the evidence, the PNA did not include one provision for the maintenance of the appellant which had been communicated to the solicitors who prepared the PNA. We will return to this later.

37. The primary Judge was satisfied that the deceased had freely executed the PNA and wanted the appellant to do the same. He rejected the appellant's claim that she had signed PNA under duress and without a proper understanding of its contents.

38. In a judgment delivered on 14 April 2021 in the probate proceedings, Saksak J answered some questions referred by the present parties for the Court's determination: *Russet v Russet & Warmington*. Amongst other things, Saksak J held that the PNA could not have any validity in the administration of the deceased's estate. That ruling has a significance to some of the issues on the appeal and cross-appeal to which we will return.

The decision of the Judge

39. The primary Judge reasoned as follows:

(a) the principles of equitable estoppel discussed in cases such as *Taylor Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] QB 133; *Muschinski v Dodds* [1985] HCA 78, (1985) 160 CLR 583; *Commonwealth v Verwayen* (1990) 170 CLR 395; *Gillett v Holt* [2001] Ch 210; *Morton v Morton* [1999] SASC 31; and *Sidhu v Van Dyke* [2014] HCA 19, (2014) 251 CLR 505 are applicable in Vanuatu, at [39], [40], [62] and [64]. In particular, the Judge regarded the principles stated in *Muschinski v Dodds* and *Verwayen* to be apposite to the present case, at [40]. This meant that an estoppel was to be found only in accordance with proper principle so that a party should not be allowed to do

what is unreasonable or oppressive to the extent that it affronts the conscience, at [40];

(b) the application of the principles required a wide and comprehensive view of the overall circumstances of the case and flexibility in shaping the appropriate relief, at [41];

(c) there was substantial evidence that the deceased wanted Mr Russet to inherit the Tagabe farming operations and his other assets after his death and that he had wanted Mr Russet to come to Vanuatu to work on the farm with him, at [77]-[80];

(d) Mr Russet had chosen, in reliance on the deceased's statements, to move to Vanuatu and work with his father in the expectation that he would inherit the entire farming operation on his father's death and had thereby acted to his detriment, at [120]-[121]. This was so despite Mr Russet's acknowledgement that, as the sole son, he had expected that he would inherit the farming operation, whether he came to Vanuatu or not, at [122]. Accordingly, Mr Russet had established a proprietary estoppel in accordance with established principle and the deceased had, from 2009, held the Tagabe farming operation on a constructive trust in his favour;

(e) Regulation 5 in the Queen's Regulation was not a bar to the grant of relief, at [69]-[71];

(f) the "*minimum equity*" principle discussed in *Crabb v Arun DC* [1975] EWCA Civ 7 required that the relief granted be proportionate to the expectation created, at [65] with the consequence that Mr Russet's equity was subject to provision being made for the continued residence of the appellant on the property and for her continued maintenance;

(g) as Mr Russet was not a party to the PNA, he could not enforce it, at [44]-[46];

(h) Mr Russet's claims based on the appellant's execution of the PNA could not succeed for a number of reasons, including that he was not a party to it, there was no legal relationship between him and the appellant and that he had not acted to his detriment in belief of the appellant's alleged promise, at [47]-[52]; and

(i) the alternative claim that the appellant's entitlements in the intestacy were to be dealt with in accordance with Arts 731 and 767 of the French Civil Code could not succeed because Art 95 of the Constitution required the Court to have regard also to British law, and the received law of Vanuatu deals with every citizen in the same way, at [53] - [56].

40. On the basis of those reasons, the Judge made the orders set out earlier in these reasons.

The applicable principles

41. The principles concerning the equitable estoppel relevant presently have not previously been considered in any detail by this Court. However, considerable assistance can be obtained from authorities in England and Australia. It was common ground that it was appropriate for the Court to have regard, and give effect, to them.

42. The equity which Mr Russet asserts can be traced back to a line of authority commencing with *Dillwyn v Llewelyn* [1862] ER 908 and *Ramsden v Dyson* (1866) LR 1 HL 129. Many of the subsequent English cases are reviewed in the recent judgment of Lord Briggs in *Guest v Guest* [2022] UKSC 27. In Australia, the leading decisions of the High Court are *Commonwealth v Verwayen* [1990] HCA 39, (1990) 170 CLR 394; *Giumelli v Giumelli* [1999] HCA 10, (1999) 196 CLR 101; and *Sidhu v Van Dyke* [2014] HCA 19, (2014) 251 CLR 505.

43. Regrettably, circumstances analogous to the present are not uncommon and the applicable principles have now been applied in numerous cases. It is established that the equity which will support the relief (usually by the imposition of a constructive trust) is "found in an assumption as to the future acquisition of ownership of property which had been induced by representations upon which there had been detrimental reliance by the plaintiff" (*Giumelli* at [6]).

44. To like effect, Lord Briggs said in *Guest* at [8]:

> *"The remedy afforded under the label of proprietary estoppel is there to eliminate, or at least mitigate, the affront to conscience constituted by a decision by the maker of a non-contractual promise or assurance about property upon which the recipient has relied to their detriment to go back on it."*

(Emphasis added)

45. In *Delaforce v Simpson-Cook* [2010] NSWCA 84; (2010) 78 NSWLR 483, Handley AJA stated the underlying principle, and Equity's role in giving effect to the unfulfilled expectation, in the following terms:

> *"[21] The proprietary estoppel upheld by the Judge was an estoppel by encouragement. Such an estoppel comes into existence when an owner of property has encouraged another to alter his or her position in the expectation of obtaining a proprietary interest and that other, in reliance on the expectation created or encouraged by the property owner, has changed his or her position to their detriment. If these matters are established equity may compel the owner to give effect to that expectation in whole or in part."*
>
> (Emphasis added)

46. In the same case, Allsop P (Giles JA agreeing) said of this class of estoppel:

> *"[3] I agree in particular with Handley AJA that the reasons of [the plurality] in [Giumelli] appear to remove as a governing principle in the relief to be granted in equitable or proprietary estoppel cases the notion of enforcement or vindication only of the "minimum equity": see Giumelli at 123-125 [40]-[48]. That, of course, does not make irrelevant matters that can assuage the detriment brought about by the resiling from the representation or encouragement by the party concerned. It does mean, however, that relief in such cases is not to be measured by weighing detriment too minutely in order that it be converted into some equivalent of cash or kind, as if one were measuring the consideration for a commercial bargain. Equity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscience of keeping a party to any relevant representation or promise made, even if not contractual in character. Equity has always had a place in keeping parties to representations or promises ...*
>
> *[4] Proportionality of the claimed interest or remedy to the prejudice or detriment is undeniably a relevant consideration, and sometimes of considerable importance. It should not, however, be transformed into a necessary constitutive element of a cause of action to be pleaded or proved by the party seeking relief. To do so would elevate one consideration above others, and in particular above the importance of making good an expectation by encouragement or representation ... It would tend to equate the analysis to one requiring that the party encouraged receive no more than it can prove that it suffered in detriment. This would see the equity become one of compensation for proved equivalent detriment. The equity is a broader one based on the just and conscionable satisfaction in appropriate fashion of the equity arising from the expectation created in another by encouragement or representation. As Handley AJA says, the role of proportionality is better understood, in a doctrine dealing with the legitimacy or otherwise of*

resiling from an encouragement or representation that has created an expectation, as assisting in an assessment whether what is claimed or contemplated to be granted is disproportionate or unjust in all the circumstances.

[5] The importance of keeping a party to a representation or encouragement previously made is all the stronger where, as here, the encouragement or representation has been relied upon by a party to abandon a course of conduct that could possibly have led to a different outcome. This can be described in the language of loss of a chance that is not fanciful or unrealistic, or in the language of proceeding thereafter on the basis of a new or changed convention or conventional basis ... For instance, if, as here, in reliance upon a representation or encouragement, a court case is abandoned and the representation or encouragement is later sought to be resiled from, the party to whom the representation or encouragement was made and in whom the expectation was raised is left in the position not only of the loss of the entitlement to pursue his or her rights in the case in the past, but also is likely to be in the position of being unable to demonstrate what would, or even may, have happened in the case, it being an alternative, complex and now hypothetical body of human conduct. That the party encouraged cannot show that he or she would have been better off in the posited alternative reality is not fatal to the making out of the estoppel. Indeed, the inability to prove such things reveals a central aspect of the detriment: being left, now, in that position. Of course, if it is self-evident or can be clearly demonstrated that the case was fanciful or otherwise doomed to fail, there may be no real detriment; but that was not the case here ..."

