

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

Civil
Case No. 20/2639 SC/CIVL

BETWEEN: Susan Noel
Claimant

**AND: Marie-Pierre Malere as Administratrix
of the Estate of late Raymond Malere**
Defendant

AND: Ameren Rowalere Delagroux
Interested Party

Date of Trial: 18 & 19 April 2023
Before: Justice V.M. Trief
In Attendance: Claimants – Ms V. Muluane
Defendant – Mr L. Tevi
Interested Party – Mr D. Yawha, via video link to Luganville Court House
Date of Decision: 20 February 2024

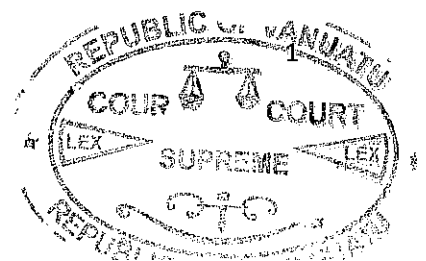
JUDGMENT

A. Introduction

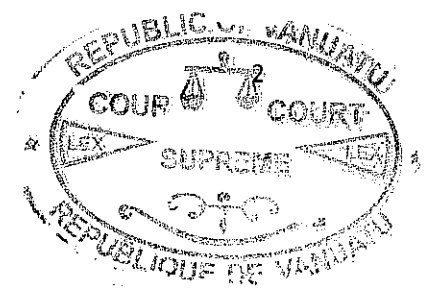
1. This was a contested claim against the administratrix of an estate alleging that she breached her fiduciary duties. The subject property at the heart of the dispute is a leasehold property at Sarakata area in Luganville on Santo.

B. Background

2. Raymond Malere (deceased) and his wife and widow Defendant Marie-Pierre Malere lived in a house at leasehold title no. 03/OI72/012 at Sarakata area at Luganville on Santo (the 'property'). The Claimant Susan Noel also lived at the property, in a different house.
3. Mrs Noel and the Interested Party Amerene Rowarele Delagroux (maiden name "Noel") are sisters.



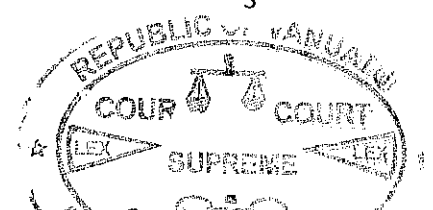
4. On 24 March 1996, the lease between the Minister of Lands (lessor) and Mr Malere (lessee) was registered.
5. On 15 May 2000, Mr Malere filed Supreme Court Case No. 09 of 2000 ('CC 2000/09') seeking orders evicting Mrs Noel from the property.
6. By judgment dated 19 July 2002, the Supreme Court ordered Mrs Noel's eviction from the property.
7. On 30 October 2002, the Court of Appeal noted that the appeal had been allowed by consent, returned the matter to the Supreme Court for rehearing and advised the parties to settle the dispute over the property: *Noel v Malere – Note* [2002] VUCA 32.
8. On 4 June 2003, counsel for Mr Malere, Mrs Noel and Mrs Delagroux signed Consent Orders/Agreement to settle in CC 2000/09 in which they agreed as follows (the 'Consent Orders'):
 - a. [To] settle the matter by:
 - i) The plaintiff [Mr Malere] agree that the first respondents [Mrs Noel and Mrs Delagroux] shall have the plot of land within leasehold title no. 03/OI72/012 surveyed and registered in the names of Susan Noel and Amarene Warele Delagroux, in the current state of the boundary marks;
 - ii) The plaintiff and first respondents agree that upon completion of survey a new title will be created to indicate rights and interests to be possessed by the plaintiff and Susan Noel and Amarene Warele Delagroux;
 - iii) Civil Case No. 9 of 2000 is hereby discontinued; and
 - iv) Each parties [sic] meet their own costs.
9. The Consent Orders have not been challenged or set aside or quashed by a Court Order.
10. On 27 September 2009, Mr Malere passed away without complying with the Consent Orders.
11. In 2011, Mrs Malere applied for letters of administration of her husband's estate in Probate Case No. 07 of 2011 (the 'Probate Case').
12. Mrs Noel and Mrs Delagroux opposed Mrs Malere's application to be appointed administratrix on the basis that there were signed Consent Orders to settle the long-outstanding dispute over the lease, which Mr Malere had not complied with.
13. On 19 April 2012, the Supreme Court in the Probate Case appointed Mrs Malere as administratrix of Mr Malere's estate.



14. On 4 April 2014, the lease was transferred by transmission to Mrs Malere (that is, from the deceased to the surviving spouse/joint proprietor).

