MARIANGO V NALAU [2007] VUCA 15: COMPENSATION FOR CONTRIBUTIONS TO PROPERTY BY DE FACTO PARTNERS

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INTRODUCTION

In Vanuatu, Parliament has not seen fit to enact any statutory provisions to regulate the rights of legally married spouses to property accumulated during their marriage when their marriage is dissolved and the formerly married spouses go their own separate ways. Instead, through the judicial inventiveness of the Court of Appeal in *Joli v Joli*,[1] the rights of formerly married spouses in Vanuatu to property accumulated during their marriage are regulated by Part II of the *Matrimonial Causes Act 1973* (UK).

It is not then surprising that the Parliament of Vanuatu has not enacted any legislation to regulate the rights of de facto partners, who have never been legally married, to property accumulated during their cohabitation when their cohabitation ceases, and the former partners go their separate ways. Again, the inventiveness of the Court of Appeal has had to be called into play to determine the respective rights of the parties to property accumulated by them during their period of living together. The Court of Appeal has, however, had overseas precedents to guide it, and the solution that it has enunciated for the first time in Vanuatu in the case which is the subject of this case note is one which is in accordance with that adopted in other countries of the Commonwealth.

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Summary of facts

In 2001 a woman who was divorced from her husband started to live with a single man, planning eventually to marry. They decided to build a rent house comprising three flats on leasehold land which was registered in the name of the woman and her former husband. Most of the physical work on the house was done by the man, who was a builder by occupation, and the woman paid for most of the materials. They agreed to marry in August 2003, but shortly before the anticipated nuptials, the man took off with another woman. At this stage the rent house was completed and the three flats were let out to tenants, the rent being paid wholly to the woman. The man brought proceedings for a share of the value of the house which was estimated to be worth VT2,224,000, basing his claim on constructive trust, unjust enrichment, estoppel, and common intention. The Supreme Court upheld his claim and ordered the woman to pay him VT500,000. From this decision, the woman appealed to the Court of Appeal, but the court upheld the decision of the Supreme Court.

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[1] [2003] VUCA 27 http://www.paclii.org.

Grounds of decision of Court of Appeal

1. No common understanding as to what was to happen to the property in the event of separation

The Court of Appeal agreed with the Supreme Court that the parties had not formed any clear intention as to what was to happen to the property to which they made their respective contributions if they should separate, stating 'I do not think they ever had any common understanding about what would happen if they separated.'[2] In this respect, the facts of this case are different from the facts of the decision of the Court of Appeal of New Zealand to which the court made reference, *Gillies v Keogh*,[3] in which it was evident that the woman made it clear at all times that the house that was acquired was hers alone, which the man accepted, and accordingly the man was held to have no right to the house.

2. Equitable rules of constructive trust, unjust enrichment and estoppel are part of the laws of Vanuatu

The Court of Appeal held that the above concepts of the law of equity of England were introduced into the laws of Vanuatu as part of the British laws in force in the country immediately before independence by virtue of Article 95(2) of the *Constitution* of Vanuatu. Although there had been no decision in New Hebrides prior to independence which had explicitly applied or recognised these rules of equity, the court stated:

> Counsel for the [woman] accepted, as he was obliged to do, that the equitable principles that have application to this case including constructive trust, unjust enrichment, imported common intention or estoppel are incorporated into the law of Vanuatu by virtue of Article 95(2) of the Constitution. Those equitable principles were known to the common law of England before the relevant date in the constitution of 30 July 1980.[4]

3. Equitable principles of constructive trust, unjust enrichment, estoppel and reasonable expectations are closely linked

The Court of Appeal of Vanuatu, as had the Court of Appeal of New Zealand in *Gillies v Keogh*, held that the equitable concepts of constructive trust, unjust enrichment, estoppel and reasonable expectations, all often arise from the same circumstances. It made this clear in the following words:

> The key facts were the parties agreed the benefits from the property would be shared between them. They agreed to share the rent from the property. And so they contributed to the property in this expectation. Thus when the relationship broke down it is reasonable and fair that they both share in the value of the asset created…Other equitable principles will also apply here. A constructive trust may also arise; through the efforts of the parties and their reasonable expectations…or the Court's desire to ensure one person is not advantaged at

[2] Ibid [4] (quoting the Supreme Court judgment).
[3] [1989] 2 NZLR 327.
[4] Above n 1 [16].