(Emphasis added and citations omitted)

47. The view that the equity is to restore the disappointed expectation and not just to compensate for the detriment occasioned by reliance on the promise was endorsed in *Sidhu v Van Dyke* in which the majority said:

"[84] If the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay. But this case is one to which the observations of Nettle JA in Donis v Donis are apposite:

> *"[H]ere, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based."*

[85] The appellant's argument, rightly, sought no support from the discussion in cases decided before Giumelli v Giumelli of the need to mould the

remedy to reflect the "minimum relief necessary to 'do justice' between the parties". There may be cases where "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption"; but in the circumstances of the present case, as in Giumelli v Giumelli, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that "the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct", where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise."

(Emphasis added and citations omitted)

48. To similar effect is the recent judgment of the Supreme Court of the United Kingdom in *Guest*. Lord Briggs, in the judgment of the majority, said:

> *"[71] In my view therefore this Court should firmly reject the theory that the aim of the remedy for proprietary estoppel is detriment-based forms any part of the law of England. I acknowledge that the common law (and perhaps even equity) could have based itself on such a theory, and I accept that the concept that the remedy compensates for detriment is one which will appeal to some minds. But the cases show that equity did not take that course, and there is no good reason for doing so now, by a reversal of over 150 years' careful development of the remedy upon a different foundation.*
>
> *[72] By contrast the concept of a proportionality test does appear to have taken root in England, as part of the assessment of whether a proposed remedy to deal with the proven unconscionability based on satisfying the claimant's expectation works substantial justice between the parties. It has become a well-used part of the relevant equitable toolkit in the Chancery Division ..."*

49. Earlier, Lord Briggs had spoken of circumstances which may make equity's enforcement of the unfulfilled promise inappropriate:

> *"[6] [T]here have been many cases where the court has recognised that full specific enforcement is not the appropriate remedy. The promise may be incapable of specific enforcement, for example where the underlying property is no longer in the hands of the promisor or his estate. The promised date for performance may lie so far in the future, or the date may be so unpredictable, that an order for performance on the promised date would be too insubstantial as a remedy. Or the early enforcement in full of a promise which, although repudiated, is years away from the due date for performance may give the promisee too much, or something radically different from that which was promised. The promisor may have other powerful equitable or moral claims on his bounty, so that the appropriation of the whole of the promised property to meet the claim of the promisee may be unjust to those other claimants, and be more the*

cause of unconscionable conduct than a remedy for it. Finally the magnitude of specific enforcement in full may be so disproportionate to the detriment undertaken by the promisee that something much less than full specific enforcement is needed to clear the conscience of the promisor."

50. The following principles derived from the English and Australia authorities are also pertinent presently:

(i) a proprietary estoppel by encouragement may be established even though the conduct of the party estopped did not define the expectation, although the quality of the assurances given may be pertinent to the issues of reliance and detriment;

(ii) the courts should, *prima facie*, and subject to the kinds of considerations mentioned in *Delaforce*, *Sidhu* and *Guest* as set out above, enforce a reasonable expectation which the party bound created or encouraged;

(iii) the detrimental reliance by the plaintiff need not constitute in any sense a consideration moving to the party bound. It is a unilateral element to the estoppel and not the price paid for it;

(iv) events occurring subsequent to the relevant promise may enlarge or diminish the plaintiff's equity;

(v) notions of affording the minimum relief necessary to do justice between the parties (sometimes referred to as "the minimum equity" principle) are inappropriate when it is recognised that ordinarily the relief will provide fulfilment of the unfulfilled expectation; and

(vi) the relief afforded in any given case will depend very much on the circumstances of the case and may be shaped so as to recognise practical considerations such as the need for a clean break between the parties, the impact of the orders on third parties and any injustice they would suffer.

Ground 1 – challenge to the finding of a constructive trust

51. By Ground 1, the appellant challenges in a variety of ways the Judge's finding of a proprietary estoppel and his conclusion that the Tagabe farming operation was held on a constructive trust.

52. The appellant contended first that the representations of the deceased to Mr Russet were no more than a revocable statement of testamentary intention being, she contended, of a general kind, relating to a property which changed in character and extent over the years, and which had not been accompanied by any statement that the promise would not be revoked or altered. Counsel referred to authorities indicating that courts are reluctant to assume such an intention, including *Barnes v Alderton* [2008] NSWSC 107 at [60]; *Thorner v Major* [2009] UKHL 18 at [57]; *Dable v Peisley* [2009] NSWSC 772 at [109]; and *Menczer v Menczer* [2009] NSWSC 1466 at [55]. Mr Russet should have known, counsel contended, that the deceased may remarry and change his testamentary instructions.

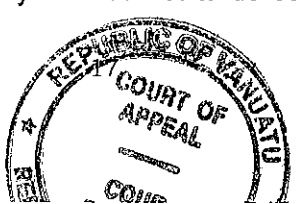
53. Counsel submitted that the PNA itself by providing for the appellant's right of residence upon the death of the deceased, indicated a modification by the deceased of his testamentary intention since making the promises on which Mr Russet relied. Counsel also relied on some evidence from Mr Bayer, the deceased's business partner, to which we will return.

54. We commence by noting two matters. In innumerable cases of the present kind, the absence of any assurance that the promisor would not revoke the promise has not been fatal to the finding of an equitable estoppel.

55. It is true that at one time it was thought that a plaintiff seeking to establish proprietary estoppel on the basis of a promise had to show that there had been an assurance by the promisor that he/she would not revoke the promise. However, this is no longer regarded as the law in England or Australia, as the authorities reviewed by Young CJ in Eq in *Barnes v Alderton* indicate. And, as was noted by Robert Walter LJ in *Gillett v Holt* [2001] Ch 210 at 227:

> *"The inherent revocability of testamentary disposition ... is irrelevant to a promise or assurance that "all this will be yours". Even when the promise or assurance is in terms linked to the making of a will ... the circumstances may make clear that the assurance is more than a mere statement of present [revocable] intention, and is tantamount to a promise."*

56. Secondly, the assistance which can be derived from authorities concerning circumstances dissimilar to the present is limited. For example, in *Barnes v Alderton* on which the appellant relied, the dispute was between a brother and a sister and concerned a house purchased by the brother with his father as joint tenants. On the father's death, the brother, the sister and the mother discussed whether the father's share should be transferred to the mother. They decided not to do so because of the expense and



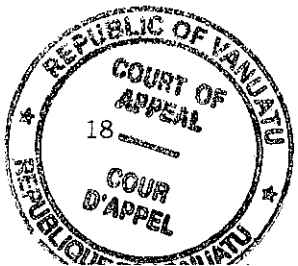
because the brother said "when the time comes I will sell the property. I will give half to you Colleen as that is what dad always wanted. Are you happy with that mum?". Following the mother's death, the brother did not proceed in accordance with that statement but transferred the house to his daughter and son in law for nominal consideration. The sister had not ever made any contribution to the property and there had been no reliance by her to her detriment on the strength of her brother's promise. In these circumstances, it is unsurprising that Young CJ in Eq was not satisfied that the sister had believed the promise to be irrevocable.

57. The facts giving rise to the decision in *Thorner v Major* were more analogous to the present, and it is true that Lord Scott said that "a problem inherent in every case in which a representation about inheritance prospects is the basis of a proprietary estoppel claim, is that the expected fruits of the representation lie in the future, on the death of the representor, and, in the meantime, the circumstances of the representor or of his or her relationship with the representee, or both, may change and bring about a change of intentions on the part of the representor", at [19]. But Lord Scott was also in broad agreement with Lord Walker (with whom Lord Rodger and Lord Neuberger, while adding some reasons of their own, also agreed) who said:

> *"[56] I would prefer to say ... that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in Walton v Walton (in which the mother's "stock phrase" to her son, who had worked for low wages on her farm since he left school at fifteen, was "You can't have more money and a farm one day"). Hoffmann LJ stated at para 16:*
>
> > *"The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."*
>
> (Emphasis added)

58. Later, Lord Walker endorsed the statement of Hoffmann LJ in *Walton* that "equitable estoppel ... does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept". See also Lord Neuberger at [101].

59. We consider these principles to be apposite presently.



60. A consideration of the deceased's statements well justifies a conclusion that they were sufficiently clear and intended to be taken seriously. The deceased had told Mr Russet that he wanted him to come back to the Tagabe property; that he wished him eventually to "take over" the Tagabe farming operation; that he wanted to prepare Mr Russet "properly to run things" when he died or became unable to work; that he wished the Tagabe farming operation to pass to Mr Russet and in turn to his children; and that he would "hand over" his whole estate to Mr Russet as his only son. These statements were specific in character, and were made (initially) as inducements to persuade Mr Russet to make the life changing decision to leave Australia and to come to live and work in Vanuatu. They were not statements made casually or light-heartedly or made to someone having only a remote or indirect association with the deceased. There was a natural inference that they were intended seriously.

