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

CIVIL CASE NO. 206 of 2007

BETWEEN: **PAUL DE MONTGOLFIER**
Executor of the Ohlen Estate
First Claimant

AND: **JENNIFER PREVEL**
Second Claimant

AND: **CHRISTOPHE PREVEL** represented by his Litigation Guardian, **MRS. DOMINIQUE PREVEL**
Third Claimant

AND: **MICKAEL AND JULIA OHLEN** represented by their Litigation Guardian, **MR. GILLES OHLEN**
Fourth and Fifth Claimants

AND: **JACQUELINE DE GAILLANDE**
First Defendant

AND: **GERARD DE GAILLANDE**
Second Defendant

Coram: Justice Mary Sey

Counsel: Mr. Robert Sugden for the Claimants
Mr. John Less Napuati for the Defendants

Date of Hearing: 12, 13 & 14 June 2013
Date of Decision: 23 August 2013

JUDGMENT

1. This is a case primarily concerning the administration of the estate of Mrs. Isabelle Ohlens of Port Vila, (the deceased), who died on 24th day of December 2005.

2. The case was originally brought by the heirs under the deceased's Will against the First Defendant, who was then executrix of that Will, and her husband.

3. It was brought in tandem with a Probate action in which the heirs were seeking the First Defendant's removal as executrix and the current executor of the Will replaced the First Defendant on 13th December 2009 and became a Claimant in these proceedings.

4. By a Consent Order dated at Port Vila on the 20th day of November 2009, the parties consented to these proceedings being joined with Probate Case No. P8 of 2006, for the purpose of further hearings to resolve the various claims, *and the parties noted that this was done* for administrative reasons and that the issues remain as pleaded in separate proceedings.

5. It is noteworthy that, between 2006 and early 2013, before the file was put before me, the proceedings were sequentially considered by four different judges:

   - Hon. Justice Tuohy
   - Hon. Justice Clapham
   - Hon. Justice Dawson
   - Hon. Justice Spear

6. It also needs to be mentioned that counsel Mr. Napuati, who took over

the case as the Defendants' counsel after the death of Mr. Juris Ozols, filed a notice of ceasing to act for the Defendants on the 22nd day of July 2013. This was well after the conclusion of the trial which took place from the 12th to 14th June 2013 during which period the Defendants were legally represented by Mr. Napuati throughout the proceedings.

Preliminary Issues

7. The claim alleged deficiencies in the administration of the estate by the First Defendant, as former administratrix, which allegations were denied.

8. However, before the trial was eventually reached, Mr. Sugden raised a matter in respect of pleadings.

9. A number of sworn statements were filed for the Defence that seemed to indicate that, although they were not pleaded in the Defence, the Defendants intended to raise allegations that the deceased had made inter vivos gifts and had created joint accounts with the First Defendant.

10. It was submitted by Mr. Sugden that the Claimants' lawyers for years had tried to ascertain whether the Defendants intended to raise these matters in their pleaded defence, but the Defendants, through their lawyers repeatedly refused to agree to plead the matters.

11. Rule 11.7 (1) of the Civil Procedure Rules provides that the Claimants' sworn statements are already in evidence and so the Claimants must apply to have struck out parts that should not be in evidence. The

Claimants, as a result sought, by Application filed on 8th June 2012, to have all materials in the sworn statements that related to the unpleaded issues struck out.

12. At trial, Mr. Sugden made his application to expunge the paragraphs relating to inter vivos gifts and joint bank accounts in all the sworn statements. It was submitted by counsel that if the issue of inter vivos gifts and the issue of joint accounts had been pleaded, then the Claimants would have been in a position to adduce evidence to rebut those issues.

13. When called upon to respond to the application and the submissions made by Mr. Sugden, the Defendants' counsel, Mr. Napuati, told the Court that he had "no objection".

14. In considering the application to expunge the paragraphs relating to inter vivos gifts and joint bank accounts, the Court was referred to the decision of Tuohy J. given on 1st August 2008 in **J. De Gaillande v ANZ Bank (Vanuatu) Limited**, Civil Case No. 147 of 2006, in which His Lordship refused to decide issues raised in cross examination but not pleaded, and adhered strictly to the pleaded case.