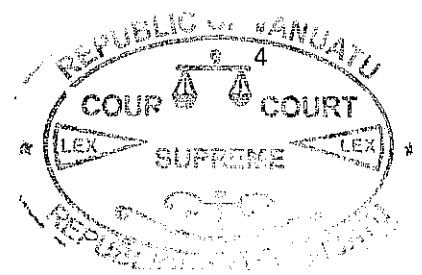
C. Pleadings

15. By the Further Amended Claim filed on 16 March 2022, it is alleged that Mrs Malere's administration of the estate was subject to the Consent Orders/agreement to settle signed on 4 June 2003 in CC 2000/09. That is, that Mrs Malere as administratrix of the estate had an equitable obligation to subdivide the property and transfer one of the derivative titles in accordance with Mr Malere's agreement/obligation to do so under the Consent Orders.
16. Further, that Mrs Malere's duty as administratrix and trustee of the estate was to take all the necessary steps to dispose of the estate which included complying with the Consent Orders to subdivide the lease into two within a reasonable time.
17. It is alleged that Mrs Malere as administrator of the estate breached her fiduciary duty when:
- a. She refused to subdivide the property into two despite the many requests from Mrs Noel and Mrs Delagroux to comply with the Consent Orders and to keep her promise that she made in the Probate Case;
 - b. She hindered the subdivision of the lease when she mortgaged the lease in 2020 for VT3,638,439;
 - c. She obtained the loan and mortgage from the Bred Bank as she was not acting for the benefit of the estate but for the benefit of her two children who obtained the loan;
 - d. She wrongfully and illegally enriched herself by keeping the property for herself and for her own benefit instead of complying with Mr Malere's obligation under the Consent Orders;
 - e. After the property was transferred to her name, she kept it wholly for her own benefit instead of subdividing it in accordance with the Consent Orders;
 - f. She misrepresented to the Bred Bank that she owns the whole lease, or was silent as to only holding half of the property and holding the other half on trust for Mrs Noel and Mrs Delagroux, and that she should have disposed of their half of the property before she obtained a mortgage on half of the property only;
 - g. She caused damage to the house and allowed the house situated on Mrs Noel and Mrs Delagroux's half of the property to be destroyed. This was a two-bedroom house of 80 m² area which could have been rented out for VT70,000 per month if it had not been damaged by Mrs Malere including



by her refusing to allow Mrs Noel to repair the roof leak which began in 2010. She further damaged the house in February-March 2017 when her agents removed the roof and structure of the house so that it has been completely ruined. Loss of rental claimed from 2010-2020 is VT10,080,000 and to restore the house to an inhabitable condition is VT8,283,800; and

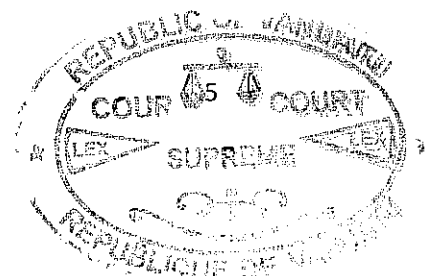
- h. On 11 November 2020 (2 days after the Claim was filed in the present proceedings), she signed a deed of release and settlement solely with Mrs Delagroux – excluding Mrs Noel – agreeing to comply with the Consent Orders but on terms which exclude Mrs Noel.
18. Further, it is alleged that Mrs Malere has committed fraud in that she misrepresented that she was the owner of the full lease when she lodged her application for transmission with the Director of Lands and when she applied to the Bred Bank for a mortgage.
19. On 14 April 2023, the Claimant filed the Amended Application to Amend the Remedies in the Further Amended Claim. At the commencement of trial, Mr Yawha counsel for the Interested Party conceded to the Application. Defendant's counsel Mr Tevi did not have instructions as to the application. I ruled that it was a matter for the Claimant what remedies she was seeking and granted the Application. As a result, the relief sought in the Amended Claim is as follows:
1. *Make a declaration that the Defendant committed a breach of trust;*
 2. *Make a declaration that the Defendant has committed a fraud;*
 3. *For the Defendant to account for the mortgage and the use of the monies obtained through it;*
 4. *Order the Defendant to:*
 - i) *Surrender the leasehold title 03/OI72/012 and create two new leases at the estate's costs or the Defendant's costs;*
 - ii) *Do all necessary steps to register one of the new [derivative] leases... in the Claimant and Interested Party's names at the estate's costs;*
 5. *If the Defendant does not proceed with order 4 within the Court's Judgment, or if the lease cannot be subdivided into two because of the mortgage on the lease, the Court must order the sale of the lease as follows:*
 - a) *That the Sheriff of the Supreme Court of Vanuatu immediately seize and sell the lease;*
 - b) *That the proceeds of the sale be put into the Chief Registrar's Trust Account and should be distributed as follows:*
 - i) *Firstly, pay off the mortgage;*
 - ii) *Out of the balance, as priority to pay:*
 - a) *The value of half of the lease (i.e. 512 m²) to Mrs Noel and Mrs Delagroux;*



b) *Any other damages as granted by the Court;*

6. *That if the Court finds that the Defendant breached her trustee's duties, that the trustee's costs of this proceeding and any other disbursements incurred by her in connection with the lease should not be taken out of the Estate.*

20. Mrs Malere relied on the Amended Defence filed on 21 May 2021. It was alleged that parties' counsel signed the 4 June 2003 Consent orders but that Mr Malere disagreed with them. It was not admitted that the property was to be subdivided into 2 leases, namely survey plan 03/OI72/085 of 512 m² in the names of Mrs Noel and Mrs Delagroux, and survey plan 03/OI72/086 of 570 m² in Mr Malere's name. She denied that there were any official survey plans for titles 03/OI72/085 and 03/OI72/086.
21. She admitted that she was entitled to be granted administration of her late husband's estate and to administer the property according to law. It was not admitted that she promised during the Probate Case that she would comply with the Consent Orders, nor that the Supreme Court appointed her on the condition that she would comply with the Consent Orders. Further, it was not admitted that she had breached her fiduciary duty or that she had committed any fraud or fraudulent breach of trust. It was not admitted that Mrs Noel had suffered any loss or damage.
22. Ms Kaukare stated that the Interested Party agreed with the Further Amended Claim therefore had not filed a Defence to it.
23. The issues arising include the following:
- a) Whether Mrs Malere's fiduciary duty (the necessary steps to dispose of the estate) included complying with the Consent Orders to subdivide the property into two and to register one part in the names of Mrs Noel and Mrs Delagroux?
 - b) Whether Mrs Malere breached her fiduciary duty when she refused to comply with the Consent Orders?
 - c) Whether Mrs Malere breached her fiduciary duty when she mortgaged the whole property for her children's benefit?
 - d) Whether Mrs Malere breached her fiduciary duty when she allowed damage to happen to the house located on the part of the property belonging to Mrs Noel and Mrs Delagroux?
 - e) Whether Mrs Malere breached her fiduciary duty when she signed a deed of settlement with Mrs Delagroux on 11 November 2020 without Mrs Noel's knowledge and consent?
 - f) If Mrs Malere breached her fiduciary duty, whether such breach caused loss and damage to Mrs Noel?