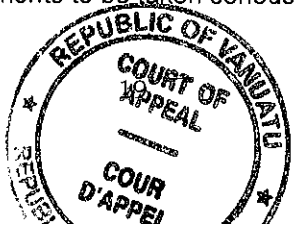
61. It is true, as counsel for the appellant submitted, that the deceased did not express himself in contingent terms, ie, by using the terminology of "if you do X, I will do Y". But equity looks to the substance of what was conveyed. It does not require that inducements be expressed in some straight jacketed form, and requires only that the promise of the bestowal of an interest in land be made and be intended to operate as an inducement to the representee.

62. A change over time in the property promised is not fatal to a finding of promissory estoppel. Instead, changes in the character or extent of the property in question are relevant to the relief which equity will provide, but do not exclude a remedy when there is identifiable property: see *Thorner v Major* at [9], [65] and [102].

63. Having regard to all these matters, there was no error in the Judge finding that the deceased intended his statements to be taken seriously and that it was reasonable for Mr Russet to have understood them in that way.

64. Accordingly, we consider that the deceased's statements had the quality to which Lord Walker referred, and the Judge was not in error in not characterising them as mere general (and revocable) statements of present testamentary intention.

65. The appellant pointed to two subsequent events as indicating that the deceased had not regarded himself as committed to passing in full the Tagabe property to Mr Russet. Counsel submitted first that the deceased must have thought that he could, despite his statements to Mr Russet, provide for the appellant to have some use of the Tagabe farm in the event that he pre-deceased her. While one may accept the premise of this submission, we do not think that it has force in detracting from the conclusion that the deceased intended his statements to be taken seriously. Instead, when the PNA is read



as a whole, as it should be, it is supportive of the view that the deceased was seeking to preserve the Tagabe farm (and indeed the rest of his assets) for his son. The limited right of residency granted to the appellant in the event of his death was not so significant as to undermine that promise. This being so, there was no error by the Judge in regarding the PNA as "strong and compelling" evidence supporting Mr Russet's claim.

66. Secondly, the appellant referred to the evidence of Thomas Bayer, the appellant's business partner, about a conversation he claimed to have had with the deceased. Mr Bayer stated relevantly:

> *"Henri wanted to know how he could take care of Li Ya if he died first without causing a huge falling out with his family. I suggested he do nothing. If he had no Will, his estate would automatically go 1/3 to Li Ya and would not be his doing. The family would only learn after his passing that there was no Will and there was nothing that they could do about it. The law would take care of Li Ya without Henri doing anything."*

67. It is true that the Judge made no reference to this statement in his reasons. However, in our view, several matters indicate that this should not be regarded as undermining the Judge's reasoning:

(i) the very terms of Mr Bayer's evidence raise questions about its reliability and it is plain that the Judge had a preference for the evidence of Mr Russet and his witnesses;

(ii) even if the evidence is taken at face value, it is equivocal because the statement that the deceased wished to avoid "a falling out with his family" is consistent with him wishing to honour the promises and commitments he had made to Mr Russet; and

(iii) there was in any event nothing in the statement attributed to the deceased to indicate that he was contemplating that the provision for the appellant should come from the earnings of the Tagabe farming operations, and not from the balance of his estate.

The evidence of detrimental reliance

68. There were two aspects to the appellant's submission on this topic which we will address separately. Counsel critiqued first both the pleading of the claim that Mr Russet had relied on his father's representations and his evidence in support of the pleading. He contended

that Mr Russet had not pleaded "immediate" detrimental reliance and had not proven actual reliance on any promise of the deceased.

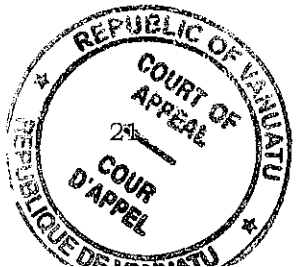
69. This submission cannot be accepted because Mr Russet had pleaded in [9] of his Statement of Claim that his move to Vanuatu had been "by reason of" his belief and faith in the truth of his father's representation (as well as the emotional attachment to Tagabe which those representations had engendered). It was not necessary for Mr Russet to plead (or, for that matter, to prove) that he had acted "immediately" in response to his father's representation.

70. The critical issue instead was whether the statements of inducement had continued to be an operative cause for his decision to sell his home and business and move to Vanuatu. Obviously and speaking generally, an elapse of time between the making of the representation, and conduct relied upon, may be relevant to an assessment of whether the latter had been induced by the former. However, that was hardly an issue in the present case given that the deceased had repeated his representations in 2009, shortly before Mr Russet made his decision to move to Vanuatu.

71. The second aspect of the appellant's submission on this topic concerned the quality of Mr Russet's evidence about his actual reliance in making the decision. Mr Russet identified in his evidence a number of matters bearing on his decision. The first was that he had believed what the deceased had said to him about his wish that he inherit his estate and that it should remain in the Russet family. Secondly, he said that his own appreciation and emotional attachment to the Tagabe property had increased as a result of his father's statements. In consequence of those matters, he had promised his father in 2003 that he would return to Vanuatu to work with him on the Tagabe property. He then said that when he and his wife had made the decision to move permanently to Vanuatu in 2009 it had been due, largely, to the promise he had made to his father in 2003. This evidence indicated how the deceased's representations had operated, in a sequential way, to induce Mr Russet to make the decision to move to Vanuatu. In our view, the primary Judge was entitled to conclude, as he did:

> *"[121] Mr Russet chose to alter his way of life on the express repeated indication 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."*

72. We see no error in this conclusion of the Judge.



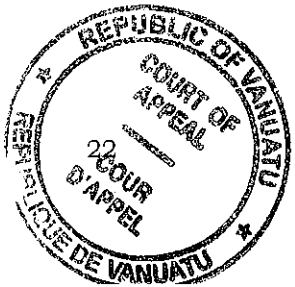
73. Next, the appellant contended that Mr Russet had not established that any reliance by him on his father's representations had been detrimental, in the requisite sense. This complaint was made in Grounds 1.2 and 1.3 of the Notice of Appeal, and again in Ground 3.5. Counsel noted, for example, that Mr Russet had not adduced evidence of his income in Australia before coming to Vanuatu, nor of the value of the assets which he had liquidated in order to move to Vanuatu, nor of any losses he had suffered as a result, and nor had he made a comparison with the benefits which he had received and enjoyed after moving to Vanuatu.

74. In our view, these grounds of appeal are based on a misapprehension as to the kind of detriment Mr Russet was claiming. It was a detriment similar to that described by Nettle JA in *Donis v Donis* [2007] VSCA 89 at [34] and approved by the High Court of Australia in *Sidhu* in the passage set out earlier in these reasons, namely, the making of a life-changing decision with irreversible consequences of a profoundly personal nature. It was much more than a detriment said to consist of the financial consequences of his liquidation of assets in Australia and the cessation of a particular form of gainful activity.

75. This was also a case of the kind to which Allsop P referred in *Delaforce* at [5], set out earlier in these reasons, namely, detriment resulting from the abandonment, by reason of reliance on the representor's promise, of a course of action which could possibly have led to a different outcome. As Allsop P noted, it is often difficult for a representee in that situation to prove, in financial or practical terms, the extent of the detriment. But that is not fatal to the establishment of the estoppel.

76. When these matters are understood, the absence of evidence from Mr Russet on the matters to which counsel for the appellant pointed is not significant. Mr Russet proved the detriment he alleged sufficiently by pointing to his life changing decisions concerning the country in which he would reside, the place at which he would bring up his family, the occupation which he would pursue and his acceptance of subordination to his father's control instead of being a proprietor in his own business. Changes of this kind are not to be disparaged as mere "lifestyle adjustments", as counsel for the appellant suggested. Contrary to the submission of counsel, we see no error in the Judge's characterisation:

> *"[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 location – instead of operating a Pet Shop, he was to now be the Operations Manager of 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."*



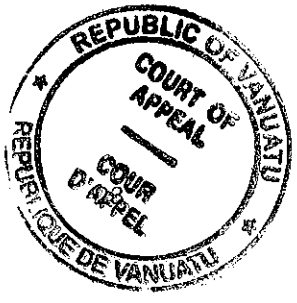
77. Counsel made a further submission on this topic. Mr Russet had acknowledged in his evidence that he had had an expectation that he would, by reason of being his father's only child, inherit his estate even if had decided against moving to Vanuatu. That being so, counsel submitted that the deceased's representations could not have operated as an inducement to Mr Russet to change his position. Counsel seemed to suggest that Mr Russet would have been in no worse position had he chosen to remain in Australia but, on his father's death, owned the Tagabe property in the manner of an absentee landlord.