At paragraph 50, His Lordship said:

"I do not therefore propose to make any findings in relation to the additional issues raised by the Bank's counsel. It would be wrong to do so when they were not raised at the time of dismissal and are not raised on the pleadings. I am conscious that there are other proceedings before the Court brought by the beneficiaries of Mme

Ohlen's estate where at least some of those matters will be directly in issue. I do not intend to prejudge them in any way. Whether the claimant was guilty of serious misconduct must be judged on the basis of the charges made against her at the time. I assume for the purposes of this case that the documents which contain Mme Ohlen's signature have not been falsified."

15. As correctly submitted by the Claimants' counsel, the "other proceedings" referred to by the Judge were these proceedings. The First Defendant was the Claimant in that case when His Lordship clearly emphasized the importance of raising any issues that a party wanted to have the Court consider by pleading those issues. The First Defendant benefitted from the ANZ's failure to do so in that case and won her case.

16. Nonetheless, in the almost 5 years since Tuohy J's direct reference to these proceedings, the Defendants have not pleaded such matters as inter vivos gifts and joint bank accounts in these proceedings.

17. By virtue of changes in the pleadings and the refusal of the Defendants to plead issues such as inter vivos gifts and the making of joint bank accounts, it was clear that some paragraphs of the Claimants' and the Defendants' sworn statements contained materials that offended Rule 11.4 (1) of the Civil Procedure Rules which states that:

> *"A sworn statement may contain only:*
>
> *(a) material that is required to prove a party's case, and references to documents in support of that material, and*
>
> *(b) material that is required to rebut the other party's case, and references to documents in support of that material."*

18. Ultimately, on 13th June 2013, the Court ruled that the unpleaded issues were not issues in the trial, so that all materials, in the sworn statements relating to those issues, would only be had regard to the extent that they were relevant to issues that were raised in the proceedings or as part of the res gestae.

The Pleadings

19. The operative pleadings in this case had been identified as follows:
    a) Further Amended Supreme Court Claim filed on 30th March 2010
    b) Amended Defence filed on 16th October 2010

20. In paragraphs 4, 5, 6 and 7 of their Further Amended Supreme Court Claim filed on 30th March 2010, the Claimants alleged that the First Defendant acted in breach of her duties as trustee and executrix under the deceased's Will.

21. For ease of reference, paragraphs 4, 5, 6 and 7 of the said pleadings are reproduced hereunder as follows:

> "4. At her death, the Deceased possessed real estate, chattels, and substantial moneys in Bank accounts all of which became the Estate.
>
> 5. The Estate included but is not limited to:
>
> (i) A registered leasehold property at Ohlen.
>
> (ii) Jewellery and chattels unknown as to extent or amount.

(iii) Large sums of money deposited in a number of accounts with the ANZ Bank at Port Vila, (the ANZ) including a large sum of money belonging to the deceased that was on fixed deposit at the ANZ and that the bank identified, in its system, as account No. AUD768856 (hereinafter 768856).

6. While she was Executrix of the Estate the First Defendant, in breach of her duties as Executrix made payments of monies from 768856 to a number of people who were not beneficiaries under the Will.

PARTICULARS

Until an account is given by the First Defendant the full extent of such payments is not known to the Claimants but with the Claimants' knowledge is:

(i) Substantial payments to herself;

(ii) Substantial payments to the joint benefit of herself and the Second Defendant (who is her husband) including payments of their children's expenses and the transfer to their joint names of a large part of the money in 768856.

7. While she was executrix of the Estate, the First Defendant gave substantial quantity of the chattels belonging to the Estate to people not named as beneficiaries under the Will.

PARTICULARS

The Claimants are not aware of the full number of such

dispositions but they include:-

(i) An old safe and its contents to the Second Defendant

(ii) Jewellery and other property to Jacques Ohlen, the brother of the deceased

(iii) Further dispositions of chattels to Anais Rolland, Bernand Roland, Suzie, Betty, the First Defendant and the Second Defendant.

22. In the Defendants' Further Amended Defence filed on 16th October 2010, the First Defendant denied the allegations contained in the Claimants' pleadings and further averred that all jewellery and chattels were disposed of in accordance with the deceased's wishes.

23. It is perhaps timely at this juncture to set out a background of material events:

Background

24. The deceased and the First Defendant had known each other well from early in the First Defendant's life and from 2003 onwards the First Defendant was effectively the deceased's bank manager and directly assisted the deceased in managing her finances.

25. The deceased was of advancing years and suffering from a number of debilitating complaints over the last few years of her life.

26. On 9 September 2005, the deceased became very ill and she was flown to a hospital in Noumea where she was admitted until 24 October 2005. The First Defendant also went to Noumea during this time visiting the deceased in hospital.