- g) If such breach caused loss and damage to Mrs Noel, what relief is Mrs Noel entitled to?

D. Evidence

24. The Claimant **Susan Noel** relied on her Sworn statement filed on 17 December 2021 [Exhibit C1]. She deposed that CC 2000/09 was commenced against her alone but subsequently, the Director of Lands was added as second defendant and she and her sister Mrs Delagroux counter-claimed against Mr Malere. She attached a copy of the Consent Orders dated 4 June 2003 [**Annexure "SN7"**]. The Consent Orders have never been challenged.
25. Mr Malere died on 27 September 2009 without complying with the Consent Orders, that is, to subdivide the property into two new leases (survey plan 03/OI72/085 of 512 m², and survey plan 03/OI72/085 of 570 m²) and to register lease title 085 in the names of her and her sister Mrs Delagroux.
26. Mrs Malere sent a letter dated 31 July 2010 to Mrs Delagroux that she did not agree with her entering onto and clearing the property, and that Mrs Delagroux had never had a written agreement with Mr Malere to share the property [**Annexure "SN10"**]. By letter dated 1 August 2010, Mrs Delagroux wrote to Mrs Malere informing her of the Consent Orders [**Annexure "SN11"**].
27. At the conference on 19 April 2012 in the Probate Case, the Judge recorded Mrs Malere as saying the following [Judge's notes attached as **Annexure "SN15"**]:

For 16 years now I have been paying land rents and property taxes. I agree to divide the title but only if they reimburse me half of what I've paid – VT822,144. If they can pay half of this to me – I agree to divide title. Last payment in March 2012 – VT51,654 per year for 16 years now. Will pay half in September 2012.

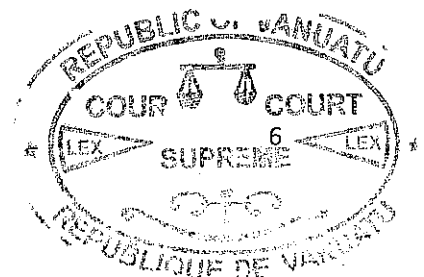
Mi promise se mi no giaman – bae mi tekem administration form, bae mi dividem graon by 2 taetol, wan blo olgeta, wan blong mifala.

28. The Judge then refused a third party's request for adjournment, and recorded his words as follows before he granted letters of administration of the estate to Mrs Malere:

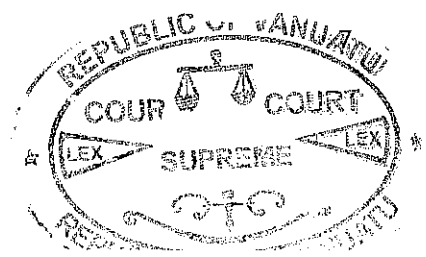
Court must grant administration today to Mrs Malere so that this long outstanding matter can be sorted out and you can all go about your respective businesses without being concerned about his matter anymore.

About the reimbursement of half of the VT800,000 Mrs Malere has paid as property taxes for the last 16 years, these can be discussed further between yourselves. If it is not agreed, Mrs Malere can take a separate civil action to claim.

Orders issued accordingly granting administration to Mrs Malere.

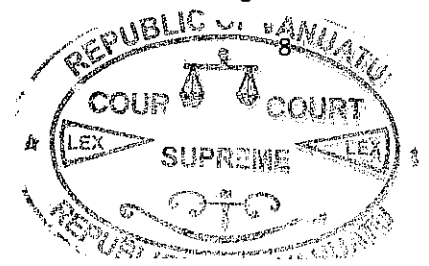


29. Mrs Noel deposed that Mrs Malere has not kept her promise made in Court nor executed the Consent Orders. On 4 April 2014, the transmission of the property to Mrs Malere was registered – to her in her personal name, not as administratrix of the estate.
30. By letter dated 11 April 2017, the Public Solicitor wrote on Mrs Noel's behalf to Mrs Malere to stop developing the property and reminding her of the Consent orders [Annexure "SN17"]. On 24 April 2020, Mrs Malere used the property as security for a loan from the Bred Bank for VT3,638,439. She did so without her (Mrs Noel's) and Mrs Delagroux's consent or knowledge.
31. On 11 November 2020, Mrs Delagroux and her daughter Ro Marie France and Mrs Malere and her children Ronaldo Malere and Prisca Malere entered into a Deed of Settlement in which they agreed to subdivide the property and share it only amongst themselves, contrary to the Consent Orders [copy of Deed at Annexure "SN18"].
32. Mrs Noel also relied on her Sworn statement filed on 18 February 2022 [Exhibit C2] in which she deposed that the part of the property that she and her sister Mrs Delagroux are entitled to contained a house which had two bedrooms, kitchen, living room, toilet, bathroom and veranda. She lived in the house from 1990 to 2010 and it was still in good condition.
33. In early 2010, there was small leak in one of the bedrooms. She went to see constructor Neil Croucher to repair it but he said he could not as the property was not yet in her and Mrs Delagroux's names. Mrs Malere refused to comply with the Consent Orders to put that part of the property into their names. Around the same time, she moved to another of Mrs Delagroux's properties to look after it but then Mrs Malere prevented her returning to the property claiming she owned it all.
34. The leak was not repaired and the house began to deteriorate because Mrs Malere refused to transfer their part of the property to her (Mrs Noel) and Mrs Delagroux. If she had transferred the property to them when requested, they would have used it or rented it out and maintained and repaired it and it would not have been damaged. Therefore, she is claiming loss of rental income of VT10,080,000 [valuation by First National Real Estate dated 25 January 2022 in Annexure "SN2"].
35. In February-March 2017, Mrs Malere's agents removed the roof and other parts of the house then left it to completely deteriorate. The house is ruined [photos attached as Annexure "SN3"]. To repair the property and restore it to its original condition or at least a liveable condition would cost VT8,283,800 [quotation from Santo Wood Works Joinery and Construction dated 24 January 2022 in Annexure "SN4"].
36. Mrs Noel also relied on her Sworn statement filed on 27 March 2023 [Exhibit C3]. She deposed in reply to Mrs Delagroux's sworn statement that the issue of whether