78. In our view, this is an over simplification of the position because it treats Mr Russet's expectation about inheritance as being equivalent to certainty. The submission thereby overlooks the potential for the deceased to have adopted some alternative means of keeping the Tagabe property in the wider Russet family, if Mr Russet had expressed disinterest in it or had no greater interest than being an absentee landlord. It overlooks the advantage to Mr Russet in receiving training from his father in the operation of the property. It overlooks the potential for Mr Russet to effect improvements to the property (increasing its value and/or attractiveness) by the combined efforts of himself and his father which the deceased would not have been able to achieve by his own efforts alone. Putting these matters slightly differently, by acceding to his father's requests, Mr Russet was induced to show that he was, in addition to being the natural heir, also a *suitable* heir who would have the capacity to retain the Tagabe property in the Russet family in the manner his father desired.

79. Perhaps more fundamentally, however, even if the submission is taken at face value, it overlooks that Mr Russet was induced to abandon his own successful business and potentially valuable real estate in Perth.

80. Lastly, counsel submitted that it was necessary for Mr Russet to show that, as at the date of his father's death, he was "worse off" than he would have been had be remained in Australia. We doubt that this was so and refer again to [5] of the reasons of Allsop P in *Delaforce*. But even it if was necessary, Mr Russet's evidence that he had sold his business and his home in Perth and had thereby forgone all the potential for development of the business and appreciation in the value of the home suggested, by itself, that he was in a far inferior position economically that would have been the case had he remained in Australia.

81. In our view, all of Grounds 1.2, 1.3 and 3.5 fail.



The knowledge of the deceased of Mr Russet's detrimental reliance

82. Next, counsel submitted that there was no, or only limited, evidence that the deceased had intended or appreciated that Mr Russet would rely on his promises and that the Judge had been in error in finding that that had been the case. As we understand it, counsel sought again to derive support for this submission from Mr Russet's acknowledgement that he had expected that he would, as his father's only son, inherit his estate on his father's death.

83. This ground of appeal cannot be accepted. As noted earlier, when the deceased first sought to induce Mr Russet to stay in Vanuatu to work on the Tagabe farm, he linked it to the promise of inheritance. It was an obvious inference for the Judge to draw that the deceased had intended his son to rely on the promise. Indeed, it can be inferred that the deceased had sought to add to the moral force of his inducement by an appeal to Mr Russet's sense of fairness. That same inference can be drawn from the deceased's repeated statements over the years to Mr Russet that he wished the Tagabe farm to pass through him to future generations of Russets.

84. Ground 1.4 fails.

85. We will address Ground 1.5 concerning the appellant's reliance on the Queen's Regulation in the next section of these reasons. Subject to our consideration of the parties' submissions concerning that ground, the reasons so far indicate that Ground 1 in the Notice of Appeal wholly fails.

Ground 1.5 – the effect of Regs 5 and 6 in the Queen's Regulation

86. Regulations 5 and 6 have been set out earlier in these reasons.

87. The Queen's Regulation was made in 1972 by the British Resident Commissioner to provide for succession, probate and the administration of the estates of deceased persons in Vanuatu. As we explain below, it continues to have effect to the present day.

88. The appellant contended that Reg 6(1) in the Queen's Regulation on its proper construction governed the way in which the intestate estate of the deceased was to be distributed and, specifically, that it precluded Mr Russet from having any right or interest in the Tagabe farming operations, or in the deceased's estate more generally, except as provided for in that Regulation. The submission seemed to be that the Tagabe farming

operations were "property of the deceased" at his death and were accordingly to be distributed in accordance with Reg 6.

89. The Judge rejected this submission and instead accepted the submission of Mr Russet that the subordinate clause in Reg 5 should be understood as referring only to a *legal* right, title etc, and not encompassing beneficial and equitable interests.

90. On the appeal, counsel for the appellant repeated his trial submission but, by Ground 1 in the notice of contention, Mr Russet advanced a slightly different construction of Reg 6. This submission focused instead on the term "property of an intestate". Counsel submitted that those words should be construed as referring only to property to which the deceased was entitled "in the eye of equity" immediately prior to death.

The applicability of Regs 5 and 6

91. Counsel for the appellant accepted that his submission concerning the effect of Regs 5 and 6 involved an antecedent question, being that of whether those Regulations are even applicable to the deceased's intestate estate. This issue was also raised by Mr Russet's claim at first instance, and repeated in Ground 5 of his cross-appeal (raised as an alternative), that the intestate estate was to be administered in accordance with Articles 731 and 767 of the French Civil Code.

92. The issue has a wider importance because its resolution will (subject to the determination of the remaining grounds of appeal and the cross-appeal) determine the extent of the appellant's entitlement in the intestacy. The submissions on the appeal proceeded on the basis that, if Reg 6 is applicable, the appellant is entitled to one-third of the deceased's estate in addition to the sum of $10,000 and that, if Articles 731 and 767 of the French Civil Code as in force when Vanuatu achieved independence are applicable, she is entitled to a lesser benefit, being "a right of usufruct" equal to one-quarter, calculated on "a mass made of all property existing at the date of death". There is said to be a prospect of the "right of usufruct" being converted to an annuity but the Court was not provided with any details of the manner of calculation of such an annuity.

93. The issue arises from the development of Vanuatu law, explained by d'Imecourt J in *Banga v Waiwo* [1996] VUSC 5. In *Joli v Joli* [2003] VUCA 27, this Court described the explanation of d'Imecourt J as helpful and relied on it. In these circumstances, we do not need to repeat the explanation in any detail. It is sufficient to say that, immediately before Independence on 30 July 1980, the effect of the Anglo-French Protocol of 1914 had been that separate laws applied to British and French subjects in Vanuatu. Putting to one side

Joint Regulations made by the French and British Commissioners, the laws which applied to British subjects and "Optants" included statutes of general application in force in England on 1 July 1976, regulations made by the British Resident Commissioners pursuant to the powers vested in them by an Order in Council of 22 June 1922 and common law and equitable principles. The laws which applied to French nationals and their "Optants" were those applicable under the French Criminal and Civil Codes.

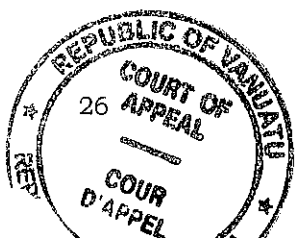
94. On Vanuatu achieving independence, the laws in force immediately before the Day of Independence were continued in force by operation of Article 95 of the Constitution. Article 95 provides (relevantly):

> *(1)* ...
>
> *(2)* *Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.*

95. As the Parliament has not yet enacted any laws concerning intestacy, the Queen's Regulation and Articles 731 and 767 of the French Civil Code are each laws to which Article 95(2) applies and, by force of that Article, have effect as laws of Vanuatu. However, this is subject to the important qualification explained by d'Imecourt J in *Banga v Waiwo*. That is that all the laws promulgated under the Constitution are laws of Vanuatu which are to be applied to everyone in Vanuatu equally. This has the consequence that all the French and English laws which were in effect in Vanuatu immediately before Independence and which have not been repealed or superseded by legislation of the Parliament, continue to form part of the law of Vanuatu and apply to everyone irrespective of (relevantly) their nationality. Using the language of Harrop J in *In re MM, Adoption Application by SAT* [2014] VUSC 78 at [26], there is but one law of Vanuatu, albeit derived in some instances from both the French and English laws which were in force at Independence.

96. This circumstance creates the potential for there to be a conflict in the law of Vanuatu between a prescription derived from pre-Independence British law and a prescription derived from pre-Independence French law. The present case is one instance of such a conflict.

97. There is no law specifying the manner in which the conflict is to be resolved. That is accordingly a matter to be determined by the Court.



98. Different methods have been proposed in the authorities. Some are based on Article 47(1) of the Constitution which provides:

> "The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. *If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice* and whenever possible in conformity with custom."
>
> (Emphasis added)

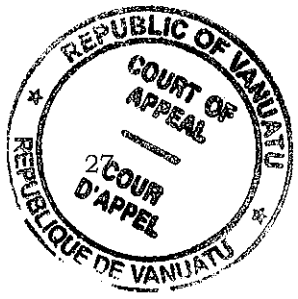
99. *Prima facie*, the present is a case of the kind mentioned in the last sentence of Article 47(1), that is, one in which there is no rule of law applicable to the resolution of the conflict.