27. Whilst in Noumea, the deceased gave a Procuration speciale - Representation, dated 29 October 2005, over all of her affairs to the First Defendant. The translated version of the document reads as follows:

"**Special Power of Attorney – Representation**

The undersigned:

Madame Isabelle Angele, Blanche, Marie Ohlen retired, residing at Port Vila (Vanuatu),BP 19Born at Port Vila Vanuatu (New Hebridies) on 2nd February 1928,

With the followings constitute as special mandator:

Madame Jacqueline Deroin, wife of Monsieur de Gaillande, residing at Port Vila (Vanuatu), BP 578

With power to act at the effect of:

- *Manage for her property holdings and movable property (specifically but not exclusively to sign all leases, do all work, withdraw any amount of money, do all investment, proceed with all purchases...)*
- *Effect all act of arrangements (sale, donation) that the mandator judge appropriate and at the expense and conditions she accepts*
- *Decide in her name if need be from her residence.*
- *The all without limitation until the death of the mandant (this power includes the right to act in the name and for the account of the mandant if she cannot express her wish due to geographical distances or due to her seasonal or permanent lost of intellectual or mental faculties)*

The mandant excludes for the some personal reasons that her brother Jacques to interfere in any ways on her affairs or making decisions concerning her.

Noumea, 29th October 2005

Isabelle Ohlen *Witness: Philippe Delacroix"*

28. On 4th November, 2005, the deceased made her Will naming the First Defendant as executrix and trustee of the estate as follows:

"<u>This is my final will and testament</u>

I, the undersigned, Isabelle Ohlen

Born at Port Vila on 2 February 1928
Residing at Nambatu, PO Box 19, Port Vila, Vanuatu
Being a French Citizen

Hereinafter known as << the Testator>> do hereby set forth my will:

- I hereby designate my great-nephews and great-nieces, Michael and Julie (i.e the children of my nephew, Gilles) and Jennifer and Christophe (i.e the children of my niece Dominique) to be my sole legatees who shall therefore, and without exception or reservation, each receive a quarter of all my estate. As a condition for such designation, I hereby require that all financial investments and the product of the sale all real estate titles be invested in Vanuatu on interest-bearing accounts held in their names until they respectively reach adulthood.
- In particular, I hereby bequeath to my nephew, Giles Ohlen, my parents' large canteen of cutlery.
- I hereby appoint as executor of my will Jacqueline de Gaillande and, should she decease first or refuse such appointment, Paul de Montgolfier.
- I wish to be buried at the Quatrieme Kilometre Cemetery, Noumea, in the family vault paid for by the Ohlen Company.
- I hereby forbid my brother, Jacques Ohlen, to be involved in any way in the settlement of my estate.

I hereby revoke any previous testamentary provisions.

This will was dictated by Isabelle Ohlen in the uninterrupted and concurrent presence of both witnesses named hereinafter:
Jacques White Ungai, PO Box 1276, Port Vila, Vanuatu and
Paul de Montgolfier, Legal Adviser, PO Box 1276, Port Vila Vanuatu....."

29. It appears to me that the central issues before this Court are first: ascertaining what was in the deceased's bank accounts at the time of her death on 24/12/2005. Secondly, what chattels and real estate the deceased possessed at that time. Thirdly, whether or not the First Defendant had made any dispositions out of the deceased's money in her bank accounts and/or out of her assets that were not in accordance with her Will. Fourthly, if she did, how much money? and what assets? and how much of this has gone to the legitimate expenses of administering the estate and how much has gone to the four heirs.

30. The Amended claim alleges that the First Defendant, while she was executrix, distributed estate money and assets other than in accordance with the Will.

31. The Defence is a simple denial by the First Defendant that she did this.

The EVIDENCE

32. The Claimants' evidence is essentially contained in the following documents admitted in evidence as follows:

Exhibit "P1" - sworn statement of Anne Pakoa dated 27.06.08

Exhibit "P2" - sworn statement of Paul de Montgolfier dated 27.06.08

Exhibit "P3" - sworn statement of Paul de Montgolfier dated 7.05.10 following Court Orders of 22 March 2010

Exhibit "P4" - sworn statement of Paul de Montgolfier dated 12.10.10 in support of further application for Order to protect property

