IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Matrimonial Jurisdiction)

Matrimonial Case No. 08 of 2002

BETWEEN: DANIEL GUY JOLI
Petitioner

AND: PATRICIA MICHELLE JOLI
Respondent

AND: CEDRIC MAROQUIN
Co-Respondent

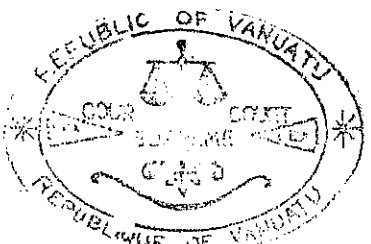
RULING RE WHAT CONSTITUTES MATRIMONIAL ASSETS

In 1980 the petitioner and respondent started living together as man and wife. They have two children, Alexandra born on 15th January 1990 and Alexia Born on 23rd May 1992. On 3rd January 1992 they were married. In the early months of 2002 they separated. Both parties say there is no prospect of reconciliation.

There is a substantial number of matrimonial assets, some of significant value, which must be divided up. There is a dispute as to whether certain assets are to be regarded as matrimonial assets or purely those of the petitioner. The assets concerned are: -

1. His interest in the two leasehold titles numbered 12/0634/009 and 12/0634/010.
2. Shares in the companies a) Pactec Limited b) Snoopys Stationery and Office Supplies and c) Orchid House Limited.
3. The interests in a) Hereton b) Salt Water Fishing Adventures and c) Multiclean Limited.

I have heard the evidence of Daniel Joli, including his affidavits of 2nd and 20th September 2002, 28th January 2003 and 14th February 2003. I have heard the evidence of Patricia Joli, including her affidavits of 6th and 20th September 2002 and 6th February 2003.



There is no Vanuatu statute which addresses the issues in this case. The Matrimonial Causes Act [CAP. 192] is silent on the matter. Whilst the case of Patricia Molu and Cidie Molu (Civil Case No. 30 of 1996 and Matrimonial Case No. 130/96) dealt with the division of matrimonial property it did not specifically consider which property is to be regarded as matrimonial property and which not.

In Geoffrey Kong –v- Rachael Kong (Civil Appeal Case 10 of 1999) at pages 20 –21, the Court of appeal stated "*Counsel points out that the Matrimonial Causes Act does not vest jurisdiction in the Supreme Court to make orders for the settlement of matrimonial property – at least otherwise than as part of a maintenance order. That is so. The jurisdiction of the Court to deal with matrimonial property arises under the application, in Vanuatu of the Married Women's Property Act 1898, (sic), (UK). The Court also has in its general original jurisdiction power to make orders regarding legal or equitable interests which the parties may have in property. These are not jurisdictions invoked by a petition under the Matrimonial Causes Act ... In a matrimonial cause when there is an associated property claim it is common practice to issue separate proceedings in the general jurisdiction of the Court, and for the two matters then to be heard together*".

How is the Court determine which assets are matrimonial property and which are not?

This raises fundamental questions about the nature of a marriage relationship in Vanuatu at the beginning of the twenty-first century.

The starting point is the Constitution. Article 5 (1) states that "*... all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of ..... sex .....*" The fundamental rights and freedoms are listed. The whole tenor of this provision and the Constitution itself is that under the Constitution and in law there is to be no discrimination on the grounds of sex.

Article 1 (k) in fact guarantees "*equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons ...*".

Vanuatu is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention was ratified by Act No. 3 of 1995 which came into force in Vanuatu on 14th August 1995. That Convention is aimed at the elimination of all forms of discrimination against women.

As part of the preamble it states, "*Bearing in mind the great contribution of women to the welfare of the family and to the development of society so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.*

"Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women."

Article 5 (a) requires State Parties to take all appropriate measures, "*to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles of men and women*".

Article 16 states

> "*1, States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> ....
>
> *(c) The same rights and responsibilities during marriage and its dissolution*
>
> ...
>
> *(h) The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.*"

In these terms the thinking behind the Married Women's Property Act 1882 can have little application in Vanuatu today. The

Constitution and law of Vanuatu envisages full equality between men and women and actively aims at the elimination of all forms of discrimination.