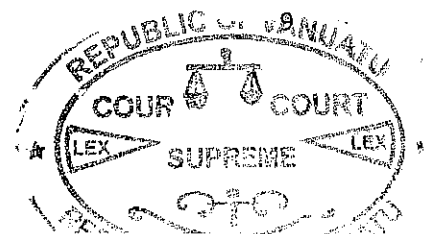
Mrs Delagroux reserves her right to file a separate case against her for breach of trust is irrelevant.

37. Mrs Noel relied on her Sworn statement also filed on 27 March 2023 [Exhibit C4] in reply to Mrs Malere's 2 sworn statements. She deposed that Mrs Malere already knew about the Consent Orders before she applied for administration of her husband's estate. When the Court granted her letters of administration, it stated that the issue of reimbursement of land rents and property tax can be sorted out of Court and if not agreed, Mrs Malere can file a new claim against her (Mrs Noel) and Mrs Delagroux but she never has.
38. She deposed that the third-party mortgage that Mrs Malere entered into with the Bred Bank to guarantee its loan to her children breached the Consent Orders and therefore is misappropriation. She breached her trustee's duty as she is only entitled to half of the property but has mortgaged the whole of the property for her children's benefit. The deceased Mr Malere never challenged the validity of the Consent Orders until his death in 2009. The Deed of Settlement between Mrs Malere and Mrs Delagroux is contrary to the Consent Orders which required that one of the derivative titles be registered in the names of both her and Mrs Delagroux.
39. Finally, Mrs Noel relied on her Sworn statement filed on 13 April 2023 [Exhibit C5] to which was attached a copy of the third-party mortgage over the property, registered on 24 April 2020, between Mrs Malere (mortgagor) and BRED (Vanuatu) Ltd ('Bred Bank') (mortgagee) in favour of Reynaldo Malere and Prisca Malere (customers) in the amount of VT3,638,439 [**Annexure "SN1"**].
40. In cross-examination by Defendant's counsel Mr Tevi, Mrs Noel agreed that since the Court of Appeal decision in 2003, Mrs Malere and her children had developed and still live on one part of the property but the other part of the property is empty and undeveloped until today. She agreed after being shown the Public Solicitor's letter dated 11 April 2017 that that letter was written to Mrs Malere on her behalf. She agreed that Mrs Malere had not done any more work to the property since that letter.
41. In re-examination, she explained that one part of the property is empty and undeveloped because she is waiting for Mrs Malere to subdivide the property then she (Mrs Noel) can develop or repair the house. She spoke with Mrs Malere to do so but she has not. And Mrs Malere always tells other people that the property is hers but not mine (Mrs Noel's). She went to a constructor to repair the house and roof but he would not do it because the property had not been subdivided and part of it registered in her and Mrs Delagroux's names.
42. In cross-examination by Interested Party's counsel Mr Yawha, Mrs Noel stated that the house she lived in on the property was built by French people who were deported after Independence. The builder was Roberto from Italy and his wife was Mariva. She confirmed that when CC 2000/09 was on, she and her sister were still living on



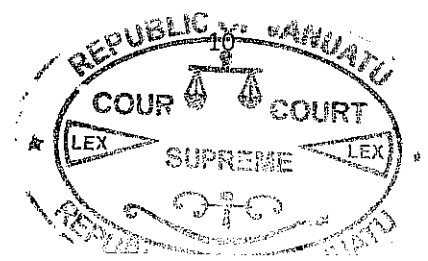
the property. She left it in 2009 because it was leaking. She wanted to repair the house but could not because the property was not in her name. She agreed she left the house because it was leaking, not because Mrs Malere chased her out.