> the expense of another (unjust enrichment)…or through the Court's interpretation of what may be a common intention to be implied from the circumstances…As the New Zealand Court of Appeal said in *Gillies* we do not think it matters which of the equitable principles are adopted in this case given the similar underlying approach.[5]

4. Equitable principles not affected by fault

The Court of Appeal held, as had the Supreme Court, that the fact that it was the man who brought an end to the three year relationship between himself and the woman by refusing to marry the woman and running off with another woman, did not disentitle him from claiming in respect of his contribution to the property:

> The [woman] submits that because the [man] refused to marry the[woman] this disentitled him to any compensation. The [woman] did not suggest that there was any direct agreement between the parties that if the parties did not marry the [man] would not be entitled to compensation…..In the absence of any expressed agreement between the parties that if one party called off the marriage then they would effectively forfeit their contribution to the property to the other, we would not be prepared to infer such an agreement. Nor do we think there is any basis to introduce *'fault'* for the relationship break-up into property division unless directly relevant to such matters as contribution or asset preservation. Fault, in any event, is notoriously difficult to reach clear conclusions about in relationship break-ups and is often in the eye of the beholder. We agree with the approach of the Supreme Court Judge as to this aspect of the claim.[6]

4. A monetary award may be preferable to an interest in property

The Court of Appeal also recognised, as had the Court of Appeal in New Zealand, that often an award of a monetary payment may be a more appropriate remedy than a declaration of an interest in the property. For that reason, it held that the decision of the Supreme Court to order the woman to pay the sum of VT500,000 to the man was the appropriate remedy to grant:

> We agree with the judge's conclusions. We consider this is exactly the type of case where compensation (as opposed to a declaration of an interest in land) should be ordered. …We are satisfied that a reasonable person, in the [man's] position would have expected to receive monetary compensation for his work should the marriage not have eventuated.[7]

5. Quantum of award

The Supreme Court awarded the man VT500,000. The court accepted that the completed house was worth VT2,224,00, and that the cost of the materials paid by the woman was Vt1,300,000. The court also accepted that there had been some contribution to the construction by the family of the woman, and reached an estimate

[5] Ibid [28] – [30].
[6] Ibid [21] – [22].
[7] Ibid [23], [26].

of VT500,000 for the contribution of the man. This was challenged on appeal by the woman, but does not appear to have been challenged by the man. Without any precise information as to the value of the contribution of the woman's family, it is difficult to know how accurate a calculation this was. However, it was upheld by the Court of Appeal:

> The final ground of appeal is the quantum of the claim. Assessment of quantum in this area is notoriously difficult… We consider the Judge undertook an assessment of quantum as well as he could given the circumstances…We are satisfied that the Judge's conclusions were properly open to him and have not been shown to be wrong.[8]

CONCLUSION

De facto relationships between men and women are a very obvious social phenomenon in the society of Vanuatu, as they are of other countries. In New Zealand census statistics show that between the census of 1981 and the census of 1986 there was an increase of 30% in de facto relationships. Accurate figures for Vanuatu are not available, but are probably similar. This causes one to consider that in Vanuatu, as in New Zealand, the time is opportune for some legislative provisions that can reflect the views of the community more accurately than is possible by decisions of courts, a view that was expressed in the following words of Richardson J in *Gillies v Keogh*:

> In an area of family relations which is now so basic to the functioning of society there is, I believe, much force in the argument that a statutory code enacted after appropriate consideration of all the public policy interests involved, and providing a clear statement of the principles to be applied, would be abetter basis for allocating property interests than continued reliance on the innovative skills of the judiciary in developing and adapting equitable principles.[9]

[8] Ibid [31] – [32].
[9] Above n 3, 348.