The parties in this case are both francophone and culturally come from a French background. Neither counsel invited the Court to examine whether or not French law applied or could apply in this case and if so the law as of which date.

The parties started living together at the end of 1980. They were actually married on 20th January 1992. They separated in early in 2002.

The petitioner says she has been employed throughout the entirety of their time together. Her parents helped in the early days with accommodation for them and work for the petitioner. Over the years businesses were formed some thrived, some didn't. Monies of hers and his went into those businesses and the home. She worked throughout. She contributed to the well-being of the family to the limit of her assets. At the time of the marriage she owned the leaseholds of two pieces of land and a car. At that time the petitioner only had an interest in one business. There were joint bank accounts, the petitioner might have also had accounts. She says she paid the household running expenses. She says if the petitioner's argument is correct she will leave the marriage with virtually no assets, he will have valuable business interests. His open negotiations to settle the property dispute clearly regarded the businesses as matrimonial assets.

The petitioner accepts all the property save that listed above is matrimonial property. However, he says his interests in the two (different) leases, and the various businesses belong to him alone. It is not matrimonial property. The businesses were built up by him, the earnings were put to the welfare of the family, but the interests in the businesses were separate. They should be excluded from any settlement talks.

From 1980 to 1992 the parties were to all intents and purposes married, save for a formal ceremony. That took place in 1992 and the marriage subsisted for another ten years, albeit deteriorating in latter years.

In my judgment, in these circumstances, for the purposes of making this ruling I look at the whole period from 1980 until 2002.

There is therefore a relationship of over twenty years. Each party contributed to the family over those years. Assets are held, some in joint names, some in separate names.

The concept of a pooling of assets, incomes and interests was considered in Wachtel –v- Wachtel (1973) 1AER p. 829. At p. 836 Lord Denning stated "*The phrase 'family assets' is a convenient short way of expressing a concept. It refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole ... The family assets can be divided into two parts (i) those which are of a capital nature, such as the matrimonial home and the furniture in it; (ii) those which are of a revenue – producing nature, such as the earning power of husband and wife.*" (It must be remembered that this was an action brought under a specific United Kingdom Act and there has since been change in the United Kingdom.)

In my judgment this approach more nearly reflects the state of the law in Vanuatu today than imported and often old statutes and common law. It is also more in keeping with French law. (See also the Working Paper in the Journal of South Pacific Law. "*What is the Matrimonial Property Regime in Vanuatu,*" August 2001, by Sue Farran).

Upon the breakdown of a marriage there will be assets held in joint names and individual names. Some of those assets will clearly belong to one or the other, for example, clothing, a special eighteenth or twenty-first birthday present given to one party by a relative, a birthday present from one party to the other. In a marriage of any duration there will be assets which have been bought, created or acquired during the currency of the marriage.

In my judgment there is presumption that all such assets are beneficially owned jointly, no matter whose name they are in or who in fact paid for them, made them or acquired them. That presumption can be rebutted concerning any asset by showing that it was the intention of the parties that at the time of its

acquisition or subsequently both intended it should be the sole property of one.

Upon reading the affidavits of both parties and hearing the evidence it is clear that indeed in this case they regarded their contributions and activities as building up the family assets and the use of those assets as being for the advancement of the welfare of the family as a whole. The petitioner pointed out that Multiclean was set up after the separation and, whatever the outcome, could not be a matrimonial asset. I am satisfied it is a matrimonial asset. Work to set up the business started before the separation, it started trading afterwards.

I cannot find on the evidence anything to rebut the presumption that all the assets in dispute are beneficially owned by both parties. Accordingly I rule that all the assets listed as being in dispute are matrimonial assets for the purposes of negotiation for a settlement.

It must be remembered that the parties in this case are not affected by custom law considerations. It is in this context that this judgment is made. The Constitution and statute law and Convention principles do apply to all people. Questions of matrimonial property might require more refinement, where considerations of custom bear upon the relationship of the parties and their property.