Exhibit "P5" - sworn statement of Paul de Montgolfier dated 8.12.08

Exhibit"P6" - sworn statement of Paul de Montgolfier dated 10.12.10 as ordered by the Court on 3.09.10

Exhibit "P7" - Inventory of the house and personal belongings (Red Arch Binder:1/3)

Exhibit "P8" - Accounts statements (Red Arch Binder: 2/3)

Exhibit "P9" - Receipts and other documents (Red Arch Binder: 3/3)

Exhibit"P10" - Document dated 24 January 2008 from Paul de Montgolfier certifying that his firm was holding a deposit of VT5 Million from the First Defendant

Exhibit "P11" - sworn statement of Estella Ben dated 27.06.08

Exhibit "P12" - sworn statement of Makrao Luen dated 6 .06.16

Exhibit "P13" - sworn statement of Bernard Rolland dated 19.03.07

Exhibit "P14" - sworn statement of Marlene Rolland dated 29.04.08

Exhibit "P15" - sworn statement of Eric Jimmy Hotil dated 16.04.08

Exhibit "P16" - sworn statement of Jacqueline Ohlen dated 24.08.07

Exhibit "P17" - sworn statement of Dominique Prevel dated 14.04.08 incorporates three sworn statements in Probate Case No P8 of 2006

33. For their part, the Defendants relied on the sworn statement of Dr. J. L. Bador dated 17.06.08 and eight sworn statements of the First Defendant Jacqueline De Gaillande dated 23.11.08, 19.05.08, 14.07.08, 15.07.08, 11.09.09, 11.09.09, 10.11.08 and 24.11.08.

All these sworn statements were admitted in evidence and marked as Exhibits "D1" -"D9" respectively.

Findings

34. It is clear from the evidence of Paul de Montgolfier and that of Makrao Luen, from the ANZ Bank, that accounts held by the deceased with balances as at 24.12.05 were as follows:

(i) Account No. 1031404: **AUD246,166.87**
(ii) Account No. 768856: **AUD293,577.08**
(iii) Account No. 792958: **VT101,201**

35. In respect of Account No. 1031404, I accept the evidence from both the First Claimant and the First Defendant that the money deposited into this account with the interests paid by the bank was distributed to the four heirs as follows:

- Micheal Ohlen 62, 908.54
- Julie Ohlen 62, 908.54
- Jennifer Prevel 62, 908.54
- Micheal Prevel 62, 908.54

TOTAL = **AUD 251, 634.16**

36. Makrao Leun, had referred to an authority given to the First Defendant in respect of account numbers: 761725, 110693, 768856, 792458, 790825, CIF300101665 and CIF300102211. She said as a bank officer, when one receives such a document it means the account holder has given authority to someone to act on her behalf.

37. The witness further referred to Annexure 3 to her sworn statement as a screenshot of transactions under the CIF accounts for Mme Isabelle Ohlen and she confirmed that they were the same accounts that were transferred to Mme De Gaillande.

38. In answering questions put to her in cross examination, the First Defendant confirmed several bank transactions she had made relating to the deceased's bank accounts. I do not propose to recapitulate them at any length. I shall only mention those transactions which seem to me necessary by way of explanation relating to evidence of wrongful distribution by the First Defendant.

39. The First Defendant confirmed she made withdrawals which were personal such as the following:

- That she opened Account No.1062397 in her name with a transfer of VT1,000,000 from Account No. 768856;
- That she made a TT of AUD10000 F/O Fabian De Gaillande;
- On 2/05/06 there was a TT F/VS MEMES of AUD2010;
- On 2/05/06 there was a transfer of AUD10000 from 768856;
- That on 06/06 AUD40000 cheque account was opened by her;
- There was a transfer of AUD2378.60 to her son David;
- On 30/05/07 there was TT to her visa account of AUD10012.00;
- There was a transfer to Acct 792958 of AUD8,000 plus fees
- On 10/02/07 a transfer of AUD15012.07 was made to her son David;
- On 13/06/07 there was a transfer of AUD11011.79 to her son Pascal;
- There was a TT of AUD1010 to her visa account;
- Also a TT of AUD10000 to her son and another TT of AUD2010 to Pascal.
- She made POS debits of VUV 18000 for baby clothes and other items at Stop Press and Au Bon Marche;
- She agreed that most of the cash withdrawals were personal and had nothing to do with the estate.

40. The First Defendant was asked to explain what the term "break out" means and she stated that it meant that fees are incurred. She agreed that such fees would not have incurred if money was not taken out of the account before the fixed deposit period ran out.