43. She agreed that following the Consent Orders, she lived on the property waiting for Mr Malere to subdivide it. It was put to her that she did not get an order for contempt or to compel Mr Malere to subdivide it. She replied that she went to him to subdivide the property but he did not do it. She agreed she did not apply to the Court to force Mr Malere to subdivide the property – that he knew of the Consent Orders but that he did not do so.
44. In re-examination, she clarified that the house leaked and she stayed but then her sister Mrs Delagroux asked her to move to her house near the Natapoa Motel/Hibiscus Motel to clean it. She explained that she has not repaired the house on the property because the property is not in her name. Mr Malere should have subdivided it but he did not, so she had not repaired the house.
45. Whether or not Mr and Mrs Malere have complied with the Consent Orders is a matter for the Court to determine therefore I will disregard that part of Mrs Noel's evidence. Similarly, whether or not Mrs Malere made a promise in Court and if yes, whether or not she has broken that promise is a matter for the Court to determine and I also disregard that part of Mrs Noel's evidence. I do not accept Mrs Noel's evidence that the transmission of the property to Mrs Malere was to her in her personal name, not as administratrix of the estate, as that is contradicted on the face of the Advice of Registered Land Dealing in respect of the transmission in **Annexure "MPM21", Exhibit D1**. Finally, whether or not Mrs Malere has breached her fiduciary duty is a conclusion for the Court to draw therefore I also disregard those parts of Mrs Noel's evidence asserting that Mrs Malere has committed such breaches. Otherwise, I consider that Mrs Noel was a witness of truth and accept the balance of her evidence.
46. The Defendant **Marie-Pierre Malere** relied on her Sworn statement filed on 9 February 2021 [Exhibit D1]. She deposed that her husband became the registered proprietor of the property in 1996. When they went to Court, she offered to subdivide the property but on condition that Mrs Noel and Mrs Delagroux must pay back the land rent and property tax she had paid from 1996 to 2012 but they did not want to hence the Court granted administration of her husband's estate to her.
47. She wrote a letter dated 31 July 2010 to Mrs Delagroux that she did not agree with her entering onto the property and that there was no agreement with her husband to share the property. She received Mrs Delagroux's letter dated 1 August 2010 about the Consent Orders.
48. On 4 April 2014, the transmission of the property to her (Mrs Malere) as administratrix of her husband's estate was registered [**Annexure "MPM21"**]. In 2019, her two children took out a third-party mortgage over the property with the Bred Bank, and they are still repaying the loan. In 2011, she built a rental house on the property which cost around VT3 million. She entered into a Deed of Settlement with



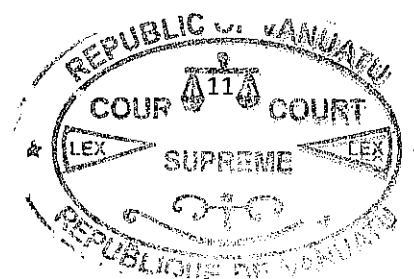
Mrs Delagroux because she is the one who should claim for the property as her name is on the documents but not Mrs Noel's name. She is asking the Court that if she loses the property, that she be compensated for the developments and land rents paid.

49. Mrs Malere also relied on her Sworn statement filed on 23 September 2022 [Exhibit D2]. She deposed that where is the proof that the Court granted her administration in the Probate Case on a condition as claimed by Mrs Noel. She also asked if Mrs Noel built the house she lived in. Did Mrs Noel pay any land rent or property tax for the house or the property? She deposed that if Mrs Noel had agreed to her condition (to refund her half of the sum spent on land rent and property tax), that she (Mrs Malere) would have subdivided the property and would not have mortgaged the whole property.
50. In cross-examination by Claimant's counsel Ms Muluane, Mrs Malere agreed that she knew of the outcome in the Court of Appeal but after her husband had died. She knew of the Consent Orders after her husband had died. She agreed that she was aware of the dispute over the property before she applied for letters of administration in the Probate Case. She knew of the Consent Orders too through the Probate Case.
51. Mrs Malere agreed that she promised to the Court in the Probate Case to subdivide the property into two and register one part in Mrs Noel and Mrs Delagroux's names, in accordance with the Consent Orders, but on the condition that she was paid half of what she had paid in land rents and property taxes for the property.
52. She agreed that Mrs Noel and Mrs Delagroux were beneficiaries of part of the property. She agreed that as administrator of her husband's estate, she had a duty to administer the estate following the law. She agreed that she had a duty to administer the estate according to the Consent Orders to subdivide the property into two. It was put to her that she failed in her duty when she did not subdivide the property. She replied that she had a condition which she told them from the beginning, but they did not want to; all she wanted was half of what she had paid in property tax because she had paid for it for the whole of the property.
53. It was put to Mrs Malere that she also breached her duty when she gave security over the whole of the property for her two children's loan. She agreed. She agreed that the purpose of the loan was to benefit her two children but not the estate. She agreed that the mortgage was for VT3,638,439. She stated that she did not tell the Bred Bank about the Consent Orders. She agreed that she breached her duty to the estate when she did not tell the bank.
54. She agreed that in 2010, she stopped Mrs Delagroux from entering onto and cleaning the property. She stated that she only wrote to them once not to enter the property because she had not subdivided it yet but other times, she left them to clean it. She agreed that in February-March 2017, her agents removed the roof from the house because the roofing pieces were broken and she was scared that in a cyclone, the



roofing pieces would fly off and hurt people on the road. She had the roofing pieces placed on the ground, she has not used them because they are broken, and the grass has grown over them. She agreed that she removed the roofing from the house that is on the part of the property that should be registered in Mrs Noel and Mrs Delagroux's names. She did not get their consent before she had the roof removed - they had already left by then and the place was covered in bush.

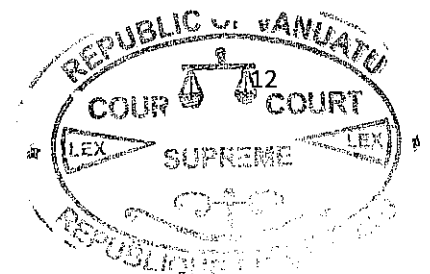
55. She agreed that she was bound by the Consent Orders and to comply with them. She agreed that she and her two children signed the Deed of Settlement with Mrs Delagroux and her daughter two days after the Claim was filed. She agreed that the Deed was invalid because it did not reflect the Consent Orders. She agreed her signing the Deed was another breach of her duty.
56. The re-examination did not assist.
57. In cross-examination by Interested Party's counsel Mr Yawha, Mrs Malere agreed that during the Probate Case she became aware of the Consent Orders. She was asked about the condition she referred to in her evidence. She replied that in 1996, she began paying land rent and property taxes so she just wants them to give her back half and she can subdivide the property into one part that she will remain on and the other part for them.
58. She stated that she became aware of the Consent Orders after her husband had passed away. She agreed that the Consent Orders do not contain a condition that Mrs Noel and Mrs Delagroux refund her land rent and property taxes paid since 1996.
59. There was no re-examination.
60. Mrs Malere in her evidence, and particularly in cross-examination, agreed wholly with Mrs Noel's case and evidence but with one significant difference – that she agreed in Court in the Probate Case to subdivide the property on condition that they reimburse her half of what she had spent since 1996 on land rent and property taxes in respect of the property. I considered that Mrs Malere at all times was endeavouring to assist the Court with the truth, and accept her evidence.
61. The Sworn statement of the Interested Party Amerene Rowarere Delagroux filed on 17 February 2023 [Exhibit IP1] was tendered by consent. She deposed that she along with her sister Mrs Noel counter-claimed in CC 2000/09 which led to the Court of Appeal ordering a rehearing and recommending that the parties amicably settle their dispute. She authorized her sister Mrs Noel in 1996 to occupy and look after their house while she (Mrs Delagroux) returned to France. She filed a defence to the Claim in the present proceeding because the relief sought was for a lease to be registered only in Mrs Noel's name. However, the relief sought in the Amended Claim is that both she and Mrs Noel be jointly named in any new lease, and she agrees with that.