100. In *Banga v Waiwo*, d'Imecourt J noted that, in cases of conflict between laws derived from the British and the French, the courts have a duty to resolve "the matter" (ie, the issue in the parties' litigation) according to "substantial justice". In *Montgolfier v Gaillande* [2013] VUSC 39, Sey J thought it appropriate to achieve substantial justice by adopting a "pluralistic approach", that is, by applying aspects of both the common law and the French Civil Code. There was an appeal from the judgement of Sey J but it was not necessary for this Court to address the present issue: *Gaillande v Montgolfier* [2013] VUCA 28.

101. In *Re MM*, in which conflicting English and French laws concerning the adoption of children were applicable, Harrop J considered it appropriate to give effect to the principle that there is only one Vanuatu law by requiring the applicant for adoption to satisfy the criteria in both laws, at [37].

102. We consider that a number of matters may determine a principled approach to the resolution of a conflict between two applicable laws of Vanuatu. These include the nature of the legislation in question and the nature of the conflict between the two laws. In some cases, it may be possible for a litigant or the parties to comply with both laws, so that it can be said that there is in truth no consistency. *Re MM* appears to be such a case. But in other cases, there will be true inconsistency in that both laws cannot be applied simultaneously or application of both laws will produce inconsistent results.

103. Fortunately, cases of conflict between two applicable laws are infrequent. When they do arise, the Court must do its duty pursuant to Article 47(1), even if this does involve giving one law priority over another.



104. Generally, we expect that the Court will be cautious about *creating* a law for the resolution of the conflict, as opposed to making a principled choice of the law to be applied.

105. In the present case, both parties accepted that it was not possible to distribute the intestate estate of the deceased in accordance with both the French Civil Code and the Queen's Regulation. These were appropriate concessions. The appellant accepted that the choice between the application of the French Civil Code and the Queen's Regulation should be determined by reference to the substantial justice of the matter. We did not understand counsel for Mr Russet to contend to the contrary. That is the approach which we consider apposite.

Substantial justice is achieved by the application of the Queen's Regulation

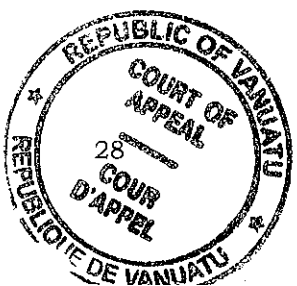
106. The issue is whether substantial justice in this litigation will be achieved by the Court applying the Queen's Regulation or Articles 731 and 767 in the French Civil Code.

107. Counsel for Mr Russet relied on matters said to evidence a "connection" with France and its laws:

> *(a)* *"the Russet family is Francophone. In particular, the deceased was Francophone;*
>
> *(b)* *the deceased took advice from Paul de Montgolfier in relation to the provisions of French law which would apply to the distribution of his estate upon his death. Before 2003 and after 2016, M. de Montgolfier had practised as a Notaire. As we understand it, the evidence did not disclose the advice that M. de Montgolfier had given to the deceased but the implication was that the deceased was told that the French Civil law would apply;*
>
> *(c)* *Mr Russet and the deceased commonly conversed in French; and*
>
> *(d)* *the marriage of the deceased and the appellant was registered with the French Embassy in Vanuatu."*

108. On the other hand, a number of matters, including some of a more substantive and practical kind, indicate that substantial justice would be better achieved by the application of the Queen's Regulation. These include:

(a) none of the assets comprising the intestate estate are located in France and none, with the exception of the shares in the New Caledonian company owning land at Dumbea, are subject to French law. Instead, they are subject to Vanuatu law;



(b) the appellant is not French and, apart from her marriage to the deceased, does not have a "connection" to France and its laws;

(c) it is the common law originally derived from Britain and shared with other Commonwealth countries, and as developed over time, which applies in Vanuatu. As d'Imecourt J noted in *Banga v Waiwo*, "after so many years of independence we have become, by the passage of time and the way we have applied our laws since independence, a common law jurisdiction". The truth of that proposition is even more evident in 2022. It may be pertinent here that the appellant and the deceased specified expressly in the PNA that it was not to be governed by French law;

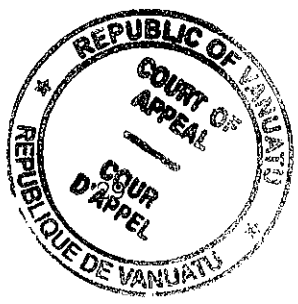
(d) in relation to the intestate estate, Mr Russet invokes equitable doctrines developed in English law which are not recognised in French law. Application of the Queen's Regulation will therefore involve consistency in the legal regime governing the intestate estate;

(e) the administration of the estate is likely to be more efficient if the Queen's Regulation applies. Its provisions are relatively straightforward and those involved in the administration of estates in Vanuatu are familiar with them;

(f) in contrast, there is some uncertainty as to the content of the "right of usufruct" and as to the manner in which it is to be assessed and administered. In this respect, counsel for the appellant submitted, and counsel for Mr Russet did not dispute, that, so far as can be ascertained, the French Civil Code has not been applied to the administration of any estate in Vanuatu since Independence, but, conversely, the Queen's Regulation has been applied many times;

(g) the appointment of the second respondent as administrator was made under the Queen's Regulation; and

(h) the parties also invoked the Queen's Regulation in relation to the intestate estate. They did so in the probate proceedings by seeking the Supreme Court's determination of certain questions premised on the Queen's Regulation being applicable. We will return later to the judgment of Saksak of 14 April 2021 in which he answered some of the parties' questions. The maintenance of consistency of approach is an important consideration in achieving substantial justice;



(i) if Articles 731 and 767 in the French Civil Code as in force at Independence apply, the administrator will be required to apply rules which France recognised in 2001 were no longer appropriate because of their inconsistency with contemporary values. In this respect, we note that Article 767 was amended by the French Parliament in 2001 because, as the Senator introducing the amendments to the Senate said, "our inheritance law is particularly unfavourable to two categories of people: on the one hand, the surviving spouse, on the other hand, natural children, known as "adulterines"". The Senator continued by saying "consideration must be given to protecting surviving spouses for whom no testamentary provision was made by the deceased, through lack of precaution or – quite simply – through ignorance"; and

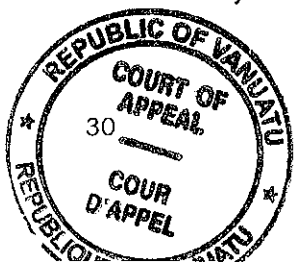
(j) the application of Articles 731 and 767 has the potential to give rise to further litigation, given the uncertainty as to the manner in which the usufruct is to be assessed and, possibly, converted into an annuity.

109. In our view, these matters, being both substantive and practical, outweigh the matters of "connection" on which Mr Russet relies. Accordingly, acting in accordance with Article 47(1) of the Constitution, we conclude that, in order to achieve substantial justice in the administration of the intestate estate, Reg 6 of the Queen's Regulation is to be applied.

The proper construction of Reg 6

110. We have previously set out the competing submissions of the parties as to the construction of Reg. 6, and need not repeat them.

111. We consider that neither of the constructions of Reg. 6 proposed by the parties is correct. Instead, the term "property of an intestate" is a reference to *all* property of an intestate, including legal and beneficial interests. However, if the property is subject to the beneficial interest of another, then (in the absence of some express provision to the contrary) the property which the administrator holds continues to be subject to that interest. That is to say, the beneficial interest of the other continues unaffected and is not caught by Reg 6. That is because the beneficial interest of the other person was not "property" of the intestate and intestates are no more capable of passing by succession property which they do not own than are testators by will.



112. The result is that we do not accept as appropriate the construction of Reg 6 for which the appellant contended in Ground 1.5 of the notice of appeal, nor the construction of the Regulation for which Mr Russet contended in Ground 1 of his notice of contention.

113. In the present case, Mr Russet's equitable interest did not arise only after the deceased's death. It is not necessary to identify when it first arose, although one possibility is that it came into existence when the deceased did not make a will giving effect to his promise to Mr Russet. It is sufficient to say that the equitable interest arose, at the latest, when the deceased no longer had the capacity to honour his promise to his son. That must have been some time before the death.

114. Accordingly, on the Judge's findings, the deceased's interest in the Tagabe farming operations was, at his death, subject to the beneficial interest of Mr Russet secured by the constructive trust. The latter's beneficial interest was not extinguished by the deceased's death and the property of the deceased which passed to the second respondent for administration was subject to it.

