

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

Civil
Case No. 24/231 SC/CIVL

BETWEEN: CHEN SHO TANG
Claimant

AND: BRED (VANUATU) LIMITED
First Defendant

AND: FONCIERE DU VANUATU LIMITED
Second Defendant

Date of Hearing: 3 July 2024

Date of Decision: 12 July 2024

Before: Justice M A MacKenzie

Counsel: Mr. R. Willie for the Claimant- via video link, Santo Courthouse

Mr. J. Malcolm for the First and Second Defendant

DECISION ON APPLICATION FOR SUMMARY JUDGMENT

The application

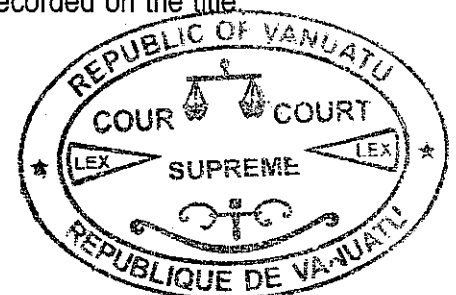
1. This is an application for summary judgment. It is opposed by the First and Second Defendants.

Result

2. The summary judgment application was heard on 3 July 2024. I refused the application and said I would give written reasons. These are my reasons.

Background

3. The Claimant, and the Second Defendant, are the registered proprietors of lease titles adjacent to each other. Both front the road.
4. The Claimant purchased lease title 03/0184/002 in 2022, and since then has been constructing a building on the property. No easement is recorded on the title.
5. The Second Defendant is the registered proprietor of lease title 03/0184/021. The First Defendant occupies the property. There is a 4 metre "servitude" recorded on the title.

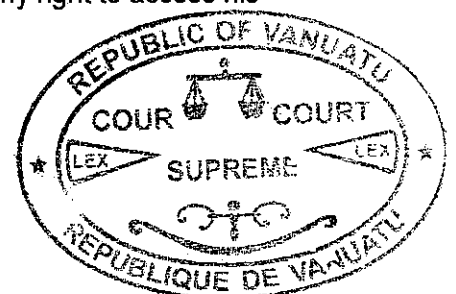


The Defendants concede that the servitude is the same as a Land Leases "right of way", being an easement over the title. Not much else is agreed between the parties.

6. The Claimant alleges he has a legal right to access his property via the 4 metre right of way on the neighbouring property occupied by the First Defendant. He asserts that the First Defendant has prevented him accessing the right of way in various ways – constructing a car park over the 4 metre right of way, locking a gate, and putting a container on the parking area which partly blocks the gate.
7. The Defendants acknowledge they have prevented the claimant from accessing the property. This is because the Defendants dispute that the servitude gives the Claimant a legal right to access the property occupied by the First Defendant, particularly as the Claimant has access to his property as it fronts the road.

The claim

8. The Claimant alleges that there is a right of way created through the First Defendant's property which gives the claimant an overriding interest as provided for under s17(a) of the Land Leases Act (Cap 163), and that the Defendants are preventing him from using the right of way.
9. The Claimant seeks an order permanently restraining the Defendants and others from disturbing his use of the right of way created over lease title 03/0814/021, together with an order that the Defendants remove the parking area over the 4 metre right of way.
10. The Claimant has not provided any documentation as to the creation of the servitude shown on the Second Defendant's lease title. Rather, the Claimant relies on the sworn statement of Mr James Ngwango asserting that the servitude is a right of way, created to access the Claimant's property. He also relies on a letter signed by Mrs Sandra Joses saying that Land Surverys Office Santo "*wishes to confirm that the servitude stated in Survey plan 03/0814/021, i.e. servitude (4m Large) is a 4 m right of way accessing 03/0814/002*". The letter is attached to the Claimant's sworn statement filed on 19 April 2024.
12. The First and Second Defendants deny;
 - (a) That there is a 4 metre right of way through the Defendants property.
 - (b) That the Claimant has any entitlements under s17 of the Land Leases Act.
 - (c) That there is any servitude in favour of the Claimant or any right to access his property via the Defendants' property.



(d) That the servitude could be used for anything other than underground services.

13. While the Defendants acknowledge that a servitude is a right of way, they dispute the nature and purpose of the right of way, or that it provides that Claimant a right to access his property via the Defendants property. The defence point to the fact that the Claimant has not filed any evidence as to the document or instrument creating the servitude, and so do not accept the assertions of Mr Nwgango and Mrs Joses as to the nature of the right of way.