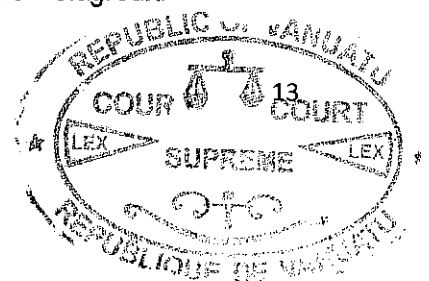
62. There was no cross-examination.
63. There is no other evidence to confirm that because of their counter claim in CC 2000/09, the Court of Appeal ordered a rehearing and recommended that the parties amicably settle their dispute. Accordingly, I will disregard that part of Mrs Delagroux's evidence. Mrs Delagroux explained why she had not filed a defence to the Amended Claim. Her evidence otherwise was not relevant to the issues between the parties. Accordingly, I accept her evidence but could not take any of it into account in determining the issues between the parties.

E. Findings and Discussion

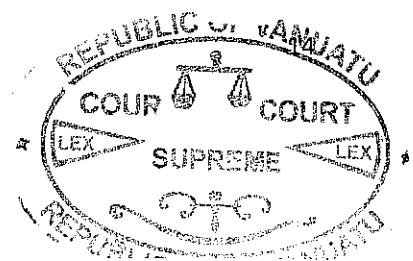
64. It was part of the defence case that the parties signed the Consent Orders but that Mr Malere disagreed with those orders.
65. The Consent Orders have never been challenged or set aside. Accordingly, there is no evidence that Mr Malere disagreed with the Consent Orders. That aspect of the defence case is rejected.
66. In the absence of evidence to the contrary, I accept Mrs Noel's evidence about how the property was to be divided:
- a. Lease title no. 03/OI72/085 of 512 m² in the names of Mrs Noel and Mrs Delagroux; and
 - b. Survey plan 03/OI72/086 of 570 m² in Mr Malere's name
67. It was also part of the defence case that there were no official survey plans for lease title numbers 03/OI72/085 and 03/OI72/086. No survey plans with those lease title numbers were put into evidence but if needed, new surveys can be conducted and new survey plans drawn which may use the same lease title numbers 03/OI72/085 and 03/OI72/086, or be allocated new lease title numbers.
68. Did Mrs Malere promise during the Probate Case that she would comply with the Consent Orders? It is clear from the Judge's notes from the Probate Case conference on 19 April 2012 that Mrs Malere agreed to subdivide the property but only if Mrs Noel and Mrs Delagroux reimbursed half of what she had spent on land rent and property taxes since 1996. Accordingly, I do not accept that Mrs Malere made an unqualified promise to comply with the Consent Orders.
69. I find that Mrs Malere did not promise unconditionally that she would comply with the Consent Orders. She was clear that she would do so if she were reimbursed half of what she had spent since 1996 on land rent and property taxes for the property.
70. Did the Supreme Court appoint Mrs Malere as administratrix of her husband's estate on the condition that she would comply with the Consent Orders?



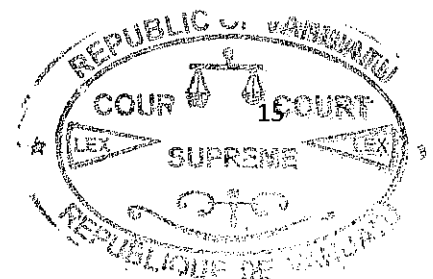
71. First, I cannot agree from my reading of the Judge's notes that the Court imposed any condition that Mrs Malere must comply with the Consent Orders in return for appointing her as administratrix. The Judge made comments that the Court must grant administration to Mrs Malere so that the long-standing matter can be sorted out, and that Mrs Malere could sue Mrs Noel and Mrs Delagroux for reimbursement of the land rent and property taxes she had paid in respect of the property. However, neither of those comments amounts to a condition that Mrs Malere must comply with the Consent Orders in return for being appointed as administratrix.
72. Secondly, only the Judge's notes are in evidence; there is no copy in evidence of the sealed Orders from the conference on 19 April 2012. Accordingly, it is unknown whether or not the sealed Orders of the Court from the 19 April 2012 conference included a condition as alleged by the Claimant.
73. In the circumstances, I disagree with the Claimant's case that the Supreme Court appointed Mrs Malere as administratrix of her husband's estate on the condition that she would comply with the Consent Orders. I am unable to make such a finding on the evidence.
74. It is undisputed that the Supreme Court's orders on 19 April 2012 included appointing Mrs Malere as administratrix of her husband's estate.
75. The administrator (called 'administratrix' if it is a woman) is appointed by the Court to administer the property of a deceased person. He or she is under a duty to collect and get in the deceased's real and personal estate and administer it according to law: para. 25(a) of the *Administration of Estates Act 1925 (UK)*.
76. The administration of the property of a deceased person is a trust and therefore the administrator owes fiduciary duties to the beneficiaries of the estate.
77. All claims founded upon any obligation which might have been enforced by suing the deceased in his lifetime, are in like manner enforceable, to the extent of assets, against the administrator of the estate, even though he is not named in the instrument creating the obligation: *Halsbury's Laws of England* (4th ed.), Vol. 17 at [1511].
78. The Consent Orders contained an obligation on Mr Malere to subdivide the property and have one derivative title registered in the names of Mrs Noel and Mrs Delagroux. That obligation could have been enforced by suing Mr Malere in his lifetime. Accordingly, the obligation in like manner is enforceable against Mrs Malere, the administratrix of the estate, even though she is not named in the Consent Orders which created the obligation.
79. Accordingly, Mrs Malere's fiduciary duty as administratrix of her husband's estate included to comply with the Consent Orders to subdivide the lease into two and to register one derivative title in the names of Mrs Noel and Mrs Delagroux.