Ground 2 – the sufficiency of the deceased's estate

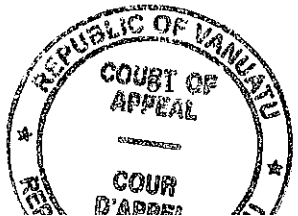
115. As previously noted, the deceased left a very substantial estate comprised of much more than the Tagabe farming operations. The appellant argued that that meant that the administrator could pass the whole of the Tagabe farming operation to Mr Russet as part of his entitlement under the Queen's Regulation and that that in turn had two consequences:

(i) the minimum equity principle did not require the imposition of a constructive trust to protect Mr Russet against his disappointed expectation; and

(ii) it had not been unconscionable for the deceased not to bequeath the Tagabe farming operation to Mr Russet so as to require the imposition of a constructive trust.

116. For the reasons previously noted, the premise on which this submission is based is sound.

117. However, we consider that this ground too proceeds on a misapprehension, indeed, possibly more than one misapprehension. First, the submission overlooks that the expectation of Mr Russet, induced by the deceased and on which Mr Russet relied to his detriment, was the expectation that he would inherit the whole of the Tagabe farming



operation *in specie* and that would be so independently of whatever entitlement he had to share in the residuary estate. It was also an expectation that he would be *entitled* to receive the Tagabe farm from the estate, not that he would do so only upon a favourable exercise of discretion by the administrator in the manner of administration of the estate. It was these expectations which were disappointed and which give rise to the affront to the Court's conscience. It is to be remembered that real estate has always been regarded in the law as having special value. That was especially so in a case like the present having regard to the historical association of the Russet family with the Tagabe property. Mr Russet was entitled to have his expectation with respect to inheritance of the property itself fulfilled by the imposition of the constructive trust.

118. Secondly, as the authorities reviewed above indicate, in this context, minimum equity is no longer the governing principle. Instead, equity seeks to fulfill the expectation induced by the representor, subject to the presence of factors which may make that course inappropriate. Even if the minimum equity principle was applicable, it is not easy to see how it could have meant that Mr Russet was not entitled to a complete interest in the Tagabe farming operation. In *Guest* at [6] (set out earlier in these reasons), Lord Briggs noted that other powerful equitable or moral claims on a deceased's bounty may make inappropriate equity's enforcement of the promise in full. That is not this case. Instead the fact that the estate is sufficiently large to allow all entitlements to be met without resort to the asset which is the subject of the estoppel tends to support, rather than detract from, Mr Russet having his expectation met in full.

119. Counsel for the appellant submitted that the Court was being asked to determine that she should share in a portion only of the intestate estate, rather than of the whole estate (a reduced "cake", as counsel put it), as though this was in some way inappropriate. This was an egocentric submission, because its effect, if accepted, would be that the appellant would have included in her share of the estate (to Mr Russet's detriment) the value of assets which the deceased plainly intended should not ever pass to her and which (other than the right of residence) are not subject to an equity in her favour. For this reason, we do not consider that this submission avails the appellant presently.

120. This ground of appeal fails.

Ground 3 – miscellaneous matters

Ground 3.1 – The adverse findings concerning the appellant's credit

121. The appellant contended that the Judge had erred in making adverse findings concerning her credit, submitting that those findings were irrelevant to the disposition of the case.

122. Counsel acknowledged that he could not identify any order made by the Judge which would be affected if the adverse findings of credit were set aside.

123. In our view, this ground of appeal rests on a misapprehension. The appellant may well be disappointed that the Judge regarded her as unimpressive witness, but appeals lie against the orders of a trial judge: not against the judge's reasons. It is accordingly unnecessary to address this ground further.

Ground 3.2 – the timing of the Pre-nuptial Agreement

124. The appellant did not pursue this ground.

Ground 3.3 – de facto enforcement of the Pre-nuptial Agreement

125. By Ground 3.3, the appellant contends that the Judge "misdirected himself" by enforcing, in effect, the PNA despite not ruling on its validity and enforceability, despite the ruling of Saksak J on 14 April 2021 (to which we will return shortly) and despite Reg 5 of the Queen's Regulation.

126. On its face, this ground seemed to be a complaint about, at the least, the orders in [135(a) and (b)] of the judgment, that is, the orders providing for the appellant's right of continued residence in the marital home. This was a curious complaint for the appellant to make as these orders were favourable to her.

127. We also note that the ground was argued only faintly, with the appellant submitting little more than that the Judge had "fashioned, in effect, a judicial will from the rump of the [PNA]". This meant that it was not made clear whether the ground was really pressed.

128. As will be seen, we will uphold the ground in Mr Russet's cross-appeal by which he challenges the making of the order in [135(c)]. Mr Russet did not, however, challenge the making of the orders in [135(a) and (b)].

129. In the circumstances we consider it appropriate to regard Ground 3.3 as directed only to the orders in [135(a) and (b)] and to conclude that the appellant did not press the ground. It will accordingly be dismissed.

Ground 3.4 – Mr Russet's contribution to the Tagabe farming operation

130. The primary Judge accepted Mr Russet's evidence that he and his father had worked closely together and had increased the value and productivity of the Tagabe farming operation and the associated quarry, at [95].

131. By Ground 3.4, the appellant contended that the Judge had erred in considering that there was "evidence that the efforts of [Mr Russet] had increased the value or productivity of the farming operation, generally or in excess of the sum [Mr Russet] was paid for his work".

132. In our view, this ground involves something of a "straw man" submission. It was not necessary for Mr Russet to show that the "value" of his contributions had exceeded the allowance he received from his father nor to engage in some form of comparative analysis of the benefits he had received from his father and those his father had received from him. Certainly, counsel did not point to any authority for the submission and, ultimately, acknowledged that it was again a complaint about the Judge's reasons which was not directed to any particular order the Judge had made.

133. We note, in any event, two further matters bearing on this submission. First, Mr Russet gave evidence of the activities which he had undertaken on the farm. Some of these involved relieving his father from the burden of administration which, while no doubt a benefit for the deceased, may not have produced any tangible increase in the value of the farm or its productivity. Other activities do seem to have involved practical improvements on the farm or in the manner of its operations. Mr Russet also deposed to activities which the deceased would not have been able to complete had he or she worked alone. The Judge accepted that evidence.

134. Secondly, the submission again seemed to overlook the nature of the detrimental reliance on which Mr Russet's claim rested.

135. This ground of appeal fails.

Ground 3.5 – proof of detriment

136. We have dealt with this ground above. It is not necessary to repeat the reasons. This ground fails.

Conclusion on the appellant's Notice of Appeal

137. For the reasons given above, the appellant's appeal wholly fails.

The cross-appeal

Ground 1 – the order for payment of a monthly allowance

138. Mr Russet's cross-appeals against the order that the appellant receive a monthly allowance of VT 300,000 from the earnings of the Tagabe farming operation. The Judge explained this order in [132]-[135] of his reasons, set out earlier in this judgment.

139. There was evidence in the trial that the deceased had been giving the appellant a monthly allowance of VT 200,000, increased at some time before his death to VT 300,000. Mr Russet conveyed in an email on 21 September 2017 to the solicitors preparing the PNA, his father's request that the PNA provide for the appellant to be "entitled to reside in their home on the farm until her death and [be] entitled to a monthly allowance of 300,000 VT per month". However, the PNA executed by the deceased and the appellant made no provision for that allowance. We note that the provision in the PNA for the deceased's right of residence also departed from the terms of the instructions conveyed by Mr Russet to the solicitors.

140. Mr Russet complains, on three bases, of the order in [135(c)] of the Judge's reasons for payment of the monthly allowance:

(a) the order had been made in breach of the obligations of procedural fairness in that its subject had not been the subject of any pleading, or of any submissions, at the trial and the Judge had not forewarned the parties that he was contemplating such an order;

(b) the order was informed (using the terminology of Deane J in *Muschinski v Dodds* [1985] HCA 78; (1985) 160 CLR 533 at 615) by "idiosyncratic notions of fairness and justice" rather than by legal reasoning and principle. Had the Judge proceeded in accordance with proper principle, he would not have limited the equity to the "bare necessity", but would have given prominence to the

performance of Mr Russet's expectation induced by his detrimental reliance on the deceased's promise and notions of proportionality; and

(c) if, contrary to his own submission, Regs 5 and 6 of the Queen's Regulation are applicable, the appellant will be entitled to approximately one-third of the deceased's residual estate (excluding the Tagabe farming operation). This is likely to be an inheritance of more than VT 100 million, with the consequence that neither promissory estoppel nor "idiosyncratic notions of fairness" warranted an additional order for a monthly payment of VT 300,000 from the earnings of the Tagabe farming operations.