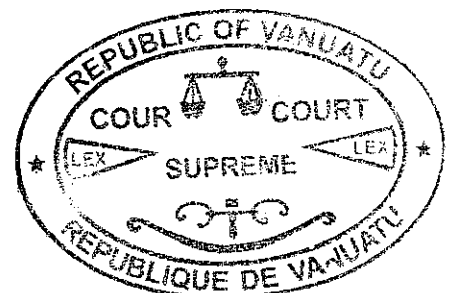
The Law

14. As set out above, a key issue is the nature and purpose of the servitude. There is no dispute that a "servitude" is a pre independence name for a right of way, but squarely in dispute is whether the nature and purpose of the right of way is an access way, as the Claimant alleges.
15. The Land Leases Act does not contain any reference to a servitude. The only reference to rights of way in the Land Leases Act is contained in s17(a), which says-

"Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interest as may, for the time being, subsist and affect the same without there being noted on the register-

(a) rights of way, rights of water, easements and profits subsisting at the time of the first registration of that lease under the Act".

16. An "easement" is however defined in s 2 of the Land Leases Act. It means a right attached to the land comprised in a registered lease which allows the proprietor thereof to either use the land comprised in another registered lease in a particular manner or to restrict its use to a particular extent, but does not include a profit".
17. Part 10 of the Land Leases Act deals with the creation, release, extinguishment and modification of easements. Section 67 of the Act provides that the proprietor of a registered lease may, by an *instrument* (emphasis added) in the prescribed form, grant an easement over the land contained in their lease to the lessee of the other land for the benefit of that other land. Relevantly, s 67(3) sets out what the instrument creating the easement must specify. The instrument must specify clearly the nature of the easement, and the land burdened by the easement and the land which enjoys the benefit of the easement.



18. Helpfully, Mr Malcolm attached to his submissions Halsbury's Laws of England 14 on Rights of Way, which discusses extensively both the meaning of "servitude" and the meaning of "easement".
19. According to Halsbury, an easement is a servitude, but "servitude" is a wider term and includes both easements and profits a prendre. An easement is a right annexed to land to utilise other land of different ownership in a particular manner or to prevent the owner of the land from utilising the land in a particular manner. Easements have essential characteristics, including that there must be a dominant and servient tenement.
20. A legal easement is an easement capable of subsisting at law which has been validly created at law, namely by statute, deed or prescription: *Re Ellenborough Park*, *Re Davies, Powell v Maddison* [1956] Ch 131 at 163, [1955] 3 All ER 667 at 673.
21. Easements may be classified according to their nature into positive and negative easements. A positive easement confers a right to commit some act upon the servient tenement. The most important and commonest easements are rights of way, support, water, light and air. The commonest positive easements are rights of way. An easement does not give the dominant owner the exclusive or unrestricted use of any part of the servient tenement.
22. Easements can only be granted by statute or grant. The grant of an easement for a legal estate must be by deed. An easement can exist by presumed grant and is an easement claimed under the doctrine of prescription- resting on the fact of long disturbed enjoyment of the right constituting the easement.

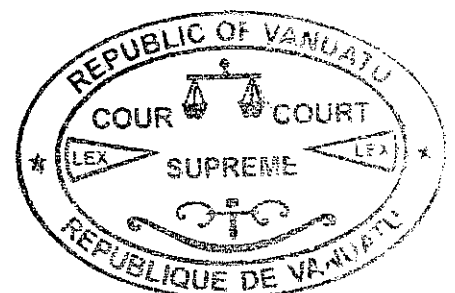
Summary Judgment

23. Rule 9.6 of the Civil Procedure Rules 2002 addresses the summary judgment procedure. It is one of the ways provided for in Part 9 of the Civil procedure Rules for ending a proceeding early.

23 Rules 9.6 (7) and 9.6 (9) are applicable and say: -

"(7) If a Court is satisfied: -

- (a) The defendant has not real prospect of defending the claimant's claim or part of the claim; and*
- (b). There is no need for a trial of the claim or that part of the claim, the Court may:*
- (c) Give judgment of the claim or part of the claim; and*



(d) Make any other orders the Court thinks appropriate.

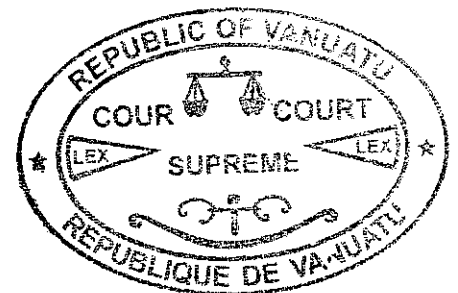
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(9). The Court must not give judgment against the defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."