41. I find that there is clear evidence of wrongful distribution mostly to the First Defendant herself and to her family, in spite of the denial in the Defence. Most of this evidence is in the form of admissions in the sworn statements and in answers given in cross-examination.

42. In particular, the First Defendant, in cross examination, identified payments that were not in accordance with the Will taken from Account 768856 totaling:

(a) AUD 61,023.79 taken directly from 768856; and
(b) VUV 5,166,305 taken after first being transferred from 768856 to Account No. 1062397 (which was an account of the First Defendant.)

43. In addition it was clear that some of the chattels were disposed of other than as the Will required:-

(i) a few pieces of jewellery
(ii) a safe
(iii) a motor vehicle
(iv) some of the furniture
(v) firearms

44. The First Defendant testified that she has in her possession a ring and earrings. It was clear from cross-examination that nearly all of the jewellery had gone to the heirs. Jacqueline and Jacques Ohlen have delivered receipts for the "delivery" of the jewels and silverware and

they further confirmed that such delivery was made " in accordance with the inventory". However, the First Defendant had retained a few pieces of jewellery including the *"croix Agades en or"* and some earrings. It is clear also from annexure B10 (inventory of jewels given to Jacques Ohlen on 28/03/2006) to the First Defendant's sworn statement of 23/11/2007 that she retained also (*remise a Jacqueline De Gaillande) some items which* must be returned to the estate, namely:

"1 bague pierre ronde
2 boucles d'oreilles à tige rigide
2 boucles d'oreilles à chaines
1 pendentif entoure tiges or"

45. As regards the furniture, the First Defendant testified that she sold some of the furniture for VT181,000 and that the said amount was used by her for paying the entitlements of the deceased's former employees. The First Defendant further averred that at the time she was discharged of her duties as executrix and replaced by the first Claimant, she had remitted to de Montgolfier all the receipts concerning the payments made to the gardener and house girl of Mme. I. Ohlen. However, the amount was not paid to the heirs.

46. The First Defendant admitted that the motor vehicle and the safe did not go to the heirs and that they are stored in the garden of Gerard de Gaillande, the Second Defendant. His sworn statement shows that he received the safe and the motor vehicle. The values of the safe and the motor vehicle at 24/12/2005 must be obtained and paid to the Estate.

47. It is noted that the Second Defendant's statement annexes a valuation of the vehicle as VT380,000 but it is dated 20 months after 24/12/2005.

48. SODEP shares: From Annexure 3.2 to the First Defendant's sworn statement, VT38,812 was received from the sale of these shares. This amount was paid into her account No. 1062397 and it must be repaid to the estate.

49. As regards the bullets and firearms, I accept the evidence of PW5 Bernard Marie Louis Rolland that he had been asked by Mr. Geoffrey Gee to keep the firearms and that it had later been stolen.

Administration Expenses

50. The expenses of **VT13,913,529** that the First Defendant claims were properly paid by her while she was executrix are set out in her sworn statement of 23/11/2007 in the Probate Case at Part 4 (annexure D to First Claimant's statement of 13/12/2010).

51. However, the following clearly were not proper expenses and many were identified as such in cross examination:

(a)	On page 1	VT9,782	Payment to Prouds on 30/03/2006
(b)	On page 2	VT1,500,000	Paid to Anais on 24/02/2006
(c)	On page 2	VT10,365	Paid to Vet on 12/05/2006
(d)	On page 2	VT18,546	Paid to Vet on 22/11/2006
(e)	On page 2	VT3,561	Paid to Vet on 19/12/2006
(f)	On page 3	VT10,000	Paid to Suzie on 02/01/2006
(g)	On page 3	VT10,000	Paid to Suzie on 13/02/2006
(h)	On page 3	VT500,000	Reserved for Betty's schooling
(i)	On page 3	VT2,500,000	For Suzie
(j)	On page 3	VT2,995,000	For house renovation
	Total	VT7,557,254	

This leaves proper administration expenses equal to

VT13,903,529 - VT7,557,254

= VT6,346,275

Quantification of money and chattels wrongly distributed

52. The First Defendant was cross-examined extensively on some of the bank account records and she identified a substantial sum that was wrongly distributed. I believe that the most accurate method in arriving at quantification is to subtract the total of what she distributed to the heirs plus what she properly spent in the administration of the estate from what was in the accounts on 24/12/2005 at the passing of the deceased.