141. It is plain that the appellant did not, by a pleading or submission, make any claim for payment of the monthly allowance. Counsel for the appellant did not contend to the contrary, and did not dispute that Mr Russet had not been on notice that such an order was contemplated.

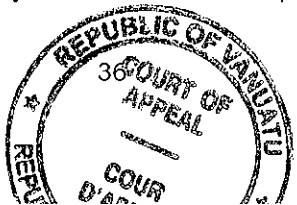
142. In these circumstances, it is not necessary to discuss the principles of procedural fairness in any detail. It is sufficient to repeat what this Court said in *Naliupis v Buletare* [2022] VUCA 2 at [34]:

> *"... An insistence on proper pleading is not merely a matter of technicality or of form for its own sake. Pleadings serve an important function in the fair conduct of litigation. One of their functions is to state with sufficient clarity the case which must be met by the defendant at the trial. In this way pleadings serve to ensure that a basic requirement of procedural fairness is satisfied, namely, that a party has a fair opportunity of meeting the case against him or her. Pleadings also define the issues for the Court's decision ..."*
>
> (Emphasis added and citations omitted)

143. We accept Mr Russet's submission that the absence of notice at the trial that such an order was contemplated has caused him prejudice. Amongst other things, it has meant that he has lost the opportunity to explore in the evidence the reason why the PNA did not include a provision for the allowance which he had communicated in his email of 21 September 2017 to the solicitors. One possibility is that the deceased had changed his mind about the allowance and countermanded the instruction conveyed by his son to the solicitors.

144. Mr Russet has been denied the opportunity of investigating these matters, including by questioning the two solicitors involved in the preparation and execution of the PNA, both of whom gave evidence in the trial.

145. To our minds, this is sufficient by itself to warrant the upholding of this ground.



146. We add that we also consider there is considerable force in Mr Russet's submission that this order of the Judge is based on "idiosyncratic notions of fairness", rather than underlying legal principle. Given that the deceased had a substantial residual estate apart from the Tagabe farming operation, that the instruction conveyed by Mr Russet had not contained any reference to the monthly allowance being funded from the earnings of the Tagabe farming operation, that both the appellant and the deceased had been willing to execute the PNA without it containing any reference to a monthly allowance at all, let alone one from the earnings of the Tagabe farming operation, and that the appellant had not raised in the trial any claim to payment of an allowance, it is difficult to identify a principled basis upon which to conclude that Mr Russet's equity was conditioned upon his compliance with the condition imposed by the Judge.

147. Likewise, we consider that there is considerable force in Mr Russet's third submission in support of this ground. If, as we think is the case, the appellant is to receive one-third of the very substantial residual estate after the Tagabe farming operations have passed to Mr Russet, it is not easy to see a basis on which it would affront the conscience of the Court if she did not also receive a monthly allowance of VT 300,000.

148. Each of these additional contentions of Mr Russet also justify the upholding of this ground of appeal.

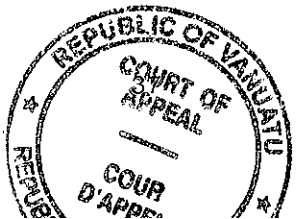
149. This ground of the cross-appeal is upheld.

Ground 2 – Did the promises in the PNA constitute property capable of passing to Mr Russet?

150. We set out at the commencement of these reasons the ways in which Mr Russet sought to rely on the appellant's execution of the PNA. This was the means by which Mr Russet sought to have the whole of the intestate estate made subject to the constructive trust, and not just the Tagabe farming operations. Mr Russet submitted that the Judge had misunderstood aspects of these claims and therefore had not addressed properly the claim he had made at trial.

151. In his final submissions at trial, Mr Russet had submitted:

> *"In SoC [29], it is pleaded that the promises in the PNA were property possessed by the Deceased at the time of death, and by reason of Reg 6 of the Queen's Regulation vested in the Administrator. Clearly, they directly benefit [Mr Russet] and it would be the duty of the Administrator to distribute them to [Mr Russet]. [Mr Russet] as assignee of the whole contract can then enforce it."*



152. Two things may be noted about this submission. First, Mr Russet submitted that the promises in the PNA were "property possessed by the deceased at his death", and, secondly, Mr Russet was submitting that the Court should invoke the Queen's Regulation in relation to that property. However, the Judge addressed an earlier submission made by Mr Russet with respect to the significance of the PNA, because he said:

> *"Thirdly, it is contended that Mr Russet is able to hold Ms Huang to the contents of the [PNA], 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."*

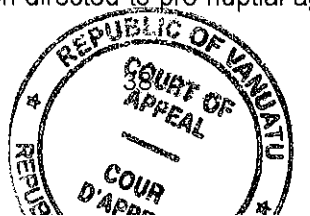
153. The Judge dealt with this aspect of Mr Russet's submission by saying:

> *"[44] I do not consider there is scope for Mr Russet [to be] 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] ... [a]t 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."*

154. It was in the light of these reasons that Mr Russet submitted that his contention that the appellant's promises were property of the deceased which had passed to the administrator had not been addressed.

155. We consider that there is some force in this submission but, for the reasons which follow, conclude that Mr Russet could not, in any event, have succeeded with this claim, and that this ground of appeal must fail.

156. Earlier, we referred to the judgment of Saksak J in *Russet v Russet & Warmington* delivered on 14 April 2021. In that judgment, Saksak J answered questions referred to him in the probate proceedings concerning the intestate estate. Eleven questions had been referred (three by the appellant, one by the Administrator and seven by Mr Russet) and Saksak J answered four of them. One of the questions was "Does a pre-nuptial agreement override the application of [the Queen's Regulation] as regards to distribution of an estate in the circumstances where the deceased died intestate?". Although this question seems to have been directed to pre-nuptial agreements generally, it is evident



that Saksak J answered the question (appropriately) by reference to the PNA in issue presently.

157. Saksak J answered the question in the negative saying:

> *"[10] Section 5 of QR No 7 of 1972 excludes and limits the operation of the [PNA] from having any validity to the administration of [the] estate.*
>
> ...
>
> *[12] ... [The PNA] is not a will and cannot amount to a valid testamentary document made under or for the purposes of the Wills Act.*
>
> *[13] Clause 9 of the Agreement extends its ambit to death of one or both parties. But this clause is inconsistent with the Wills Act and Section 5 of the QR7 No 7 of 1972. The [PNA] is therefore not valid and cannot have validity to the administration of the estate of [the deceased]. "*
>
> (Emphasis added)

158. Relevant for present purposes is the express finding of Saksak J that the PNA is not valid, and could not have any validity to the administration of the deceased estate. There was no appeal against that judgment. This means that the validity of the PNA for present purposes was conclusively determined by Saksak J. It creates an issue estoppel binding both the appellant and Mr Russet. If, as Saksak J has found, the PNA did not have any validity in the administration, then it is not possible for it, as Mr Russet contends, to have comprised property capable of vesting in the administrator, let alone property capable of being conveyed by the administrator to Mr Russet.

159. Counsel for Mr Russet sought to avoid this conclusion by contending that Saksak J had not in fact finally answered the questions. In support, he referred to [14] in which Saksak J concluded the judgment:

> *"[14] The Court defers its answers to the Questions of the respondent pending further written submissions in support or in opposition to, or in the event the Court's answers to the first 4 questions do not finally settle the issue between the applicant and the respondent, as regards the estate of the deceased."*

160. Contrary to counsel's understanding, we think it plain that Saksak J was deferring consideration only of the seven questions posed by the Mr Russet, leaving it open to the parties to present further submissions on those questions in the event that they did not regard the answers to the first four questions as finally settling the issues between them in relation to the deceased's estate. That is to say, it was open to the parties to present

further submissions *in relation to Mr Russet's questions*, but not in relation to the first four questions which Saksak J had answered.

161. This conclusion makes it unnecessary to address the appellant's alternative submission which was that the PNA was, in any event, void as being contrary to public policy. We would prefer to defer addressing the important issues to which that submission gives rise until it is necessary to do so.

Ground 3 – Did the appellant's promises in the PNA create an equity in favour of Mr Russet?

162. By Ground 3, Mr Russet complained of the Judge's rejection of his claim that the representations of the appellant in the PNA that she would not claim an interest in the deceased's assets had given rise to an equity in his favour (as distinct from his father). Counsel submitted that the Judge had not taken a sufficiently comprehensive view of the circumstances and, in particular, had not recognised the "interplay" between the representations of the appellant, on the one hand, and the equity created by the deceased's representations to him on which he had relied for the claim of constructive trust over the Tagabe farming operations, on the other.