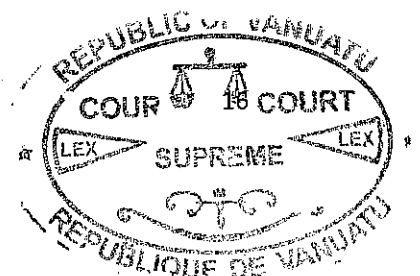
80. By the Claim, Mrs Noel is suing Mrs Malere to enforce the obligation contained in the Consent Orders.
81. It is undisputed that Mrs Malere has never complied with the Consent Orders.
82. Mrs Malere's evidence is that from the beginning, she has been willing to subdivide the property and register one derivative title in Mrs Noel and Mrs Delagroux's names but on condition that they reimburse her half of the land rents and property taxes she has paid since 1996 in respect of the property. It is understandable that Mrs Malere would like to be reimbursed that money.
83. However, the condition she outlined is not part of the Consent Orders. Nor has she ever taken action to get Mrs Noel and Mrs Delagroux to reimburse her half of what she has spent by way of land rents and property taxes since 1996 in relation to the property. The Judge's notes from the 19 April 2012 conference in the Probate Case shows that the Judge stated that it was for the parties to discuss reimbursement of half of what Mrs Malere had spent on land rents and property taxes, but if it could not be agreed, she could take separate action (commence separate proceedings) to get that reimbursement. Despite the Court saying so, Mrs Malere has never taken such action.
84. Mrs Malere could have counter claimed in the present proceedings seeking reimbursement of half of what she spent on land rents and property taxes for the property since 1996. She was represented throughout the present proceedings. However, she did not file any Counter Claim.
85. In the absence of a Counter Claim and in the absence of there being an obligation in the Consent Orders that Mrs Malere be reimbursed half of what she spent on land rents and property taxes, she must comply with the Consent Orders as they are.
86. I find therefore that Mrs Malere's fiduciary duties included that she complies with the Consent Orders by subdividing the property into two and registering one derivative title in the names of Mrs Noel and Mrs Delagroux.
87. I accept and find that Mrs Noel and Mrs Delagroux asked Mrs Malere to comply with the Consent Orders including by way of Mrs Delagroux's letter dated 1 August 2010 to Mrs Malere and by way of oral requests.
88. Mrs Malere refused to comply with the Consent Orders and never did. It is understandable that she wanted to first be reimbursed half of what she had spent since 1996 on land rents and property taxes in respect of the property.
89. However, as already stated, Mrs Malere never took action including in the present proceedings to obtain such reimbursement and the Consent Orders do not contain any obligation on Mrs Noel and Mrs Delagroux to reimburse half of the land rent and property taxes expended.



90. Accordingly, Mrs Malere's refusal and failure to comply with the Consent Orders constituted a breach of her fiduciary duty as administratrix of her husband's estate.
91. I find that on 18 December 2018, Mrs Malere signed a surety to mortgage of the Lease over a third-party mortgage.
92. I find that on 25 March 2020, Mrs Malere signed the third-party mortgage with the Bred Bank, which was registered on 24 April 2020, mortgaging the property as security for her two children's loan of VT3,638,439.
93. It follows and I find that Mrs Malere also breached her fiduciary duty in 2020 when she mortgaged the whole of the property as security for her two children's loan from the Bred Bank. First, she was under an obligation to subdivide the property and register part of it in the names of Mrs Noel and Mrs Delagroux. However, instead of doing so, she mortgaged the whole of the property. Secondly, by mortgaging the whole of the property, Mrs Malere has hindered the subdivision of the property and registration of a derivative lease in the names of Mrs Noel and Mrs Delagroux. Finally, the mortgage was entirely for her two children's benefit and not for the benefit of the estate.
94. It was also alleged that in signing a Deed of Settlement on 11 November 2020 with Mrs Delagroux to divide the property amongst just the two of them, Mrs Malere breached her fiduciary duty.
95. I accept and find that on 11 November 2020, Mrs Malere and Mrs Delagroux signed a Deed of Settlement to divide the property amongst just the two of them. They entered into the deed without Mrs Noel's knowledge and consent. The terms of the deed are contrary to Mrs Malere's obligation under the Consent Orders. Not only has she never complied with the Consent Orders but she has shown in signing the deed that she is willing to further deal with the property contrary to the Consent Orders. I do not consider that this is a breach of fiduciary duty but find that Mrs Malere has come to the Court with unclean hands. Indeed, Mrs Delagroux has also come to the Court with unclean hands.
96. I find that Mrs Malere cannot be relieved wholly or partly from personal liability for her breach of trust. She has known of the Consent Orders since at least 2010 and wilfully chosen not to comply with the Consent Orders as well as to deal with the property in a manner that has hindered, if not made impossible, her compliance with the Consent Orders. I find that she has not acted honestly and reasonably: s. 61 of the *Trustees Act (UK)*.
97. A declaration will be made that Mrs Malere committed a breach of trust and of her fiduciary duty as administratrix of her husband's estate.