53. It is clear from Makro Luen's sworn statement that on 24/12/2005 the deceased had, in her bank accounts:

(a) **AUD 293,577.08** in Account No.768856
(b) **VUV 101,201** in Account No. 792958
(c) **AUD 246,166.87** in Account No. 1031404

54. There is undisputed evidence before the Court that all of the money in Account number 1031404 was distributed to the heirs by the First Defendant.

55. However, none of the amounts in the other two accounts was distributed to them and, by the time the First Defendant was replaced as executrix by the First Claimant, there was, in those accounts the

following:

(a) In 768856 - AUD72,905.81 at the end of June 2007 when it was frozen by Court Order; and

(b) In 792958 - Zero as shown by the evidence of the First Claimant (statement filed 13/12/2010 that it had all been spent and had to be accounted for.)

56. Thus the total out of the two bank accounts 768856 and 792958 that must be repaid by the First Defendant is:

AUD293,577.08 + VT101,201 - VT6,346,275

= AUD293,577.08 - VUV6,245,074

= AUD293,577.08 - AUD66,436.96 *(at an exchange rate of VT94 per $)*

= **AUD227,140.12**

57. I shall now turn to consider the second aspect of the claim which is that, before the death of the deceased, two payments of VT500,000 and VT5 million were made on 11 November 2005 and 2 December 2005, respectively, from the deceased's account by the First Defendant

58. As trustee of the deceased's assets prior to her death, which trusteeship included her power as signatory on the deceased's bank accounts, the First Defendant was required to ensure that all payments made by her out of the deceased bank accounts were strictly for her benefit for the purpose of maintaining the deceased and her assets. If called upon to justify any such payments, as she has been in this

proceeding, the First Defendant bears the onus of proving that the payments she made were of this character.

59. The Defendants have given explanations which make it clear that the payments were not for the strict benefit of the deceased. Both are said by them to have been gifts.

60. The First Defendant contended that during the life time of the deceased Mme. Ohlen, she had given written instructions to pay the sum of VT500,000 to the Second Defendant, Gerard de Gaillande, for his birthday.

61. Furthermore, at paragraph 8.1 of their submissions dated the 27th day of July 2013, the Defendants submitted that:

> "it is not impossible that I. Ohlen understood that she was at the end of her life and that she wanted to offer presents to the people she loved."

62. I do not find it necessary to decide whether or not that is the proper characterization of these payments because it is enough that the Defendants have adduced no evidence to this effect. There is no evidence at all about how the deceased, while alive, made the decision to give the gifts.

63. It is trite that he who asserts must prove. Suffice it to say that the Defendants have failed to discharge that onus.

64. I am inclined to accept the Claimants' contention that there is good reason to doubt the explanation because there is no admissible

evidence that the deceased did mean to give anything at all to the recipients. Most significantly, they were not provided for in the Will even though the Will was made when the deceased clearly knew she had not long to live and the gifts, if the deceased had wanted to make them then, are the sort of bequest normally put in a Will.

65. It is significant that the relationship of trust and confidence between the deceased and the First Defendant existed at the time the two impugned payments were made.

66. The sworn statements of the Defendants themselves evidence a strong relationship of friendship and of increasing reliance by the deceased while alive upon the First Defendant. After 29 October 2005, the reliance was virtually a complete reliance for the deceased's wellbeing in a number of areas that included her finances as detailed in the *"Procuration Speciale".*

67. The focus is on the relationship between the giver of the benefit and its recipient. These categories of relationship have been found to include *"solicitor and client", "trustee and beneficiary" "stockbroker/investment adviser and client" (*see **Daly v Sydney Stock Exchange Ltd and others** *(1986) 160 CLR371).*

68. The Claimant only has to prove the existence of the relationship of the required category and if the relationship is held to be one of trust and confidence the gift (transaction) is presumed to be tainted by undue influence casting the onus upon the recipient to prove that undue influence was not present. If the recipient is unable to discharge this burden, the benefit must be returned as the recipient "will not be permitted to retain the advantage, although the transaction could not

have been impeached if no such relationship had existed."
(see Daly at page 8)

69. Equity will intervene in transactions *(usually gifts)* on the basis of undue influence in order .... *"to prevent taking surreptitious advantage of the weakness and necessity of another.."* (per Lord Hardwicke L.C in **Earl of Chesterfield v Janssen** (1751) 2 Ves Sen 125; 28 ER82 as cited in "Equity Doctrines & Remedies 3rd Edition by Meagher, Gummow and Lehane)

70. Judging from all the evidence adduced, it seems clear to me that the payments of VT500,000 and VT5 million were not for the benefit of the deceased within the purposes of the trust under which the First Defendant held her power as signatory.