There is an important, further consideration in this case. There was a petition and a cross-petition making various claims and cross-claims. Neither referred to the matrimonial property, although there was a claim for "*further and other relief*".

On 21st June 2002 a decree nisi was granted by the Magistrates Court and the case was transferred to the Supreme Court. On 16th July 2002 a "Notice of Motion for Ancillary Relief" was filed. That included claims in respect of custody, access and maintenance and required disclosure of all matrimonial property in the possession of either party and orders determining the parties respective shares and a proper division of the property.

Shortly afterwards there was conflict concerning the physical possession and preservation of some items. This was addressed by urgent, interim Court Orders. On 19th November a date was set to "*define what are the matrimonial assets for the purposes of a*

settlement ..." Directions were given for the exchange of lists and affidavits.

No point was taken by either counsel as to whether the Court has jurisdiction under the current proceedings to make such a determination. Indeed, both were desirous of the Court deciding the issues within the cautilage these proceedings.

It is has not been argued before me whether or not the Court can utilise its inherent jurisdiction to hear the property claim as part and parcel of one action involving everything that flows from the breakdown of the marriage, albeit the proceedings are commenced under Matrimonial Causes Act. This was not argued in Kong –v- Kong. Indeed, given the course of those proceedings there was no practical gain to anyone in arguing the point. The judge at first instance had given the parties "liberty to apply within 2 days notice for matters of maintenance, *"the property settlement"* and access. Counsel accepted there was no jurisdiction and the common practice was to issue separate proceedings. It must be pointed out that in this jurisdiction there are in fact few cases involving disputes over matrimonial property.

The Court has unlimited jurisdiction to *"hear and determine any civil or criminal proceedings"* under Article 49 (1) Constitution. Article 47 (1) also states *"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"*.

Section 29 (1) Courts Act states "*Subject to the Constitution, any written law and the limits of its jurisdiction a court shall have such inherent powers as shall be necessary for it to carry out is functions.*"

In practical terms it is absurd for parties to be obliged to commence two actions, one for matters of divorce, custody, maintenance and co-respondents and a separate one for the matrimonial property, albeit they will be joined as soon as they are issued.

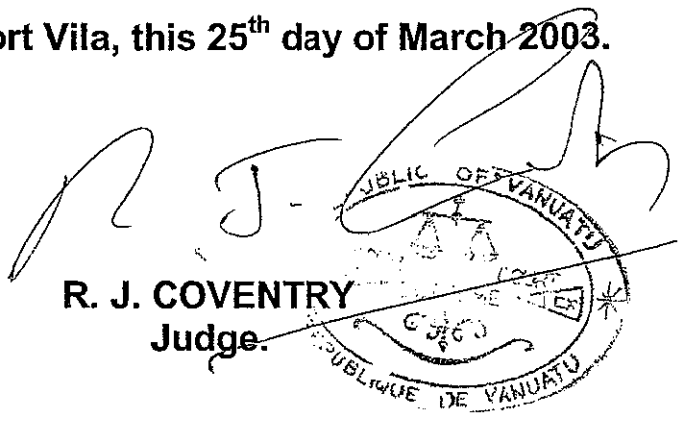
Can the Court only have jurisdiction in these proceedings by virtue of and to the limit of the Matrimonial Causes Act? Further,

therefore, if any property dispute exists a separate action must be brought? I am of the opinion that the Court, within the Constitution and its inherent powers can decide disputes relating to matrimonial property whilst dealing with a petition for divorce. Any such claims should be clearly set out and not included in "*further or other relief*".

Accordingly there is no need to require the issue of fresh proceedings and their joinder to decide the matters in dispute in this case.

Whilst it is not part of this Ruling it would appear that the financial circumstances of some of the businesses might not be good and this necessarily will bear upon the respondents interests.

Dated at Port Vila, this 25th day of March 2003.



R. J. COVENTRY
Judge.