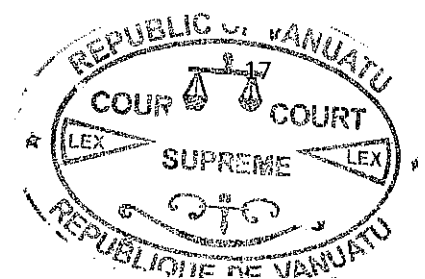
98. The allegations that Mrs Malere misrepresented to the Bred Bank and to the Director of Lands that she was the owner of the whole of the property, and thus committed fraud, cannot be determined in the absence of the Bred Bank and the Director as parties to the present proceeding. I therefore put those allegations to one side and have no further regard to them.
99. Mr Tevi in closing submissions for the Defendant submitted that the Court should first determine whether or not Mr and/or Mrs Malere obtained the lease by fraud or mistake. This was not pleaded in the Amended Defence. With respect, it was irresponsible of counsel to suggest this be determined by the Court when it was never pleaded and therefore not an issue between the parties in the present proceedings.
100. I turn now to consider what, if any, loss and damage was suffered by Mrs Noel as a result of Mrs Malere's breaches of fiduciary duty.
101. It was also part of the Claimant's case that Mrs Malere allowed the house situated on Mrs Noel and Mrs Delagroux's part of the property to be destroyed. I find that this was a two-bedroom house of 80 m² area.
102. I accept and find that in 2009 or 2010, Mrs Noel moved out of the property to go and stay at another property belonging to Mrs Delagroux near the Natapoa Motel/Hibiscus Motel. I also accept and find that subsequently, Mrs Malere prevented Mrs Noel from returning to reside on the property.
103. I accept and find that in 2010, the roof leaked but because Mrs Malere had not subdivided the property and registered one title in Mrs Noel and Mrs Delagroux's names, Mrs Noel could not get the roof fixed and over time, the roof continued to deteriorate.
104. Indeed, I find as set out in Mrs Malere's evidence that by February-March 2017, the roof was so bad that it could be looked through in many places to the sky and so she hired 2 boys to remove the roof. She stated that she did not use the roofing but had it placed on the ground and the grass has now grown over the pieces of roofing which were all broken.
105. Accordingly, I consider that the damage to the house constitutes loss and damage suffered by Mrs Noel as a result of Mrs Malere's breach of duty in refusing to subdivide the property and register one part in her and Mrs Delagroux's names. I accept and find the cost of repairing the house to an inhabitable condition is VT8,283,800 as set out in the quotation that Mrs Noel obtained [**Annexure "SN4", Exhibit C2**].
106. I do not accept that Mrs Noel is entitled to loss of rental income as she has never been a registered proprietor of the property or a part of it.



107. Having established on the balance of probabilities that Mrs Malere breached her fiduciary duty and that as a result, Mrs Noel suffered loss and damage, the issue then is what relief to order in Mrs Noel's favour?
108. Part of the relief sought in the Claim are orders for the surrender or seizure of the property. However, there is a registered mortgage over the property in the Bred Bank's favour. Accordingly, no orders can be made for the surrender or seizure of the property without first giving the Bred Bank an opportunity to be heard.
109. I note that Mrs Noel could have named the Bred Bank in the Amended Claim as an interested party. She did not. She could have applied at any time for the Bred Bank to be joined as a party to the proceeding. She did not. I do not understand why Mrs Noel did not do so, but consider that I can at this point order that the Bred Bank is joined as an interested party to the proceeding, and give it an opportunity to be heard as to the relief sought in the Claim.
110. I will give the Bred Bank the opportunity to be heard as to the relief sought in the Claim, and then the other parties in response, then will determine what relief to order in Mrs Noel's favour.

F. Result and Decision

111. For the reasons given, it is ordered as follows:
- a. **Declaration** that the Defendant Marie-Pierre Malere committed a breach of trust and of her fiduciary duties as administratrix of her husband Raymond Malere's estate;
 - b. **Order** that the Defendant is not allowed to deduct any of her legal costs of this proceeding or disbursements incurred out of or from the estate of her husband Raymond Malere;
 - c. **Order** that BRED (Vanuatu) Limited is joined as a party to the proceeding, entitled "Second Interested Party". This will be reflected in future Orders of the Court;
 - d. **Order** that the Interested Party Amerene Rowarele Delagroux is renamed "First Interested Party". This will be reflected in future Orders of the Court;
 - e. The Claimant is to serve the Amended Claim, Amended Defence, the sworn statements **Exhibits C1-C5, D1 and D2, and IP1**, the Claimant's Final Submissions and a copy of this Judgment on the Second Interested Party, and file proof of service, **by 4pm on 4 March 2024**;
 - f. The Second Interested Party is to file and serve its submissions as to the relief sought in the Amended Claim (as amended), particularly items 4 and 5 of the prayer for relief and also with regard to pages 19 and 20 of the



Claimant's Final Submissions, and file proof of service **by 4pm on 4 April 2024**; and

g. The other parties are to file and serve submissions in response **by 4pm on 25 April 2024**.

112. I will determine what relief to order in the Claimant's favour on the papers after that.

**DATED at Port Vila this 20th day of February 2024
BY THE COURT**

.....
Justice Viran Molisa Trief