24. Relevant principles include;

1. The onus is on the Claimant to establish the grounds set out in Rule 9.6(7)(a) and (b); *Sugden v Rolland* [2022] VUSC 145 at 22.
2. A real prospect means one which is realistic not fanciful; *Swain v Hillman* [2001] 1 All ER 91, approved by the Court of Appeal in *Bokissa Investments Ltd v RACE Services Pty Ltd* (In Liquidation) [2003] VUCA 22.
3. The need for caution when considering an application for summary judgment was emphasized in *ANZ Bank (Vanuatu) Ltd v Traverso* [2012]. Sey J said that it is judicially settled that the summary judgment procedure is designed to enable a claimant to obtain swift judgment against a defendant who has no real prospect of defending the claimant's claim. Sey J also sounded a note of caution when Her Ladyship said;

"By its characteristic features, summary judgment as generally viewed is literally shutting the door of justice in the face of a defendant and that it permits a judgment to be given without trial. It is this stringent nature of summary judgment that makes it imperative for the Courts to approach this remedy with the greatest caution in order to prevent turning it into a dangerous weapon of injustice".

25. In *Gouras v NACA Limited* [2020] VUCA 53, (at 22) the Court of Appeal said that the outcome of interlocutory applications will rarely be successful when there are matters of disputed fact. Further that the admissibility of certain evidence and the weight to be given certain evidence are matters for trial. Parties and counsel cannot expect the court on such an application to hear a "mini" trial or to make a decision based on contested factual material.



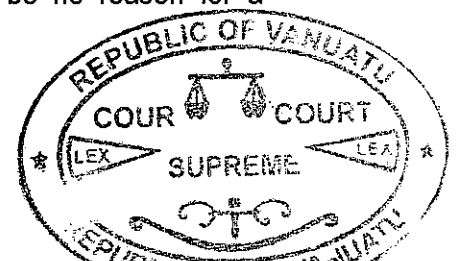
Submissions

Claimant's submissions

27. Mr Willie submits that when s17(a) of the Land Leases Act is considered, that one of the overriding interests is rights of way. Therefore, the Claimant has an overriding interest in relation to the servitude, as he has produced evidence which proves that the servitude was created to allow the Claimant to access the Defendants' property and was meant to be for the benefit of the Claimant and not the First Defendant.
28. In particular, Mr Willie relies on the sworn statement of James Nwango and a letter from Sandra Joses annexed as CST 10 to Mr Tang's sworn statement file on 19 April 2024. It is his submission that these two pieces of evidence prove that the servitude registered on the Second Defendant's lease title is a right of way to be used by the Claimant to access his property.
29. Mr Willie also submits that the First and Second Defendants have failed to identify any legal rights that they have in respect to the 4-metre servitude recorded on the leasehold title other than the fact it is located on leasehold title 03/0814/021.
30. Further, that the Defendants have not produced any evidence to show any claim of right to the servitude giving them legal authority to stop the Claimant from using the servitude, and have produced no evidence to show it was a restricted servitude.

Submissions for First and Second Defendants

31. Mr Malcom submits that it is not for the defendants to prove anything. Rather, the Claimant bears the onus of proof on the balance of probabilities.
32. Mr Malcolm submits that the Claimant has not provided any evidence as to the nature and purpose of the servitude, as he has not provided any documentation in relation to the grant or application for the servitude. This assumes significance because the right of way claimed has to be one by agreement or grant. That if it exists, the nature and extent of the right depends on the proper construction of the language of the instrument creating it, according to Halsbury's Laws of England (paragraph 149). This is unknown because the Claimant has not provided it.
33. The First and Second Defendants do not accept the opinion given by Mr Nwango and Sandra Joses that the servitude is a 4 metre right of way accessing Mr Tang's property, as there is no basis in law or fact giving reasons for such opinion and no documentation has been provided relating to the grant of the servitude.
34. Mr Malcolm submits that there are various reasons for a servitude/right of way, including for the purposes of utilities such as water and electricity type utilities, not only access. Mr Malcom submits that pre independence there appears to be no reason for a

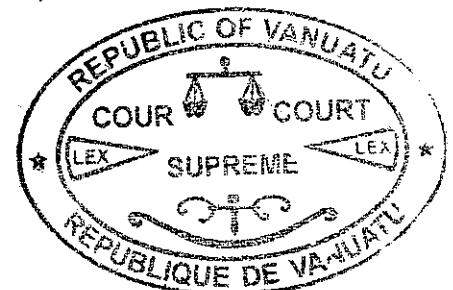


servitude or right of way between the properties and it could only have been for the use of utilities. Both properties seem to have been owned by the same person. Until now, neither the Claimant no the previous owners have ever used or sought access under the servitude.