71. It necessarily follows that, in signing the two cheques and negotiating the payments at the ANZ Bank, the First Defendant acted without authority and was in breach of trust. She must refund the money on this basis alone.

72. With respect to the VT5 million paid to the First Defendant, by herself, on 02/12/2005, the evidence of Paul de Montgolfier is that his firm is "the holder of a deposit of 5 million vatu given by Isabelle Ohlen through Jacqueline de Gaillande. *The said amount is an inter vivos gift for the project "lotus" to build the "foyer Guy Saint Jean" at Tassiriki Port Vila"*

73. There is no doubt that the VT5 million paid to the First Defendant, by herself, on 02/12/2005, went to charity and did not go into the personal fortunes of her or her husband.

74. Be that as it may, does this matter? The answer is a resounding "No". It makes no difference because the First Defendant was personally interested in the transaction and she had *"some other interest.."* in the gift.

75. In the First Defendant's sworn statement filed on 15 July, 2008 it is clear that the VT5 million was devoted to the activities of this charity in which the First Defendant had a longstanding interest – that is, to her own charity. This evidence is again clear from Annexure D6 to the First Defendant's sworn statement of 23/11/2007 which is an *"Attestation"* from the French Ambassador at the time in which he referred to the First Defendant as:

> *"....the longstanding President of ... The French Charity Association. The objectives of this association are to create and administer a retirement home for dependent people, by the name of Guysajean."*

76. The Claimants' counsel argued that this was thus a gift for the benefit of the First Defendant in the relevant sense so that she had to rebut the presumption of undue influence and that she has failed to do so and must repay the VT5 million with interest.

77. The oft cited case of **Allcard v Skinner** (1887) 37 CLD 14 gives an example similar to this. The gift from the Plaintiff in that case was to the charity of which the Plaintiff's spiritual adviser and confessor and wielder of undue influence was a founder. Notwithstanding that the gift was not for this person's material benefit, it was said to be for his benefit in the relevant sense.

78. In my considered view, the payment to the First Defendant of VT5

million made on 2/12/2005 for the charity association called "Lotus" was solely for the purposes of the First Defendant and not in any way for the purposes or in the interests of the deceased. It was a blatant abuse of the "Procuration Speciale - Representation" that had been given to the First Defendant and/or else, if any verbal consent was obtained from the deceased, that consent was obtained through undue influence. The amount must therefore be repaid to the estate.

79. In the final analysis, I hereby enter judgment in favour of the Claimants against the Defendants.

80. I make the following orders:

1. The total amount to be repaid or restored to the estate of the late Isabelle Ohlen by the First Defendant by virtue of wrongful distribution is as follows:

   (i) **AUD 227,140.12** out of bank accounts
   (ii) **VT181,000** sale of furniture
   (iii) **VT38,812** sale of SODEP shares
   (iv) Jewellery, safe and motor vehicle or the value of these items as at 24/12/2005.

2. The Second Defendant is to give to the First Claimant's lawyers for the benefit of the Claimants the **VT500,000** he received from the First Defendant on 11/11/2005.

3. The **VT5 million** currently held by the First Claimant for the project "lotus" to build the "foyer Guy Saint Jean" at Tassiriki

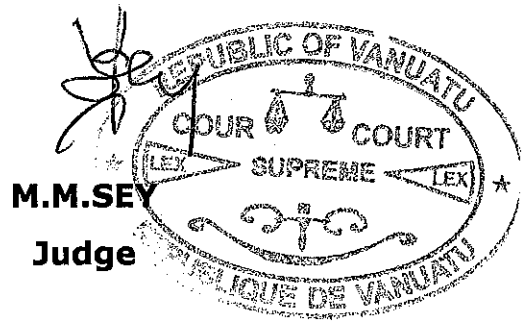
Port Vila" is to be paid to the First Claimant's lawyers for the benefit of the estate.

4. Interest is to be paid on all sums found to be owing from the date of the wrongful payments of money.

5. The Defendants are to pay the Claimants costs on a standard basis to be agreed or taxed.

DATED at Port Vila, this 23rd day of August, 2013.

BY THE COURT



M.M.SEY

Judge