163. Counsel's submissions traversed some interesting questions but it is not necessary to address them. That is because it is plain that this particular claim of Mr Russet fails at a more basic level, namely, his failure to prove the pleaded reliance, let alone detrimental reliance, necessary as the foundation for the estoppel he asserts.

164. Mr Russet's pleaded case was that, by reason of his belief in the truth of the representations made by the appellant in the PNA and the deceased's desire that he inherit the assets as sole heir, he had given "his blessing" to the marriage occurring. That was sole action Mr Russet said he had taken in reliance on the appellant's representations and said to found the claimed equity.

165. However, in his evidence in chief, Mr Russet did not depose to having taken any positive actions in reliance on the appellant's representations. In particular, he did not depose to having given his blessing to the marriage, let alone explain what that meant. He deposed instead to what he "would have" done had the appellant not signed the PNA, by saying:

> *"[39] As far as I was concerned if Li Ya had refused to sign a pre-nuptial agreement I would have told my father that I objected to the marriage. I*

would have informed him in strong terms of the sacrifices my family and I have made, the life and opportunities that we had given up in Australia and the risk to us that there was no agreement protecting us from Li Ya making a claim on his estate if they divorced or he died., In those circumstances I am confident that my father would have deferred the marriage until the pre-nuptial agreement was signed, because we needed the assurance of the promises Li Ya was making in it."

(Emphasis added)

166. Thus, Mr Russet's evidence at trial was that, by reason of the appellant's representations, he had refrained from taking action, rather than that he had positively given the marriage his blessing. That was a different form of claimed reliance. A second difficulty with Mr Russet's evidence on this topic is that, generally speaking, evidence of that kind is regarded as problematic because it concerns what would have occurred in a hypothetical circumstance (the witness not having actually to have addressed the circumstance at the time) and the potential for retrospective rationalisation in way that suits the witness' interest. See for example: *Rosenberg v Percival* [2001] HCA 18, (2001) 205 CLR 434 at [26]; and *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25, (2009) 238 CLR 304 at [146].

167. In this case, Mr Russet's evidence was further undermined by his acknowledgement in cross-examination that his father had not ever asked for his permission to marry the appellant, and his further acknowledgement that the marriage would still have gone ahead even had he objected to it (Judge's notes at 47).

168. In these circumstances, the Judge's finding at [51] that 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" is unassailable. That being so, Mr Russet did not establish a minimum requirement for the estoppel he asserted.

169. This means that Grounds 3 and 4 of the cross-appeal fail. Mr Russet did not establish the equity which was the subject of Ground 3 and therefore could not establish that the Judge was in error in not deciding that the constructive trust extended to the whole of the deceased's estate, as contended in Ground 4.

Ground 5 – the application of the French Civil Code

170. For the reasons given in relation to the appellant's Ground 1.6, Mr Russet's contention that the Judge was in error in not finding that the French Civil Code applies to the administration of the estate also fails.

Ground 6 – costs

171. As noted earlier, the Judge ordered the appellant to pay VT 750,000 towards Mr Russet's legal costs.

172. Mr Russet submitted that the Judge had erred in fixing these costs without hearing from the parties and because the costs allowed were manifestly insufficient. Counsel emphasised in this respect the substantial property which was in dispute in the litigation, the substantial number of issues in dispute (reflected in part by both parties retaining two counsel at trial with lead counsel coming from Australia), the length of the trial (five days) in addition to interlocutory activity, and the substantial preparatory work which had been necessary.

173. Counsel for the appellant opposed this ground, pointing out that the figure of VT 750,000 may well have reflected an apportionment of the costs, having regard to the number of issues upon which Mr Russet had failed at trial.

174. The purpose of an order for costs is well understood, being that stated by the High Court of Australia in *Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403 at [11]:

> *"It has not been doubted since 1278 ... that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.'*

175. It is important to keep in mind what is meant by an indemnity in this context. The general rule is that a successful party is entitled to be indemnified by the unsuccessful party in respect of the costs which were reasonably incurred *as between the parties themselves*. For that reason, these costs are commonly referred to as "party-party costs". It frequently happens that a party will incur costs greater than party-party costs but, unless entitled to an order for solicitor-client costs or indemnity costs, will not be able to recover the additional costs from the unsuccessful party. That is why Courts do not start with the notion that party-party costs should reflect the full measure of costs the successful party has *actually* incurred. If parties incur more costs than were reasonable as between the parties, they will have to meet the burden of those costs themselves.

176. We agree with counsel for the appellant that the figure of VT 750,000 is likely to reflect some apportionment of party-party costs to which Mr Russet may otherwise have been entitled. It is probable that the Judge considered that Mr Russet should not be able to recover costs on the issues on which he had wholly failed. That is especially so as a

significant amount of the trial was spent on the evidence and submissions concerning the circumstances in which the PNA was made, and Mr Russet failed on the claims based on the appellant's execution of the PNA.

177. Even so, we think that there is force in Mr Russet's submissions and that the costs awarded by the Judge were not, even after apportionment, an appropriate measure, on a party-party basis, of his entitlement to costs. The features of the litigation to which counsel referred and which are mentioned above justified a much larger order for costs than would ordinarily be the case.

178. Mr Russet sought an amount of costs which approximated two-thirds of an indemnity for costs. An award of that kind would not be appropriate because, as just explained, there is no basis in principle for the costs to be fixed by reference to a full indemnity.

179. It is desirable for a lump sum order for costs to be made. This will save the costs of a taxation and avoid the risks of the assets of the estate being further depleted.

180. In our view, an order for trial costs in Mr Russet's favour of VT 2,500,000 is appropriate, noting that this is still well less than the costs said by counsel to have been incurred on each side.

Summary

181. For the reasons given above, the appellant's appeal fails wholly. This means that the appellant's challenge to the primary Judge's finding of a proprietary estoppel and the constructive trust fail. While we have accepted the appellant's submission that the intestate estate is to be distributed in the manner for which Reg. 6 of the Queen's Regulation provides, the property of the deceased to which that regulation refers does not include Mr Russet's equitable interest arising from the constructive trust in his favour. Mr Russet is entitled to have effect given to that trust. The consequence is that we will not disturb the Judge's order in [134] that the farming operation at Tagabe and all that it includes by way of land, dwelling houses, fixtures and chattels be distributed to Mr Russet on the winding up of the administration.

182. Mr Russet succeeds on Grounds 1.1 and 6 of the cross-appeal. The first means that we uphold Mr Russet's contention that the Judge should not have found that the appellant is entitled to payment of a monthly allowance of VT300,000 from the earnings of the Tagabe farm. The second means that we accept Mr Russet's contention that the costs of VT 750,000 allowed by the Judge are inadequate. We allow VT2.5 million instead.

183. The remaining grounds of the cross-appeal are dismissed. This means that we have rejected Mr Russet's claim that the proprietary estoppel extends to the whole of the deceased's intestate estate.

184. We have also rejected Mr Russet's claim that the intestate estate is to be distributed in accordance with Articles 731 and 767 of the French Civil Code as in force when Vanuatu became independent on 30 July 1980.

185. We make the following orders:

(a) The appeal is dismissed;

(b) The cross-appeal is allowed in part;

(c) The order made by the primary Judge in [135(c)] of the judgment is set aside;

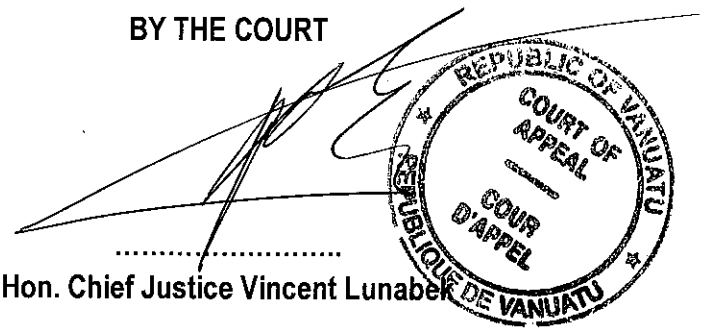
(d) The order for the appellant to pay VT 750,000 towards Mr Russet's trial costs is set aside and in its place there be an order that the appellant pay VT 2,500,000 towards Mr Russet's legal costs. In the event of non-payment, the second respondent is to use funds from the appellant's share of the residuary estate to meet this order; and

(e) The cross-appeal be otherwise dismissed.

186. We will hear from the parties with respect to the costs of the appeal and cross-appeal..

DATED at Port Vila this 18th day of November 2022

BY THE COURT



.....

Hon. Chief Justice Vincent Lunabek