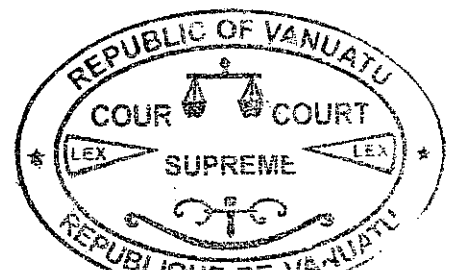
35. Summary judgment is sought on the basis of disputed facts and should be refused because of the serious dispute as to the facts.

Discussion

36. There are two issues for determination, accepting that a servitude is an easement/right of way;
- (a) What is the nature and purpose of the easement/right of way on leasehold title 03/0184/021?
 - (b) Does the servitude create a right of access for the Claimant to access his property via the Defendants' property? Put another way, is the Second Defendant's property burdened by the easement ?
37. The issues are both factual and legal. The starting point will be to consider how an easement is created, having regard to both the Land Leases Act and Halsbury's Laws of England. The Court will need to consider whether or how the nature and purpose of the easement recorded on lease title 03/0184/021 can be established without the instrument creating the easement being provided to the Court. What s 67(3) of the Land Leases Act shows, is that the instrument creating the easement must clearly specify certain information. Another issue is just what the nature of the easement is-and that is squarely in dispute.
38. It is for the Claimant to satisfy the court on the balance of probabilities that the defendants have no realistic prospect of defending the claim; a realistic not fanciful prospect. The Defence is that that the servitude does not grant the Claimant a right of way to access his property via the Defendants' property. A significant plank of the defence case is that the Claimant has not provided any documentation as to the creation of the easement to support the claim that the servitude is a right of way granting access to the Claimant's property. In those circumstances, the defence is hardly fanciful, particularly given the specificity required in any instrument creating an easement as per s67(3) of the Land Leases Act. The purpose of s67(3) must be to ensure clarity, something lacking here.
39. Pursuant to Rule 9. 6(9) provides that the Court must not give judgment if it is satisfied that there is a dispute between the parties about a substantial question of fact or a difficult question of law. It is a mandatory provision.



40. In this case, there is a substantial question of fact, which engages Rule 9.6(9). The substantial question of fact is the nature and purpose of the servitude recorded on the Second Defendant's lease title.
41. The summary judgment application is based on substantially disputed facts. The Claimant submits that the evidence of Mr Nwango, and the letter of Sandra Josez establish that the servitude is a right of way for the purpose of granting access by the Claimant to his property. This is disputed by the Defendants who submit there is no basis in law or fact giving reasons for such opinion and no copy of the grant or application.
42. Saliiently, there is no information from either Mr Nwango or Sandra Josez as to how they have determined that the easement is a right of way granting the Claimant access to his property via the Defendants' adjacent property, without recourse to the instrument creating the servitude. In those circumstances, the Court will need to assess the factual and legal basis for Mr Nwango and Sandra Josez' opinions as to the nature and purpose of the servitude.
43. While not required to prove anything, the Defendants submit that the servitude could only have been for the purpose of utilities because there appears to be no reason for a servitude of right of way between the properties which are adjacent to each other, and which both front the road. There is no evidence that the previous owners ever sought or used access under the servitude, which has never previously been used as a general right of way as is now sought.
44. There is a dispute as to whether there are high voltage cables running under the servitude. There is conflicting evidence on this point. For example, the sworn statement of Mr Lal filed on 6 March 2024 annexes correspondence from the Department of Lands Management dated 16 February 2024 advising that VUI Operations have confirmed that there is a high voltage underground cable that runs beneath the servitude. Then, contrary to that, annexed to the Claimant's sworn statement filed on 7 June 2024, is an email from the General manager of VUI showing where the First Defendant's electric service connection route is located. It is underground and built during the time of the previous concessionaire. The map indicates the cables do not run under the servitude. It may be that nothing turns on this.
45. There are difficult questions of law; whether the nature and purpose of the servitude, can be determined without the documentation creating the easement? Then the nature of the easement on the Second Defendant's lease title, a key issue, requires determination.
46. An easement can only be created by statute or grant. There is no evidence before the court that it was granted by statute. It must be then by agreement or grant, which may



be problematic in terms of the claim. It cannot realistically be suggested that there is a presumed grant, as there is no evidence of the servitude having previously been used as a general right of way.

47. I am satisfied that there is a dispute between the parties about a substantial question of fact and a difficult question of law, for the reasons set out above. In summary, the court will be required to determine the nature and purpose of the servitude, which is squarely in dispute. The defence is not fanciful in such circumstances.
48. For the reasons set out above, the application for summary judgment is refused. The factual and legal issue require ventilation at a trial.
49. Mr Malcom has filed a statement as to costs. It will be addressed separately.

**DATED at Port Vila this 12th day of July 2024
BY THE COURT**

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Justice M A MacKenzie

